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**Supreme Court**

**Petitioners failed to establish a likelihood of success on their claim that using midazolam for execution violates U.S. Const. amend. VIII.*Glossip v. Gross,* 135 S. Ct. 2726 (2015).**

?Because capital punishment is constitutional, there must be a constitutional means of carrying it out. After Oklahoma adopted lethal injection as its method of execution, it settled on a three-drug protocol of (1) sodium thiopental (a barbiturate) to induce a state of unconsciousness, (2) a paralytic agent to inhibit all muscular-skeletal movements, and (3) potassium chloride to induce cardiac arrest. In *Baze v. Rees,* 553 U.S. 35[ (2008)], the Court held that this protocol does not violate the Eighth Amendment?s prohibition against cruel and unusual punishments. Anti-death-penalty advocates then pressured pharmaceutical companies to prevent sodium thiopental (and, later, another barbiturate called pentobarbital) from being used in executions. Unable to obtain either sodium thiopental or pentobarbital, Oklahoma decided to use a 500-milligram dose of midazolam. . . .

?Oklahoma death-row inmates filed a 42 U.S.C. §?1983 action claiming that the use of midazolam violates the Eighth Amendment. Four of those inmates filed a motion for a preliminary injunction and argued that a 500-milligram dose of midazolam will not render them unable to feel pain associated with administration of the second and third drugs. After a three-day evidentiary hearing, the District Court denied the motion. It held that the prisoners failed to identify a known and available alternative method of execution that presented a substantially less severe risk of pain. It also held that the prisoners failed to establish a likelihood of showing that the use of midazolam created a demonstrated risk of severe pain. The Tenth Circuit affirmed.?

The Supreme Court held, five to four, that the Tenth Circuit did not err when it affirmed the judgment that inmates who were awaiting execution were not entitled to an order enjoining the State from using a 500-milligram dose of midazolam as the first drug it administered. The district court?s determination that 500 milligrams of midazolam would make it a virtual certainty that any individual would be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and

third drugs was not clearly erroneous, and the inmates failed to identify a known and available alternative method of execution that presented a substantially less severe risk of pain.

**D?s trial counsel were not deficient for failing to question the legitimacy of adverse ballistics evidence; *Strickland* does not allow a post-hoc assessment of trial counsel?s performance based on scientific advances not available at the time of trial.*Maryland v. Kulbicki,* 136 S. Ct. 2 (2015).**

In 1993, D allegedly shot and killed his mistress before a hearing on unpaid child support. At D?s trial, the prosecution presented evidence that the bullet removed from the deceased?s brain and the bullet taken from D?s gun were a close enough match that they likely came from the same package. After being presented with this ballistics evidence, as well as other physical evidence and witness testimony, the jury convicted D of first-degree murder. D filed a petition for post-conviction relief in state court in which he argued that he received ineffective assistance because his attorneys failed to question the legitimacy of the ballistics evidence. D?s petition was denied at the trial level, but the Maryland Court of Appeals reversed and vacated D?s conviction. The Supreme Court reversed the appellate court.

The appellate court improperly examined the conduct of D?s lawyers based on contemporary views of ballistic evidence rather than how such evidence was viewed at the time of D?s trial. An appellate court violates the core principles of *Strickland v. Washington,* 466 U. S. 668 (1984), when it conducts a post-hoc assessment of trial counsel?s performance based on scientific advances not available at the time of trial. Counsel was not ineffective for failing to attempt to discredit Comparative Bullet Lead Analysis (CBLA) evidence since the mode of ballistics analysis was uncontroversial and widely accepted at the time, and counsel was not required to search for an obscure report questioning the methodology or to predict the subsequent demise of CBLA. There was no reason for counsel to devote time to analyzing that evidence, including the 1991 report?s so-called methodological flaw against the ballistics expert on cross-examination, rather than other avenues of defense. Effective assistance of counsel does not require attorneys to go looking for a needle in a haystack that might not exist.

## Fifth Circuit

**The Fifth Circuit affirmed the district court?s order suppressing drugs discovered pursuant to a search following a traffic stop; the two Ds to whom the court granted the motion had standing to challenge the search of the bag in the trunk containing cocaine and meth because passengers in a vehicle have standing to challenge searches to their luggage, and Ds did not abandon or disclaim ownership prior to the search.*United States v. Iraheta,* 764 F.3d 455 (5th Cir. 2014).**

Furthermore, a third D?s consent to search the vehicle did not, under the circumstances, authorize the search of all the luggage in the car. The police were on notice that at least some of the luggage did not belong to the consenting co-defendant. There was no evidence that the other two Ds heard the third one consent to a search, nor were they ever informed of that third one?s consent by the officers; therefore, those two Ds did not ratify the third one?s consent by failing to contravene that consent. It was unreasonable for the officers to rely on the third D?s consent alone in searching the bag. The search was unconstitutional, and the court properly granted the motion to suppress.

**Where D pleaded guilty to mail fraud (18 U.S.C. §?1341) in connection with making unauthorized personal charges on her company?s credit cards and opening un-au-thorized accounts, there was sufficient use of the mails to trigger federal jurisdiction over the case.*United States v. Traxler,* 764 F.3d 486 (5th Cir. 2014).**

As in *United States v. Mills,* 199 F.3d 184 (5th Cir. 1999), D?s continued fraud depended on her employer?s receiving and paying the credit card bills through the mails so the credit card company would not be aware of her fraud or decline her subsequent purchases.

**Where D charged with bank robbery but found not guilty by reason of insanity was conditionally released pursuant to 18 U.S.C. §?4243(d), district court did not err in revoking D?s conditional release pursuant to §?4243(g) because the court did not clearly err in finding (1) D violated his prescribed treatment regimen, and (2) D?s continued release posed a substantial public risk.*United States v. Washington,* 764 F.3d 491 (5th Cir. 2014).**

**In sentencing D convicted of aiding and abetting sex traf-ficking of a minor (18 U.S.C. §?1591(a)), district court did not err in applying a two-level enhancement for use of a computer under USSG §?2G1.3(b)(3).*United States v. Pringler,* 765 F.3d 445 (5th Cir. 2014).**

Although the enhancement would not apply under the terms of Application Note 4 to USSG §?2G1.3, the Fifth Circuit, taking sides in a circuit split, held that Note 4 was inconsistent with the text of §?2G1.3(b)(3)(B) and, thus, should not be followed.

(2) The district court did not err in applying a two-level en-hancement for undue influence of a minor pursuant to §?2G1.3(b)(2)(B). The enhancement is appropriate where com-plainants testify to their fear of leaving, as the complainant did here. There was sufficient evidence to conclude that D ?compromised the voluntariness of the minor?s behavior,? §?2G1.3(b)(2) cmt. n.3(B).

**There was merit to death-sentenced Texas D?s ineffective assistance of counsel claim with respect to the punishment phase of trial; counsel performed deficiently by failing to conduct a mitigation investigation.*Canales v. Stephens,* 765 F.3d 551 (5th Cir. 2014).**

There was also merit to the claim that D was prejudiced by his trial counsel?s deficient performance, as mitigation evidence could have uncovered a large body of evidence of a childhood full of violence, abuse, and privation; because D had not yet had the opportunity to develop the factual basis for this claim (until *Treviño v. Thaler,* 133 S. Ct. 1911 (2013), the claim was procedurally defaulted), the Fifth Circuit reversed the district court?s denial of relief on this ground and remanded. The Fifth Circuit, however, affirmed the denial of relief on D?s remaining claims.

**Under Fifth Circuit precedent in*United States v. Johnson,* 632 F.3d 912 (5th Cir. 2011), the Attorney General?s Interim Rule of February 28, 2007 (which applied SORNA retroactively to pre-enactment sex offenders), was valid as to offenders like D.*United States v. Torres,* 767 F.3d 426 (5th Cir. 2014).**

Because the Interim Rule validly extended the Sex Offender Registration and Notification Act (SORNA) to D, the Fifth Circuit upheld D?s conviction for failing to register under SORNA after the Interim Rule was promulgated. The Fifth Circuit noted that the circuits are divided on this issue.

**The evidence was sufficient to convict D for attempt to knowingly persuade, entice, or coerce a minor to engage in illegal sexual activity, 18 U.S.C. §?2422(b); grooming behavior plus other acts strongly corroborative of intent to entice illegal sex?such as detailed dis-cussions to arrange a meeting with the minor?can establish a substantial step for §?2422 attempt.*United States v. Howard,* 766 F.3d 414 (5th Cir. 2014).**

The Fifth Circuit noted, however, that ?[i]n light of the government?s conduct [in this case], finding criminal attempt in this case is a close call, and we hope that this is the outer bounds of a case the government chooses to prosecute under §?2422(b).? The Fifth Circuit also noted that ?[w]ere we the triers of fact, we might reach a conclusion different from the district court in this case.?

(2) The word ?attempt? in 18 U.S.C. §?2422(b) does not render that statute unconstitutionally vague. Nor is §?2422(b) unconstitutionally overbroad; it does not criminalize protected speech.

**The Government violated the Stored Communications Act in the way it obtained historical cell site location data pertaining to D?s phone; under 18 U.S.C. §?2703(d), the proper procedure for such data is to seek a court or-der by submitting a detailed application.*United States v. Guerrero,* 768 F.3d 351**

**(5th Cir. 2014).**

In this prosecution for racketeering/murder charges arising out of activities of the Texas Mexican Mafia, the federal gov-ernment simply got the data from state officials, who themselves had used a subpoena not a §?2703(d) order. However, suppression was not a remedy for a Stored Communications Act violation; under the reasoning of *In re Application of the U.S. for Historical Cell Site Data,* 724 F.3d 600 (5th Cir. 2013), the obtaining of that information did not violate the Fourth Amendment.

(2) D?s argument that under the Juvenile Justice and Delinquency Act, the district court lacked jurisdiction to try D on racketeering conspiracy was foreclosed by *United States v. Tolliver,* 61 F.3d 1189 (5th Cir. 1995), *vacated on other grounds by Moore v. United States,* 519 U.S. 802 (1996). Under *Tolliver,* a defendant, after he turns 18, may be tried for a conspiracy that temporally overlaps his 18th birthday if the government can show that the defendant ratified his involvement in the conspiracy after reaching the age of majority; ratification in this context simply means that a defendant continues to participate in an ongoing conspiracy after his 18th birthday. Given the considerable evidence of D?s post-18 engagement in the RICO conspiracy, the district court had jurisdiction to try D on that charge.

(3) D was properly sentenced as a ?career offender? for conviction of assault of a prison guard while awaiting sentencing on the two cases used as predicates. Prior convictions for which a defendant has not yet been sentenced count as ?convictions? in determining ?career offender? status.

## Court of Criminal Appeals

**The taint of the unconstitutional GPS tracking device search had dissipated by the time D consented to the search of his vehicle and confessed that the meth discovered was his.*State v. Jackson,* 464 S.W.3d 724 (Tex.Crim.App. 2015).**

Law enforcement officers, suspecting D of drug trafficking, placed a global positioning system (GPS) device on his car in an attempt to ascertain when and where he was obtaining his supply. They monitored him as he traveled exceeding the speed limit. They independently verified that he was speeding by pacing his car in their unmarked vehicles. Later, another officer who was aware of the narcotics investigation verified by radar that D was speeding and pulled him over for that traf-fic offense. Without ever issuing D a speeding citation, the officers obtained his consent to search his car and discovered a quantity of methamphetamine in the trunk. A short time later D confessed that it was his. The State prosecuted D for possessing meth with intent to deliver. D moved to suppress both the meth and his confession. The trial court held that both were inadmissible, pursuant to Tex. Code Crim. Proc. art. 38.23(a), because the search was accomplished through the installation and monitoring of the GPS tracker; it granted D?s motion to suppress. COA affirmed. CCA reversed.

The trial court erred by suppressing D?s confession and the contraband. The installation of the GPS tracking device and its use to monitor D?s whereabouts constituted a search for U.S. Const. amend. IV purposes; but the independent verification of D?s speeding was an intervening circumstance that purged the primary taint of the unconstitutional GPS tracking device search. D?s detention and his consent to search, the discovery of the contraband, and his admission were sufficiently attenuated from the primary illegality. Furthermore, to satisfy the attenuation-of-taint analysis, the primary illegality in this case was not the product of a flagrant disregard of D?s constitutional rights. Tex. Code Crim. Proc. art. 18.21, §?14(a), (c) permitted officers to install and use GPS upon sworn application to a dis-trict judge; officer?s use of the GPS device was purposeful, in the sense that he expressly hoped to obtain evidence in his narcotics investigation against D, but he did not knowingly violate D?s constitutional rights in that pursuit.

**COA did not have the benefit of a recent CCA opinion when it upheld the admission of D?s prior remote con-vic-tion; CCA remanded for analysis of whether the pro-bative value of the remote conviction to impeach a witness substantially outweighed its prejudicial effect.*Campos v. State,* 466 S.W.3d 181 (Tex.Crim.App. 2015).**

?A jury convicted appellant of 3 counts of aggravated sexual assault, and sentenced him to 68 years imprisonment on each count. At trial, the State was allowed to impeach appellant, over objection, with a conviction that was more than ten years old. . . . [COA] upheld the trial court?s actions by ap-plying the common law tacking doctrine to the remote con-vic-tion, and assessing its admissibility under Texas Rule of Evidence 609(a)?s ?outweigh? standard rather than Rule of Evidence 609(b)?s ?substantially outweigh? standard. . . . We recently addressed this issue in *Meadows v. State,* 455 S.W.3d 166, 169 (Tex. Crim. App. 2015), in which we held that the un-ambiguous plain language of Rule of Evidence 609 supplants the common-law tacking doctrine. Under Rule 609(b), evidence of a prior conviction is inadmissible to impeach a witness ?if more than 10 years has elapsed since the later of the date of conviction or release of the witness from confinement imposed for that conviction ?unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.?? . . . [W]e grant ground (9) of appellant?s petition for discretionary review, vacate the judgment of [COA.]?

**Habeas applicant D was not exempt from execution as intellectually disabled because he failed to prove by a preponderance of the evidence that he had significantly sub-average general intellectual functioning.*Ex parte Moore,* 470 S.W.3d 481 (Tex.Crim.App. 2015).**

In 1980, D was convicted of capital murder and sentenced to death for fatally shooting a grocery clerk while committing or attempting to commit robbery. Tex. Penal Code §?19.03(a). CCA affirmed. Following a grant of federal habeas relief, the trial court held a new punishment hearing in 2001. D again received a death sentence. CCA affirmed on direct appeal.

In this initial writ application challenging his 2001 punishment retrial and death sentence, applicant raised 48 claims. In 2014, the habeas judge held an evidentiary hearing on applicant?s first claim?that he was intellectually disabled and thus exempt from execution under *Atkins v. Virginia,* 536 U.S. 304 (2002). Following the evidentiary hearing, the parties filed proposed findings of fact and conclusions of law. Applicant?s findings and conclusions were titled, ?Addendum Findings of Fact and Conclusions of Law on Claims 1?3? (Addendum Findings). Despite the document?s caption, applicant?s proposed findings and conclusions addressed only his *Atkins* claim. The State?s findings and conclusions addressed all of ap-plicant?s claims. The habeas court signed applicant?s proposed Addendum Findings. The Addendum Findings applied the definition of intellectual disability presently used by the American Association on Intellectual and Developmental Disabilities (AAIDD), concluded that applicant was intellectually disabled under that definition, and recommended that CCA grant relief on his *Atkins* claim. The Addendum Findings also concluded that applicant had established by a preponderance of the evidence that he was intellectually disabled under the diagnostic criteria in editions of the American Psychiatric Association?s Diagnostic and Statistical Manual of Mental Disorders (DSM-IV and DSM-V). The habeas court also signed the State?s proposed findings of fact and conclusions of law after making handwritten alterations to the final page. Through its alterations, the court: (1) indicated that applicant?s grounds for relief should be granted in part and denied in part; and (2) adopted the State?s findings and conclusions concerning claims four through forty-eight, as well as its recommendation that CCA deny relief concerning those claims. The habeas court made no findings or conclusions regarding applicant?s claims two and three. CCA set the case to address applicant?s *Atkins* allegation. CCA here denied relief on all applicant?s claims.

?The habeas judge . . . erred by disregarding our case law and employing the definition of intellectual disability presently used by the AAIDD, a definition which notably omits the requirement that an individual?s adaptive behavior deficits, if any, must be ?related to? significantly sub-average general

intellectual functioning.? The two most reliable IQ tests conducted gave D scores of 78 at age 13 in 1973 and 74 at age 30 in 1989, and his letters from prison indicated a seventh-grade writing ability. His behaviors during the crime (planning division of the robbery proceeds, wearing a wig, covering up the gun with a bag, fleeing to Louisiana, and shaving his head) indicated planning, forethought, and an appreciation of the need to avoid apprehension. For U.S. Const. amend. VIII purposes, D was capable of functioning adequately in his everyday world with intellectual understanding and moral appreciation of his behavior.

**Remand was necessary because the State?s entitlement to a nunc pro tunc judgment depended on at least one issue of fact?whether, at trial, the judge actually made a deadly-weapon finding?and this issue had not been conclusively resolved in the State?s favor.*Guthrie-Nail v. State,* No. PD-0125-14 (Tex.Crim.App. Sept 16, 2015).**

D was indicted for capital murder and conspiracy to commit capital murder. After a few days of trial testimony, the parties reached an agreement: The State waived the capital-murder charge in exchange for D pleading guilty to the conspiracy charge for a 50-year prison sentence. The conspiracy count of the indictment alleged that D,

> with intent that capital murder, a felony, be committed, agree[d] with Mark Lyle Bell and Thomas Edward Grace, that they or one of them would engage in conduct that would constitute the offense, to wit: enter the habitation of Craig Nail and cause the death of Craig Nail, and Mark Lyle Bell performed an overt act in pursuance of the agreement, to wit: entered the habitation of Craig Nail and shot Craig Nail with a firearm causing his death.

In her written judicial confession, D ?admit[ted] to committing the offense of Conspiracy to Commit Capital Murder exactly as . . . in Count II of the charging instrument.? The trial judge questioned D at length about her plea and orally found her guilty of the offense ?just as set forth in the indictment[.]? However, the judge did not orally refer to a deadly-weapon finding, nor did the plea papers mention a deadly-weapon finding. The judgment reflected ?N/A? in the space provided for ?Findings on Deadly Weapon.? More than two months after the original judgment was entered, the trial judge signed a judg-ment nunc pro tunc, changing the ?Findings on Deadly Weapon? entry from ?N/A? to ?Yes, a Firearm.? The judgment nunc pro tunc also added a special finding that D ?used or exhibited a deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited.? The effect of this finding was that D would not be eligible for parole until she served at least 25 years of her sentence. COA concluded that the nunc pro tunc judgment was correctly entered. CCA reversed and remanded.

One of D?s allegations was that she was entitled to notice and a hearing prior to the nunc pro tunc judgment. COA construed D?s notice complaint to be a complaint that the State failed to provide notice of its intent to seek a deadly-weapon finding; COA concluded the State provided sufficient notice. CCA said, ?It is beyond dispute that she had such a right and that this right was violated. The State argues, however, that a remand to the trial court would be a useless task because the record indisputably shows that the nunc pro tunc judgment properly issued[.]? The trial court erred by entering a nunc pro tunc judgment adding a deadly weapon finding under Tex. Code Crim. Proc. art. 42.12, §?3g(a)(2), because the plea papers did not mention a deadly weapon finding and the judge did not orally refer to a deadly weapon finding. An affirmative deadly-weapon finding must be an express determination to be effective. The record did not conclusively establish that a deadly-weapon finding was made at or before the time the written judgment was signed. Before any unfavorable nunc pro tunc orders are entered, the person convicted should be given an opportunity to be present for the hearing and represented by counsel to accord him due process.

**Trial court properly held that D failed to establish the reliability of expert testimony under Tex. R. Evid. 702 about the weapon-focus effect to prove that the eyewitness misidentified him because the weapon-focus-effect theory had not been generally recognized as a valid hy-pothesis.*Blasdell v. State,* 470 S.W.3d 59 (Tex.Crim.App. 2015).**

The only dispute at D?s aggravated robbery trial was the identity of the assailant. To prove that the eyewitness misidentified D, the defense called a forensic psychologist to testify about the weapon-focus effect and its possible impact in this case; the weapon-focus effect postulates that the accuracy of eyewitness identification can be detrimentally impacted when, during the commission of an offense, a weapon is used by the assailant and seen by the complainant. The trial court excluded the testimony as irrelevant. D was convicted. COA agreed that the testimony was irrelevant and affirmed. In D?s out-of-time petition for discretionary review, he argued the testimony was relevant; CCA agreed, reversed COA, and remanded. On remand, COA once again affirmed the trial court but this time on the basis that the scientific principles of the weapon-focus effect were not proven reliable by clear and convincing evidence. D filed this petition for review, which CCA granted on two grounds: (1) eyewitness misidentification is a hallmark of wrongful conviction, and (2) whether COA decided an important question of federal law in a way that conflicted with applicable decisions of CCA or the U.S. Supreme Court.

CCA affirmed COA by finding that D failed to establish the reliability of the expert testimony; the expert conceded that he had not published any peer-reviewed articles or conducted any studies of his own about eyewitness identifications, much less the weapon-focus effect.

**Officer had reasonable suspicion to conduct a traffic stop once D drove by a ?Left Lane for Passing Only? sign; she was clearly in the left lane without passing after driving by the sign in violation of Tex. Transp. Code §§?544.004(a), 541.304(1).*Jaganathan v. State,* No. PD-1189-14 (Tex.Crim.App. Sept 16, 2015).**

The traffic stop occurred mid-afternoon while State Trooper was patrolling Interstate 10. The events were captured on the video camera in Trooper?s vehicle. This section of Interstate 10 had three lanes. A car ahead of Trooper moved from the right lane to the middle lane. When that vehicle moved to the middle lane, it was slightly ahead of D. It then pulled a little farther ahead. D?s car was at the front of a short line of vehicles in the left lane. D passed a ?Left Lane for Passing Only? sign. Four or five seconds later, Trooper passed the sign while he was in the right lane. D?s car continued in the left lane. Another four or five seconds later, Trooper moved out of the right lane, across the middle lane, and into the left lane. Trooper then followed D?s car in the left lane for ten to twelve seconds; the middle lane was clear of traffic, and D was not passing any vehicles. D turned on her left turn signal, then turned it off and turned on her right turn signal, and moved into the middle lane. Trooper turned on his overhead lights, and the two vehicles pulled to the side of the road. During the course of the stop, Trooper smelled marijuana, searched D?s vehicle, and found marijuana in the trunk. As a result, D was charged with possession of marijuana. She filed a motion to suppress, which was denied. She pled guilty and was placed on deferred adjudication.

On appeal, D claimed Trooper lacked reasonable suspicion to conduct a traffic stop. COA agreed, concluding that D was increasing the distance between her car and a truck behind her. and that a white car moved into the middle lane at the time D?s car passed the ?Left Lane for Passing Only? sign. COA speculated that the white car?s movement ?may have prevented appellant from moving safely into the middle lane.? COA also said ?the State Trooper?s actions may have influenced appellant?s behavior in a manner that prevented appellant from complying with the ?Left Lane for Passing Only? sign.? Specifically, COA thought the fact that Trooper?s car approached D?s car ?at a high rate of speed? was an event that ?based on commonsense judgment and inferences of human behavior, could have caused appellant to slow down, effectively ending appellant?s ability to pass the white car that had merged into the middle lane.? COA also cited Trooper?s testimony that it is generally unreasonable for an individual to pull in front of or next to a marked police car approaching at a higher speed. Finally, COA concluded that Trooper ?did not follow appellant for a sufficient amount of time or for a sufficient distance to conclude that appellant committed a violation.? COA also considered whether D frustrated the purpose of ?Left Lane for Passing Only? signs and concluded that she had not; she neither impeded traffic nor put other drivers? safety at risk.

CCA reversed COA. ?Appellant passed a ?Left Lane for Passing Only? sign and remained in the left lane

without passing. The facts surrounding this conduct did not establish beyond question that appellant needed to remain in the left lane for safety purposes. Under these circumstances, we hold that the police officer had reasonable suspicion. . . . An officer may make a warrantless traffic stop if the ?reasonable suspicion? standard is satisfied. Reasonable suspicion exists if the officer has ?specific articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has engaged or is (or soon will be) engaging in criminal activity.? The Transportation Code requires that an operator of a vehicle ?comply with an applicable official traffic-control device,? including a sign. Before an officer can have reasonable suspicion to believe that a defendant committed the traffic offense of failing to obey a ?Left Lane for Passing Only? sign, the officer must be aware of facts that support a reasonable inference that the defendant drove past the sign before being pulled over. The record in the present case establishes that appellant did in fact pass such a sign.

?The question in this case is not whether appellant was guilty of the traffic offense but whether the trooper had a reasonable suspicion that she was. Appellant was clearly driving in the left lane without passing after driving past a sign that prohibited that conduct[.]?

## Court of Appeals

**In a case involving burglary of a building, it was error to use a prior state jail felony to enhance under Tex. Penal Code §?12.35(a) because the State failed to prove D was previously convicted of two felonies that were not state jail felonies.*Bledsoe v. State,* No. 06-14-00138-CR (Tex.App.?Texarkana Nov 3, 2015).**

After a trial in which D represented himself, he was convicted of burglary of a building. The State alleged two prior felony convictions to enhance D?s punishment range, and D pled ?not true? to those convictions. The State thereafter introduced a judgment of conviction for burglary of a building, a state jail felony, and a judgment of conviction for possession of a controlled substance, a second-degree felony. The jury found each enhancement allegation to be ?true.? D was then sentenced to 20 years? confinement.

COA found the 20-year sentence improper because it exceeded the maximum punishment of 2 years? imprisonment for an unenhanced state jail felony. Tex. Penal Code §?12.425 allows for penalty enhancement for repeat or habitual felony offenders on trial for a state jail felony, providing that ?[i]f it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies other than a state jail felony punishable under Section 12.35(a) . . . the defendant shall be punished for a felony of the second degree.? Entitlement to a new punishment hearing was not predicated on a showing of harm since there was an improper enhancement. Whether the State could have alleged proper enhancements to increase the punishment range to that of a second-degree felony was not at issue since there was no attempt to do so, and the issue of whether the error could have survived habeas corpus review was not relevant to this decision. COA reversed the trial court on punishment and remanded.

**Trial court should have included an instruction for the defense of the unborn child in addition to the instruction for the defense of the mother; this error was harmful because the matters of provocation and a duty to retreat that may have been attributed to the mother would not be attributable to the unborn child.*Holland v. State,* No. 11-13-00361-CR (Tex.App.?Eastland Nov 30, 2015).**

D appealed his conviction for aggravated assault with a deadly weapon; in four issues, he asserted the trial court erred when it refused his requests for a charge on a lesser-included offense and various defensive instructions. COA reversed and remanded for a new trial.

?[A] person that murders a pregnant mother and her unborn child commits two murders. . . . [T]his same reasoning applies in the context of the defense of third persons as set out in [Tex. Penal Code §] 9.33. If Appellant believed that attacking Burnett was immediately necessary to protect [the mother]?s unborn child

from unlawful force, then Appellant would be entitled to an instruction on defense of a third person for the unborn child. . . . We disagree with the State?s contention that the jury?s rejection of the defense of a third person pertaining to [the mother] provides us with an assurance that Appellant suffered no harm by the omission of an instruction regarding the defense of the unborn child. . . . Appellant suffered ?some harm? from the omission of an instruction on the defense of the unborn child because the matters of provocation and a duty to retreat that may have been attributed to the pregnant mother would not be attributable to the unborn child. Furthermore, the jury might have determined that greater force was necessary to protect the unborn child than was necessary to protect the pregnant mother. The absence of a separate instruction for the defense of the unborn child precluded the jury from reaching this determination. Accordingly, we sustain Appellant?s second issue. We need not address the remaining issues.?



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