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Supreme Court

When a court was satisfied that a felon would not retain control over his guns, 18 U.S.C.S. §?922(g) did not apply, and the court had equitable power to accommodate a felon?s request to transfer firearms to a third party.*Henderson v. United States*, 135 S. Ct. 1780 (2015).

After being charged with the felony offense of distributing marijuana, D was required as a condition of bail to turn over firearms he lawfully owned. D ultimately pleaded guilty and, as a felon, was prohibited under 18 U.S.C.S. §?922(g) from possessing firearms. D asked the Federal Bureau of Investigation, which had custody of his firearms, to transfer them to his friend. But the agency refused. D then filed a motion in federal district court seeking to transfer his firearms, but the court denied the motion on the ground that the transfer would give him constructive possession of the fire-arms in violation of §?922(g). The Eleventh Circuit affirmed. The Supreme Court unanimously vacated the Eleventh Circuit and remanded.

A court-ordered transfer of a felon?s lawfully owned firearms from Government custody to a third party is not barred by §?922(g) if the court is satisfied that the recipient will not give the felon con-trol over the firearms so that he could use them or direct their use. Federal courts have equitable authority to order law enforcement to return property obtained during the course of a criminal pro-ceeding to its rightful owner. Section 922(g), however, bars a court from ordering guns returned to a felon-owner like D because that would place the owner in violation of the law; because §?922(g) bans constructive as well as actual possession, it also prevents a court from ordering the transfer of a felon?s guns to someone willing to give the felon access to them or to accede to the felon?s instructions about their future use. The Government further argued that §?922(g) prevented all transfers to a third party, no matter how independent of the felon?s influence, unless that recipient was a licensed firearms dealer or other third party who would sell the guns on the open market. But that view conflates possession, which §?922(g) prohibits, with an owner?s right merely to alienate his property, which it does not.

Conviction for threatening another person under 18 U.S.C. §875(c) required proof of the defendant?s subjective intent to threaten; the court?s instruction requiring only negligence with respect to the communication of a threat was insufficient to support D?s conviction.*Elonis v. United States,* 135 S. Ct. 2001 (2015).

Under a pseudonym on Facebook, D posted self-styled lyrics containing graphically violent language and imagery concerning his estranged wife, co-workers, a kindergarten class, and law enforcement. These posts were often interspersed with disclaimers that the lyrics were ?fictitious? and not intended to depict real persons, and that D was exercising his First Amendment rights. However, many who knew D saw his posts as threatening, including his boss, who fired him, and his wife, who was granted a state court protection-from-abuse order against him. When D?s former employer informed the Federal Bureau of Investigation of the posts, the agency began monitoring D?s Facebook activity and eventually arrested him. D was charged with five counts of violating 18 U.S.C. §?875(c), which makes it a federal crime to transmit in interstate commerce ?any communication containing any threat . . . to injure the person of another.? At trial, D requested a jury instruction that the Government was required to prove that he intended to communicate a ?true threat.? Instead, the court told the jury that D could be found guilty if a reasonable person would foresee that his statements would be interpreted as a threat. D was convicted on four of the five counts and renewed his jury instruction challenge on appeal. The Third Circuit affirmed. The Supreme Court reversed and remanded.

Section 875(c) did not indicate whether the defendant must have intended that the communication contain a threat, and the parties could show no indication of a particular mental state requirement in the statute?s text. Federal criminal statutes that are silent on the required mental state should be read to include only the mens rea necessary to separate wrongful from innocent conduct. In some cases, a general requirement that a defendant act knowingly is sufficient, but where such a requirement would fail to protect the innocent actor, the statute would need to be read to require specific intent.

The presumption in favor of a scienter requirement should apply to each statutory element that criminalizes otherwise innocent conduct. In Section 875(c), that required proof that a communication was transmitted and that it contained a threat; because the crucial element separating legal innocence from wrongful conduct was the threatening nature of the communication, the mental state requirement applied to the fact that the communication contained a threat. D?s conviction was premised solely on how a reasonable person would view his posts, a standard feature of civil liability in tort law inconsistent with the conventional criminal conduct requirement of awareness of some wrongdoing. This Court has long been reluctant to infer that a negligence standard was intended in criminal statutes, and the Government failed to show that the instructions in this case required more than a mental state of negligence. Section 875(c)?s mental state requirement is satisfied if the defendant transmits a communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat. Given this disposition, the Court found it unnecessary to consider First Amendment issues.

Fifth Circuit

The district court did not err in treating D?s Nevada con-viction to commit murder as a ?crime of violence? under USSG §?2L1.2, notwithstanding the fact that Nevada conspiracy does not require proof of an overt act.*United States v. Pascacio-Rodriguez,* 749 F.3d 353 (5th Cir. 2014).

The Sentencing Commission did not intend for the term ?conspir[acy]? under §?2L1.2 to require an overt act as an element of each and every conspiracy offense; the language and context of §?2L1.2 indicate that an overt act is not required for a conspiracy to commit murder. Alternatively, the Fifth Cir-cuit concluded that the generic, contemporary meaning of conspiracy to commit murder does not require an overt act.

Where Government refused to move for an additional level off for acceptance of responsibility under USSG §?3E1.1(b) based on D?s refusal to waive his right to appeal, district court did not plainly err in

denying that re-duction.*United States v. Garcia-Carrillo,*749 F.3d 376 (5th Cir. 2014).

Even assuming that D was entitled to a post-sentencing Guidelines amendment that held such refusals to be improper, any error did not affect D?s substantial rights where he was sen-tenced to 89 months imprisonment, within the substantial overlap between the Guideline range with the reduction (77 to 96 months) and the range without the reduction (84 to 105 months), and there was no evidence that would suggest a reasonable probability of a different sentence with a change in the Guideline range. The Fifth Circuit also declined to remand to the district court for consideration of the persuasive effect of the post-sentencing Guidelines amendment, as the First Circuit had done with respect to a different Guidelines amendment in *United States v. Godin,* 522 F.3d 133 (1st Cir. 2008).

Death-sentenced Texas D was entitled to appeal his claim that trial counsel?s failure to investigate and pre-sent adequate mitigating evidence violated his right to effective assistance; however, D was not entitled to appeal that he had the right for the federal district court to consider newly presented evidence that state habeas counsel failed to present.*Escamilla v. Stephens,* 749 F.3d 380 (5th Cir. 2014).

D was entitled to a certificate of appealability (COA) on his claim that trial counsel?s failure to investigate and present adequate mitigating evidence violated his Sixth and Fourteenth Amendment right to effective assistance of counsel; however, D was not entitled to a COA on his claim that under *Martinez v. Ryan,* 132 S. Ct. 1309 (2012), and *Treviño v. Thaler,* 133 S. Ct. 1911 (2013), the federal district court should have considered newly presented evidence that state habeas counsel failed to present to the state habeas court. *Martinez* and *Tre-viño* do not apply to claims that were fully adjudicated on the merits by the state habeas court because those claims are, by definition, not procedurally defaulted. Thus, once a claim is considered and denied on the merits by the state habeas court, *Martinez* and *Treviño* are inapplicable and may not function as an exception to the rule of *Cullen v. Pinholster,* 131 S. Ct. 1388 (2011), barring a federal habeas court from considering evidence not presented to the state habeas court.

Under*Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968), and its progeny, 18 U.S.C. §?249(a)(1)?employed in this case to prosecute three white defendants for willfully causing bodily injury to an African-American man?did not exceed Congress? power to legislate under the Thirteenth Amendment.*United States v. Cannon,* 750 F.3d 492 (5th Cir. 2014).

It was not irrational for Congress to conclude that racially motivated violence was a badge or incident of slavery that the U.S. Const. am. 13 empowered Congress to address. NOTE: Judge Elrod, the author of the court?s opinion, also wrote a concurring opinion urging the Supreme Court to address ?a growing tension between [its] precedent regarding the scope of Congress? powers under §?2 of the Thirteenth Amendment and the Supreme Court?s subsequent decisions regarding the other Reconstruction Amendments and the Commerce Clause.?

In drug case, district court impermissibly participated in plea negotiations, in violation of Fed. R. Crim. P. 11(c)(1), by giving D (who was balking at pleading guilty) spe-cific examples of negative results for defendants who rejected plea offers.*United States v. Hemphill,* 748 F.3d 666 (5th Cir. 2014).

The district judge compared the evidence in D?s case to that in other cases and suggested, through a ?success story,? that favorable results could occur when a defendant pleads guilty. Moreover, the error was not harmless because the rec-ord showed at least a reasonable probability that D would not have entered a guilty plea absent the district court?s comments. Accordingly, the Fifth Circuit vacated the judgment of conviction and remanded for further proceedings before a different district judge.

In drug and gun case, district court did not abuse its dis-cretion in refusing to give an instruction on withdrawal as a defense to conspiracy charges; to be timely, withdrawal from a conspiracy must precede the commission of an overt act.*United States v. Salazar,* 751 F.3d 326 (5th Cir. 2014).

However, D did not ?invite? the district court?s error in directing a verdict of guilty against him in violation of his Sixth Amendment right to trial by jury; nothing in the record sug-gested that D wished to change his plea of not guilty to a plea of guilty or that D consented to the directed verdict. Like-wise, D did not forfeit this error so as to trigger plain-error review. The district court explicitly acknowledged that D was preserving this argument for appeal. Even though defense counsel did not specifically reference the Sixth Amendment in-terest at stake or provide any legal authority demonstrating error, the court was well aware of the issue before it. Moreover, by telling the jury ?to go back and find the Defendant guilty,? the district court improperly directed a verdict in violation of D?s Sixth Amendment right. It did not matter that D took the stand and essentially confessed to the crimes for which he was on trial. No amount of compelling evidence can override a defendant?s right to have a jury determine his guilt. This error was not appropriate for harmless-error analysis, because it would be meaningless to ask whether a jury would have returned the same verdict absent the constitutional error as a jury never rendered a verdict of guilty beyond a reasonable doubt. The Fifth Circuit vacated D?s conviction and remanded.

Even assuming arguendo that district court, in healthcare-fraud bench trial, erred in excluding evidence of an exculpatory polygraph result by defendant under Fed. R. Evid. 403 as prejudicial, the error was harmless in this case.*United States v. Willett,* 751 F.3d 335 (5th Cir. 2014).

In prosecution for alien-harboring conspiracy and substantive alien-harboring charges, district court harmlessly erred in admitting, pursuant to Fed. R. Crim. P. 404(b), evidence of a 2009 traffic stop (not culminating in arrest or prosecution), in which D was discovered to have two aliens in his vehicle. *United States v. Gutie-rrez-Mendez,* 752 F.3d 418 (5th Cir. 2014).

The Government failed to establish the evidence?s conditional relevance under Fed. R. Evid. 104(b) because it presented insufficient evidence that D knowingly harbored illegal aliens at the time of the traffic stop; however, the improperly admitted evidence was harmless, in light of (1) that evidence?s weak and benign nature relative to the conduct for which D was on trial, and (2) the multiple limiting instructions given by the district court.

(2) The Fifth Circuit noted that it was an ?open question? whether it was impermissible ?double-counting? to apply Sentencing Guideline enhancements under both USSG §?2L1.1(b)(5) and USSG §?2L1.1(b)(6) based upon the same conduct (here, the rape and attempted rape at knifepoint of two harbored aliens). However, the Fifth Circuit held that it did not need to resolve that question because the district court had explained that it would have given D the same sentence (the statutory maximum of 120 months) even if it were mistaken in its application of the Guidelines; this rendered any error harmless.

When a federal claim has been presented to a state court and denied, it must be presumed that the state court adjudicated the claim on the merits; with respect to Louisiana capital D?s claim that trial counsel were ineffective for failing to investigate and present evidence of the crime, this presumption was not overcome.*Hoff-man v. Cain,* 752 F.3d 430 (5th Cir. 2014), opinion amended on denial of reh?g and reh?g en banc, 763 F.3d 403 (5th Cir. 2014).

The Fifth Circuit affirmed the district court?s denial of federal habeas relief, holding the following points. Under *Harrington v. Richter,* 562 U.S. 86 (2011), when a federal claim has been presented to a state court and the state court has denied relief, it must be presumed that the state court adjudicated the claim on the merits, although that presumption can be overcome; here, with respect to Louisiana capital D?s claim that trial counsel were ineffective for failing to investigate and present evidence of the circumstances of the crime, the *Richter* presumption was not overcome. Therefore, the state court?s im-plicit denial of that unaddressed claim qualified as a decision on the merits for which AEDPA deference was owed. The state court did not unreasonably apply federal law in rejecting D?s claims that counsel were ineffective by failing to prepare properly for the mitigation phase of trial, or by investigating and presenting the circumstances of the crime.

(2) D?s claim of racial discrimination in the selection of the grand-jury foreperson was abandoned by D before trial and thus was procedurally defaulted under Louisiana law; because D did not meet the narrow exception to such default, the Fifth Circuit could not review the merits of that claim.

(3) The state court did not act unreasonably in rejecting D?s claim of racial discrimination by the petit jury, evidenced by the alleged affidavit of one of the jurors. The consideration of such affidavits is disfavored, if not barred completely, by La. Code Evid. Art. 606(b). In any event, the state court would like-wise not have acted unreasonably or contrary to law in con-cluding that the affidavit did not support a finding of inten-tional bias or discrimination. Furthermore, the affidavit indicated that the jury acted on the basis of the evidence and jury instructions.

The Fifth Circuit granted Louisiana death-sentenced pris-oner authorization to file a successive petition con-tend-ing that under*Atkins v. Virginia,* 536 U.S. 304 (2002), he was ineligible for the death penalty due to his intellectual disability, even though prisoner?s petition was time-barred because it was filed more than 10 years after*Atkins.In re Campbell,* 750 F.3d 523 (5th Cir. 2014).

There was considerable evidence of D?s intellectual ability, including IQ tests that were not disclosed by the State, despite a request and an earlier *Atkins* challenge; even though prisoner?s petition was time-barred under the AEDPA because it was filed more than 10 years after the Supreme Court decided *Atkins*, the State?s nondisclosure of evidence of intellectual disability might constitute grounds for equitable tolling of the AEDPA statute of limitations, and the district court would be best-positioned to determine whether equitable tolling applied. Finally, the Fifth Circuit held that prisoner had made a sufficient showing of likelihood of success on the merits so as to warrant a stay of prisoner?s execution.

Court of Criminal Appeals

The issue was not whether the trial court had authority under Tex. Code Crim. Proc. art. 42.12 to impose reimbursement of the costs of confinement as a condition of D?s community supervision, but whether the judge had the authority to order D after revocation, as part of her sentence, to pay the balance of her fine, costs, and reimbursement.*Mercer v. State,* 451 S.W.3d 846 (Tex.Crim.App. 2015).

?Here we are asked to consider whether a defendant on community supervision for a state-jail felony may be required to reimburse a county for the cost of her incarceration in county jail as a condition of her community supervision. How-ever, because we conclude the court of appeals incorrectly analyzed the relevant issue in this case, we vacate the judgment of the court of appeals and remand. . . . [COA] granted Appellant relief on an erroneous basis[.]?

?Safe place? in kidnapping statute Tex. Penal Code §?20.04(d) was ambiguous, and the determination of whether a place was safe should be made on a case-by-case basis; the jury properly rejected ?safe place? as D?s mitigation defense.*Butcher v. State,* 454 S.W.3d 13 (Tex.Crim.App. 2015).

?The punishment level for aggravated kidnapping is reduced from a first-degree felony to a second-degree felony if the kidnapper ?voluntarily releases the victim in a safe place.? [COA] concluded that the evidence was legally and factually suf-ficient to support the jury?s rejection of Appellant?s mitigating defense of release in a safe place. . . . [W]e shall affirm.? The evidence was legally and factually sufficient to support the jury?s rejection of D?s mitigating defense of release in a safe place, even though the complainant was released at a location near the abduction, where there was testimony that the area was desolate, the complainant was dropped off in the middle of the road, D kept the complainant?s mobile phone, and the complainant?s family did not have a phone at their house.

Rescinding a new trial order outside the 75-day time limit resulted in recalculating appellate timetables; the rescinding order would be treated as an appealable order under Tex. R. App. P. 26.2, and appellate timetables would be calculated from the date of that order.*Kirk v. State,* 454 S.W.3d 511 (Tex.Crim.App. 2015).

The trial court revoked D?s deferred-adjudication probation, adjudicated him guilty of aggravated robbery, and sentenced him to eight years? imprisonment. D?s sentence was imposed in court on March 7, 2013. On March 20 of that year, D filed a ?Motion for Commutation of Sentence,? in which he requested a ?time cut? and a new sentence of zero years. On March 25, D filed a notice of appeal. On May 17, the trial court entered an order granting a new trial on punishment. On May 20, the State filed a motion to rescind that order and requested that the trial court rule on the State?s motion by May 21. The trial court rescinded its order granting a new trial on punishment on May 22, 76 days after the imposition of sentence. D filed a motion to dismiss his appeal on the ground that the court?s latest order (rescinding the previous order grant-ing a new trial on punishment) was untimely. Relying on *Awadelkariem v. State,* 974 S.W.2d 721 (Tex.Crim.App. 1998), COA agreed, holding that the trial court lacked jurisdiction to rescind the order granting a new trial on punishment because the rescinding order was entered more than 75 days after the judgment of conviction. COA held that the grant of the new trial on punishment was never rescinded, and the case was restored to its position after D was found guilty. COA concluded that no final, appealable judgment remained over which COA had jurisdiction.

CCA found that a trial court had the power to rescind an order granting a new trial, and that power was not subject to a 75-day time limit. ?In a prior decision, we suggested that there was a time limit on the trial court?s power to rescind the granting of a new trial. We now conclude that there is no specific time limit on the trial court?s power to do so. Consequently, we reverse the judgment of the court of appeals.?

D had knowledge of the attorney fee and, therefore, could have challenged the sufficiency of the evidence supporting payment of the fee in a direct appeal from the initial order for deferred adjudication; failing to raise the issue in a direct appeal resulted in procedural default.*Riles v. State,* 452 S.W.3d 333 (Tex.Crim.App. 2015).

D pled guilty to possession of a controlled substance with intent to deliver; upon deferred adjudication, D was granted com-munity supervision. After a year and a half, D?s community supervision was revoked, and she was sentenced to seven years in prison and ordered to pay all court costs, including her court appointed attorney fees. D appealed, arguing that the trial court erred in ordering her to pay the attorney fees because there was no evidence of her ability to pay. COA held that this claim was forfeited because she did not raise it in an appeal from the original deferred adjudication order. CCA granted D?s petition to determine whether D forfeited her claim even though the amount and certainty of the attorney fee was unknown to her at the time community supervision was imposed. CCA affirmed COA.

With direct evidence of D?s acknowledgment of the existence of the attorney fee, the lack of knowledge of the exact amount of the fee did not make D?s case. ?The record in this case reflects multiple points where Appellant acknowledged the obligation to pay the attorney fee. In Appellant?s written plea, she signed the section entitled ?Court Costs and Fees? admonishing her that there were mandatory costs of community supervision, which could include the fee for her court-appointed attorney. Appellant also signed her Application for Community Supervision, which stated that she would reimburse the county for the compensation of appointed counsel. Finally, Appellant?s Order for Deferred Adjudication, which she signed, specifically indicated that she would be required to pay all court costs including the ?Court Appointed Attorney Fee.??

Even if the jury had received the presumption-of-reasonableness instruction under Tex. Penal Code §?9.32(b) in D?s murder trial, a different verdict was unlikely because of the weakness of the defense evidence in com-parison to refuting evidence.*Villarreal v. State,* 453 S.W.3d 429 (Tex.Crim.App. 2015).

?This case addresses whether a defendant has suffered egre-gious harm from the erroneous omission of a jury instruction that would have required the jury to apply a presumption of reasonableness as to his belief that the use of deadly force was immediately necessary to protect himself. *See* ex. Penal Code §?9.32(b). The State raises this question in its petition for discretionary review, in which it challenges the court of appeals? reversal of the murder conviction of [D] based on the conclusion that he was egregiously harmed by the trial court?s omission of such an instruction. . . . We agree with the State?s contention that [COA] erred by concluding that appellant was egregiously harmed based on the existence of theoretical harm and based on an incomplete review of the record and the arguments of counsel. We reverse [COA] and remand. . . .

?[A] charge on the presumption of reasonableness would have authorized the jury not to apply the presumption if it determined that the State had proved beyond a reasonable doubt either that appellant had no reason to know that [the deceased who was fighting with D] was attempting to commit murder or that appellant was otherwise engaged in criminal activity [(assault by threat)]. *See* Tex. Penal Code §?9.32(b). And, in light of the relative strength of the evidence in the record indicating that appellant was the aggressor and stabbed the unarmed [de-ceased] as compared to the weaker evidence giving rise to appellant?s justification defense, and considering that appellant?s defensive strategy relied upon two theories, only one of which would have been affected by the error, we are persuaded that there is no substantial risk of harm to appellant as a result of the omission of the instruction.?

On review of D?s aggravated robbery convictions, COA incorrectly applied Tex. R. Evid. 609 in finding that the trial court properly admitted remote felony convictions more than ten years old; the unambiguous language of Rule 609 supplanted the common-law tacking doctrine.*Meadows v. State,* 455 S.W.3d 166 (Tex.Crim.App. 2015) (see below).

A jury convicted D of two counts of aggravated robbery and assessed punishment at 75 years? incarceration for each count. COA overruled D?s sole point of error (that the court abused its discretion in allowing the State to cross-examine him about felony convictions that were more than 10 years old and about a misdemeanor conviction that was not a crime of moral turpitude). CCA sustained D?s grounds for review and remanded, holding that COA erred by using the general ?outweighs? standard in Tex. R. Evid. 609(a), rather than the correct ?substantially outweighs? test of Tex. R. Evid. 609(b). Rule 609(b) provided that evidence of a prior conviction was inadmissible if more than 10 years had elapsed since the later date of conviction, unless the court determined the probative value of the conviction supported by specific facts and circumstances substantially outweighed its prejudicial effect. The unambiguous plain language of the rule supplanted the common-law tacking doctrine, ?tacking? a conviction that is out of date under Rule 609 onto a more recent conviction.

Reforming D?s conviction from felony murder to lesser-included injury of a child was not workable because the injury to a child offense contained varying penalties based on the culpable mental state of the defendant, and the jury instruction grouped various mental states.*Rodriguez v. State,* 454 S.W.3d 503 (Tex.Crim.App. 2015).

?We granted Appellant?s motion for rehearing . . . to clarify our order that the trial court reform Appellant?s conviction from felony murder to injury of a child and conduct a new punishment hearing based on the reformed conviction. Appellant argues that remanding the case for an entirely new trial, rather than reforming the conviction and conducting a new punishment hearing, is the proper disposition. We agree.

?Appellant was charged with felony murder with injury to a child as the underlying offense. We determined that the evi-dence was insufficient to support the felony murder conviction, but that the jury necessarily found her guilty of the lesser-included offense of injury to a child. However, the indictment stated that she ?did then and there intentionally, knowingly, recklessly and with criminal negligence commit and attempt to commit a felony, namely injury to a child.? The application paragraph of the jury charge included each of these mental states in the disjunctive, and the court defined each one. Then, when Appellant

was convicted, the jury entered a general verdict. Therefore, there is no way to know whether the jury found that Appellant acted intentionally, knowingly, recklessly, or with criminal negligence in the starvation of her child. This is significant because the injury to a child offense contains varying penalties based on the culpable mental state of the defendant, and without a determination on mental state, the jury will have no guidance on the applicable punishment range. Tex. Penal Code §?22.04(e)?(g). . . . We made clear in [*Thornton v. State*, 425 S.W.3d 289 (Tex.Crim.App. 2014),] that reformation is necessary where the jury found every element of the lesser-included offense and the evidence was sufficient to support a conviction on that offense in order to avoid an unjust acquittal. However, we did not intend for mandatory reformation to extend to circumstances where there are multiple lesser-included offenses that meet the criteria for reformation, or where we have no way to determine which degree of the lesser-included offense the jury found. . . . [COA] is reversed, and the case is remanded to the trial court for a new trial on the lesser-included offense of injury to a child by omission.?

CCA denied the State?s emergency motion to stay COA proceedings to recuse a COA justice.*Leija v. State,*456 S.W.3d 157 (Tex.Crim.App. 2015).

?In the court of appeals, the State filed a motion to recuse Justice Lee Ann Dauphinot. Sitting en banc, the court of appeals denied the motion, with three justices dissenting. Although no judgment has been issued by the court of appeals with respect to the appeal, the State has submitted a petition for discretionary review (PDR) seeking review of the order de-nying the motion to recuse and a motion to stay proceedings in the court of appeals. We decline. . . . The rules of appellate procedure provide that an initial PDR must be filed within 30 days after ?either the day the court of appeals? judgment was rendered or the day the last timely motion for rehearing or timely motion for en banc reconsideration was overruled? by [COA.] With the word ?judgment,? the rules indicate that the right to file a PDR arises only after the court of appeals? ultimate disposition of the case. While the denial of a recusal motion like the one before us is reviewable, there is no explicit right to file a PDR from an interim ruling. . . . Moreover, ?[i]nterlocutory appeals are generally not permitted in Texas criminal proceedings.? When a motion to recuse a trial judge is denied, review occurs only after final judgment in the trial court. There seems to be even less justification for allowing an interlocutory PDR from the denial of a motion to recuse an appellate justice. Refusing to allow a PDR in the situation before us runs only the risk of remanding the case to the court of appeals for a new review of the case.?

D?s statute-of-limitations defense was a category-three forfeitable right because there was no legislative violation of the Ex Post Facto Clause, given that the trial judge?s acceptance of the time-barred plea originated from plea negotiations with the State and D?s waivers of the defense.*Ex parte Heilman,* 456 S.W.3d 159 (Tex.Crim.App. 2015).

D pleaded guilty to misdemeanor tampering with a governmental record after the relevant two-year statute of limitations expired. In return for D?s plea, the State agreed not to pursue indictment for felony tampering with a governmental record. In a habeas application, D challenged the trial court?s jurisdiction to accept his plea to the time-barred offense, arguing that his ?pure law? limitations defense is a category-one absolute right under *Marin v. State,* 851 S.W.2d 275 (Tex.Crim.App. 1993). The habeas court granted relief, and COA affirmed. CCA reversed COA.

In *Marin,* CCA constructed a three-part framework for criminal-justice rights: (1) ?absolute requirements and prohibitions?; (2) ?rights of litigants which must be implemented by the system unless expressly waived?; and (3) ?rights of litigants which are to be implemented upon request.? A category-three right can be forfeited by a litigant ?for failure to insist upon it by objection, request, motion, or some other behavior[.]? A statute-of-limitations defense is in *Marin*?s third category. ?Yet more recently in *Phillips v. State,* [362 S.W.3d 606 (Tex.Crim.App. 2011),] we distinguished between two types of limitations defenses: (1) those that are ?based on facts? and (2) those that are ?pure law.? . . . [T]he second appears on the face of the instrument and therefore ?gives rise to a statute-of-limitations bar? that constitutes a jurisdictional defect.

. . . [A] pure-law limitations defense, as a jurisdictional defect, could not be forfeited and could be raised for the first time on appeal or in a collateral proceeding. . . . [F]or Heilman?s plea agreement to stand, we must first overturn *Phillips*. . . . [B]ecause the information against Heilman showed that the statute of limitations on the misdemeanor offense to which he pleaded had run two months before his plea, prosecution on that offense was already ?forever and absolutely barred? under *Phillips*. . . . When we analyze rights under our *Marin* framework, we focus on the nature of the right at issue?not the circumstances under which it was raised. . . . But if we adhere to *Phillips*, we invite the very set of circumstances that we now address. Generally, a defendant who accepts the benefits of a plea agreement is estopped from challenging its validity. Yet estoppel does not apply when the trial court lacked jurisdiction. Therefore, because *Phillips* held that a pure-law limitations defense is an attack on a court?s jurisdiction, a defendant could ?reap the ben-efits of an illegal sentence, which is lighter than what the legal sentence would have been, and then turn around and attack the legality of the illegal, lighter sentence when it serves his interest to do so,? as Heilman now tries to do.?

Court of Appeals

The trial court properly admitted D?s prior felony con-vic-tions because while the three convictions were re-mote and similar to the charged offense, the convictions had a high impeachment value. *Meadows v. State,* No. 02-12-00643-CR (Tex.App.?Fort Worth, Apr 30, 2015) (see above).

?We cannot say, on the record before us, that the trial court could not have found that the probative value of the prior felony convictions substantially outweighed their prejudicial effect or that it abused its discretion by admitting them, particularly when [D] stated during his direct testimony that he had intended to steal money from the restaurant but that his objective had been to commit theft, not robbery, presenting the jury with a credibility issue to resolve. Because we conclude that the trial court did not abuse its discretion by admitting the three felony theft convictions, we overrule this remanded portion of [appellant]?s sole point.?

D preserved for appellate review his complaint that his arrest was illegal, and therefore the State?s motion for rehearing was denied, where he apprised the trial court of his complaint at a time when the trial court was in a position to grant his requested relief and cited the Fourth Amendment as a basis for his motion to sup-press.*Clement v. State,* No. 11-13-00055-CR (Tex.App.?Eastland May 7, 2015).

?The clearest assertion by Appellant that Trooper Johnson lacked probable cause to arrest him occurred during [closing arguments on the motion to suppress] when defense counsel said: ?[T]here?s no probable cause for his arrest? (emphasis added). The State contends that this statement did not constitute a challenge to the legality of Appellant?s arrest because it followed counsel?s request to suppress ?anything after the stop.? The State argues that the alleged violation was incongruous with the requested relief because the illegality of the subsequent arrest would not preclude the admissibility of evidence seized prior to the illegal arrest. The State is essentially asserting that, when defense counsel made this argument, Appellant was challenging Trooper Johnson?s initial basis for stopping Appellant. We disagree with the State?s very narrow reading of defense counsel?s argument. . . . Finally, we note that a pretrial motion to suppress evidence is ?nothing more than a specialized objection to the admissibility of that evidence? that is interlocutory in nature. . . . Accordingly, the State will not be precluded from seeking a reconsideration of the suppression on a more fully developed record upon the remand of this case to the trial court.?

D?s conviction for fraudulent possession of 10 or more but less than 50 items of identifying information was improper because he suffered egregious harm from the inclusion of an unconstitutional mandatory presumption in the jury charge.*Ramirez-Memije v. State,* No. 14-11-00456-CR (Tex.App.?Houston [14th Dist] May 19, 2015).

The jury was instructed that D was presumed to have the intent to harm or defraud another if he

possessed the identifying information of three or more other persons, under Tex. Penal Code §?32.51(b), but that was an unconstitutional mandatory presumption that effectively eliminated the State?s burden of proof on the presumed fact of D?s mens rea, which was his intent to harm or defraud. D suffered egregious harm because the State?s arguments exacerbated the error, the presumed fact was the primary contested issue at trial, and the evidence was not overwhelming.

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