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Please do not rely solely on the summaries below. Each case name links to the full text of the opinion, which we recommend you read in addition to these brief synopses. The SDR is sent to current TCDLA members.

Editors: [3]Tim Crooks, [4]Kathleen Nacozy, Chris Cheatham

**SUPREME COURT**

**Certiorari from the Sixth Circuit**

[5]Bobby v. Mitts, 131 S. Ct. 1762 (U.S. 2011)

Reversed: Per curiam

**Facts**: Harry Mitts drank until he became intoxicated and then shot and killed an African American man, while speaking racial epithets. During the police shoot-out that followed, Mitts shot and killed one police officer and wounded two before being apprehended. At trial, Mitts did not contest the evidence that he had killed two men, but he instead attempted to establish that he was too intoxicated to form the required intent to kill. After a penalty hearing, the jury recommended the death penalty on both aggravated murder counts and terms of imprisonment for the attempted murders. The trial court sentenced Mitts to death for the aggravated murders and to terms of imprisonment for the attempted murders.

The Ohio Court of Appeals affirmed the convictions and sentences, and the Ohio Supreme Court affirmed and denied rehearing, ruling that the trial court should have instructed the jury to merge duplicative death penalty specifications, but holding that the error did not influence the jury and was resolved by re-weighing on appeal. Mitts filed a petition for a writ of habeas corpus. A federal judge in Cleveland affirmed the sentence, but the U.S. Court of Appeals for the Sixth Circuit decided to vacate.

**Question**: Were the jury instructions given at the penalty phase of the murder trial contrary to clearly established law for purposes of the Antiterrorism and Effective Death Penalty Act?

**Conclusion**: No. The Supreme Court summarily reversed the appellate court.

**Certiorari from the Supreme Court of Kentucky**

[6]Kentucky v. King, 179 L. Ed. 2d 865 (U.S. 2011)

Reversed, remanded: Alito (8-1); [6]Ginsburg dissented

**Facts**: Police officers entered an apartment building in pursuit of a suspect who sold crack cocaine to an undercover informant. The officers lost sight of the suspect and mistakenly assumed he entered an apartment from which they could detect the odor of marijuana. After police knocked on the door and identified themselves, they heard movements, which they believed indicated evidence was about to be destroyed. Police forcibly entered the apartment and found Hollis King and others smoking marijuana. They also found cash, drugs and paraphernalia. King entered a conditional guilty plea, reserving his right to appeal denial of his motion to suppress evidence obtained from what he argued was an illegal search.

The Kentucky Court of Appeals affirmed the conviction, holding that exigent circumstances supporting the warrantless search were not of the police's making and that police did not engage in deliberate and intentional conduct to evade the warrant requirement. The Kentucky Supreme Court reversed the lower court, finding the entry was improper. The court held that the police were not in pursuit of a fleeing suspect when they entered the apartment, since there was no evidence that the original suspect knew he was being followed by police.

**Question**: Does the exclusionary rule, which forbids the use of illegally seized evidence except in emergency situations, apply when the emergency is created by lawful police actions?

**Conclusion**: Yes: "The exigent circumstances rule applies when the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment." Justice Ginsburg dissented, contending "the Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases."

**Appeal From the U.S. District Courts for the Eastern and Northern Districts of California**

[7]Brown v. Plata, 563 U.S. ____, 09-1233 (5/23/11)

Affirmed: Kennedy (5-4); [7]Scalia dissented w/Thomas; [7]Alito dissented w/Roberts

**Facts**: The Prison Law Office in Berkeley, Calif., filed a class-action lawsuit in 2001 on behalf of Marciano Plata and several other prisoners, alleging that California prisons were in violation of the Eighth Amendment to the Constitution, which bans "cruel and unusual punishment." Following a lengthy trial, a special panel of three federal judges determined that serious overcrowding in California's 33 prisons was the "primary cause" for violations of the Eighth Amendment. The court ordered the release of enough prisoners so the inmate population would come within 137.5 percent of the prisons' total design capacity. That amounts to between 38,000 and 46,000 inmates being released.

**Question**: Does a court order requiring California to reduce its prison population to remedy unconstitutional conditions in its correctional facilities violate the Prison Litigation Reform Act?

**Conclusion**: No: "The court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights and is authorized by the PLRA." Justice Scalia filed a dissenting opinion in which he admonished the majority for affirming "what is perhaps the most radical injunction issued by a court in our Nation's history: an order requiring California to release the staggering number of 46,000 convicted criminals." Justice Alito filed a dissenting opinion in which he wrote that the "Constitution does not give federal judges the authority to run state penal systems."

Summaries by [8]Oyez. For a list of issues pending before the Court, click [9]here.

**FIFTH CIRCUIT**

[10]Rocha v. Thaler, 626 F.3d 815 (5th Cir. 2010). Texas state death-sentenced defendant was not entitled to federal habeas relief, under*Brady v. Maryland*, 373 U.S. 83 (1963), that the State withheld material impeaching evidence about one of the investigating detectives (namely, his professional and romantic relationship with the sister of a State's witnesses, and a disciplinary record). The evidence did not create a reasonable probability of a different outcome, and hence was not material under*Brady*, given the fact that the evidence was redundant of the testimony of the other investigating detective and given defendant's confession; the same was true with respect to the testimony of the witness himself. Furthermore, defendant was not entitled to a certificate of appealability on the questions of whether the State violated his rights (as a Mexican citizen) under the Vienna Convention and whether such a violation requires suppression of his confession. On initial consideration, the panel held that, under*Balentine v. Thaler*, 609 F.3d 729 (5th Cir. 2010),*withdrawn by* 626 F.3d 842 (5th Cir. 2010), defendant had at least a colorable argument that his ineffective-counsel claim (based on the failure to investigate/produce mitigation evidence) was denied by CCA on the merits, not as the result of an adequate and independent state law procedural ground; the panel initially granted a certificate of appealability on this claim.**However, on denial of rehearing, the panel held that under a proper view of the law (also reflected in the substituted opinion in*Balentine*), the state court's decision on this issue had to be viewed as rested on an adequate and independent state law procedural bar, thus precluding federal habeas relief. (Judge Haynes filed a specially concurring opinion, in which she agreed that precedent required this construction of the state court's decision, but she suggested it might bear further examination by some court.)**

[11]Balentine v. Thaler, 626 F.3d 842 (5th Cir. 2010),*withdrawing* 609 F.3d 729 (5th Cir. 2010). In its initial opinion, the Fifth Circuit panel had held that, in light of*Ex parte Campbell*, 226 S.W.2d 418 (Tex.Crim.App. 2007), and*Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007), the district court should have, pursuant to Fed. R. Civ. P. 60(b), set aside its judgment denying Texas death-sentenced defendant federal habeas relief due to a supposedly adequate and independent state procedural default. Accordingly, the Fifth Circuit initially reversed the district court's order denying defendant's Rule 60(b) motion and remanded for consideration of defendant's ineffective-counsel claim, including any necessary evidentiary hearing.**However, in the substituted opinion, the panel held that it erred in interpreting*Ruiz* to mean that uncertainty about the basis of a state-court decision should give rise to a presumption that the state court reached the merits rather than relying upon a state procedural bar. In light of this correct understanding of*Ruiz*, the district court did not err in denying defendant's Rule 60(b) motion because the district court did not err in concluding that the state-court decision on defendant's ineffective-counsel claim was grounded on an adequate and independent state procedural bar; the Fifth Circuit affirmed the district court's denial of defendant's Rule 60(b) motion. On petition for rehearing en banc, the poll for rehearing en banc failed by a vote of 11-4. Judge Dennis filed a lengthy dissent from denial of rehearing en banc, in which he was joined by Judge Benavides. Judge Haynes filed a short statement dissenting from denial of rehearing en banc.**

[12]United States v. Hoeffner, 626 F.3d 857 (5th Cir. 2010). The government's abandonment of the honest-services theory during the first trial meant the Double Jeopardy Clause barred retrial on the honest-services theory where (1) defendant was indicted for mail and wire fraud under alternative theories of deprivation of honest services and deprivation of money and property, (2) the government abandoned the honest-services theory during trial, and (3) the jury failed to reach a verdict, resulting in the declaration of a mistrial. However, retrial was not precluded on the money-and-property-fraud theory; the district court did not err in denying the defendant's double-jeopardy-based motion to dismiss the indictment filed following the mistrial.

[13]United States v. Garcia-Paulin, 627 F.3d 127 (5th Cir. 2010). District court committed reversible plain error in finding an adequate factual basis to support defendant's guilty plea to bringing an alien to the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(i) and 18 U.S.C. § 2; "bringing to the United States" under this statute contemplates that the defendant have actually accompanied the alien, or arranged to have him accompanied, across the border into the United States, or at least lead them to or meet them at the border. Defendant did not commit this offense by his stipulated conduct of obtaining a fraudulent immigration stamp

for the alien's Mexican passport and telling the alien the stamp would not work to accomplish entry at the border, but would allow the alien to work once he came over illegally on his own power. The error was clear and obvious, it affected defendant's substantial rights, and COA exercised its discretion on plain-error review to vacate the conviction and remand.

[14]United States v. Thomas, 627 F.3d 146 (5th Cir. 2010).

(1) The evidence was sufficient for a rational jury to find defendants guilty of numerous bank robberies and related offenses; circumstantial evidence that is not incriminating standing alone may recur in a pattern, from which jurors can reasonably infer that evidence otherwise susceptible of innocent interpretation is plausibly explained only as part of the pattern. Under this rubric, a reasonable inference is that the defendants committed all the robberies: four of them shared a number of common characteristics. Although the evidence was weaker as to one defendant on the fifth one, the jury could reasonably infer that the other defendant had the same partner on that robbery.

(2) Where two defendants (half-brothers) were charged with numerous bank robberies and related offenses, district court did not abuse its discretion in refusing to sever the two defendants' trials; the defendants failed to demonstrate, even on appeal, any prejudice which could not be cured by the limiting instructions given.

(3) Defendant's 1,435-month conviction (151 months for conspiracy and bank robbery, and 1,284 months for firearms offenses) did not constitute cruel and unusual punishment under the Eighth Amendment, because it was not grossly disproportionate to the violent crimes.

(4) District court did not abuse its discretion in denying defendant's motion for a new trial, or for an evidentiary hearing, on defendant's allegations that by withholding information during voir dire, a biased juror sat on his jury. A party seeking a new trial on this basis must demonstrate that a juror failed to answer honestly a material question on voir dire, and must further show that a correct response would have provided a valid basis for a challenge for cause. Here, defendant failed to show even that the juror lied, much less any actual or implied bias that would have disqualified the juror from service.

**COURT OF CRIMINAL APPEALS**

**State's PDR from Dallas County**

[15]Archie v. State, __S.W.3d__ (Tex.Crim.App. No. PD-0189-10, 6/8/11)

Reversed, remanded: Price (8-0)

A jury convicted appellant of murder, and the trial judge assessed punishment at 40 years' imprisonment. COA reversed the conviction and remanded the cause to the trial court, concluding that the trial court abused its discretion by denying appellant's motion for a mistrial. In its PDR, the State argues that COA erred when it found the prosecutor improperly commented on appellant's failure to testify during his closing argument. Moreover, even assuming the prosecutor's argument was improper, the State contends, it was within the trial court's discretion to deny the motion for mistrial.

CCA concludes that COA did not err in holding that at least two of the rhetorical questions posed by the prosecutor directly to appellant during his final argument constituted improper comment on his failure to testify. However, the prejudice caused by the prosecutor's two improper questions was not so great that a jury would necessarily have discounted the trial court's firm instructions to disregard them. It is unlikely that the jury would have ignored the court's explicit instructions and convicted appellant, not on the compelling evidence introduced against him, but because he failed to take the witness stand to explain himself.*See Mosley v. State*, 983 S.W.2d 249 (Tex.Crim.App. 1998). Under these circumstances, CCA holds that it was well within the trial court's discretion to deny appellant's motion for mistrial.

**State's PDR from Dallas County**

[16]Davis v. State, __S.W.3d__ (Tex.Crim.App. No. PD-0845-10, 6/8/11)

Vacated, remanded: Price (8-0); [17]Johnson concurred

A jury convicted appellant of felony escape; he escaped the Dallas County Jail while being treated at Parkland Hospital, stole a taxicab and drove to Oklahoma, leading lawmen on a protracted high-speed chase. On appeal, appellant argued that the State failed to bring him to trial within the time limits of the Interstate Agreement on Detainers Act (IADA) and that the trial court therefore erred in failing to dismiss the indictment with prejudice in accordance with the remedial terms of that statute. COA agreed and ordered the trial court to dismiss the indictment with prejudice. The State argues that the trial court committed an error that prohibited the proper presentation of the case for appeal and, therefore, COA should have remanded the cause to the trial court, under Tex. R. App. P. 44.4, to remedy that error. The State maintains that, upon a proper presentation of the record for appeal, it should be evident to COA that the IADA was not violated.

CCA agrees with appellant that there is nothing in IADA Article IV that imposes a burden on the trial court, expressly or by necessary implication, to ensure that any proffer of good cause (though it must be made in open court) is memorialized by the court reporter. If no such burden exists by virtue of the IADA, then Rule 44.4 cannot be invoked to require COA to remand the cause for remedial action without first identifying some other provision of law that assigns a burden exclusively to the trial court to secure the presence of a court reporter.

However, appellant, as the appealing party, had an obligation to present a record to COA that demonstrated he was entitled to appellate relief. In the IADA context, this meant he had to show that the State did not satisfy its trial-level burden to present good cause for the continuance, and that the trial court therefore abused its discretion to grant it. On the state of the record, the appellate court could not say that the trial court abused its discretion to find that the continuance was necessary or reasonable for purposes of Article IV. It appears that the State proffered the re-indictment as its good cause.

**Appellant's PDR Granted from Dallas County**

**11-0064, 11-0065 ? William Kyle Walters ? Aggravated Assault**

Is a court's refusal to compel testimony from a defense witness based on her invocation of her 5th Amendment rights without a determination of a reasonable basis for "a real and substantial fear of prosecution" a violation of Petitioner's rights to due process and due course of law?

For a list of issues pending before the court, click [18]here.

**COURT OF APPEALS**

Summaries by Chris Cheatham of Cheatham Law Firm, Dallas

[19]Tijerina v. State, Nos. 07-09-00344-CR, 07-09-00345-CR, 2011 WL 667884 (Tex.App.-Amarillo Feb 24, 2011). After D told officers to leave his property, actions taken by eyewitness, at officer's behest, in

approaching D's residence and peering through a window constituted a "search" for Fourth Amendment purposes. Because the officers no longer enjoyed the implied authority to approach D's residence, neither did the eyewitness acting at officer's behest.

[20]State v. Molder, No. 02-09-00385-CR, 2011 WL 679325 (Tex.App.-Fort Worth Feb 24, 2011). While trooper's testimony established that DPS has a general policy to inventory vehicles following arrest, the testimony was deficient in that it related nothing about the scope of said policy and how it affects closed containers such as D's cloth bag. Thus, D's motion to suppress deemed properly granted. "We recognize that courts have held that an officer does not need to specifically mention 'closed containers' to establish a policy regarding them?. But we hold that in this case, [trooper's] testimony, as the sole evidence at the suppression hearing, was too barren to show any particular standardized criteria or routine concerning the scope of the inventory; the testimony is therefore insufficient for us to infer the extent of DPS's policy regarding closed containers. Also, we conclude that we cannot infer DPS's policy to open closed containers from the mere fact that [trooper] did so; such an inference would eviscerate the requirement described in [*Florida v. Wells* , 495 U.S. 1 (1990)]."

[21]Wise v. State, No. 02-09-00267-CR, 2011 WL 754415 (Tex.App.-Fort Worth Mar 3, 2011). Evidence deemed insufficient that D knowingly possessed the child porn discovered on his computer because D bought the computer second-hand at a flea market, the computer contained viruses capable of covertly placing images on the computer, and it was impossible to determine when the images were placed on, accessed, or deleted from, the computer.

Dissent: "the majority holds that when defendants possess illegal pornographic images on their computers but delete them and send them to their hard drives' free space before the police discover them, the State cannot prove intentional or knowing possession of the images?. The majority mischaracterizes the evidence about the viruses on [D's] computer. [The] State's digital forensic examiner, testified that the computer had several viruses and then said that some viruses, hypothetically, are capable of remotely accessing a computer and storing images on it. [The forensic examiner] did not say that the viruses found on [D's] computer served such a purpose. She did explain, however, that the probability of a malicious outsider using a virus to store child pornography in the free space of another computer is low?. [A] lack of direct evidence and the existence of alternative hypotheses will be common features of many cases in which illegal images have been deleted and reside in a computer's free space."

[22]Miller v. State, No. 03-09-00670-CR, 2011 WL 832126 (Tex.App.-Austin Mar 9, 2011). D was without a reasonable expectation of privacy as to thumb drive (containing child porn) that he left in a computer at his place of employment (a police station) and thus lacked standing to challenge search of the thumb drive because D had previously left the thumb drive in an area accessible to others, the drive did not contain any marks identifying D, and D did nothing to prevent others from accessing the drive (e.g., password) even though he possessed advanced computer knowledge.



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