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Supreme Court

***Cullen v. Pinholster*,131 S. Ct. 1388 (U.S. 2011); Reversed: Thomas (5?4)**

A California state court convicted Pinholster of double murder and sentenced him to death. After exhausting state court remedies, he petitioned for habeas corpus relief in a California federal district court, arguing he was denied effective assistance at both the guilt and sentencing phases of trial. The district court upheld his conviction but granted habeas relief on his death sentence. The Ninth Circuit reversed, holding that the denial of habeas relief during the guilt phase was appropriate, but not during the penalty phase. The court noted that *Strickland v. Washington* requires trial counsel to investigate mitigating evidence at the penalty phase. Here, the court reasoned that counsel failed to meet his obligations.

HELD: A federal court cannot overturn a state criminal conviction on the basis of facts the defendant could have alleged, but did not, in state court. Limiting ?review to the state-court record is consistent with our precedents.? Justice Breyer dissented in part: ?I do not join Part III, for I would send this case back to the Court of Appeals so that it can apply the legal standards that Part II announces to the complex facts of this case.? Justice Sotomayor dissented in full: ?Some habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own.?

Fifth Circuit

***Hunter v. Tamez*,622 F.3d 427 (5th Cir. 2010)**

District court did not err in denying defendant?s habeas petition, filed pursuant to 28 U.S.C. § 2241, challenging the Federal Bureau of Prisons? (BOP?s) failure to grant him (by means of a *nunc pro tunc* designation) credit against his federal sentence for time spent in Texas state custody for unrelated state convictions. Although defendant argued that the BOP?s failure to give effect to the state court?s direction that the state sentence run concurrently with the federal sentence violated principles of federalism and comity, that argument was foreclosed by *Leal v. Tombone,* 341 F.3d 427 (5th Cir. 2003). Nor were there separation of powers problems; in the absence of specific direction from the federal sentencing judge, the federal sentence was presumed to be consecutive. The request for a *nunc pro tunc* designation, so as to make

the federal sentence effectively concurrent, was thus equivalent to a request for clemency or commutation of sentence, which are traditionally prerogatives of the Executive Branch. Finally, the Fifth Circuit denied relief on defendant?s claim that the frustration of the parties? understanding about his sentences running concurrently rendered his state plea involuntary; while possibly true, that claim was not cognizable here because defendant was no longer ?in custody? on the state conviction.

United States v. Jefferson,**623 F.3d 227 (5th Cir. 2010).**

(1) COA had jurisdiction, pursuant to 18 U.S.C. § 3731, over the government?s interlocutory appeal of the district court?s order ruling inadmissible proof of defendant?s prior convictions for bribery and obstruction of justice. The district court erred in concluding that § 3731 permits an interlocutory appeal only when the excluded evidence relates to an element of the charged offense; § 3731 contains no such limitation and instructs courts to liberally construe the statute to effectuate its purpose. Moreover, the statute itself limits such appeals to evidence that is ?substantial proof of a fact material in the proceeding,? not evidentiary rulings concerning matters that involve elements of the charged offense. Finally, under the statute, this evaluation is to be made *by the United States Attorney,* not by the district court; indeed, once the government files a timely appeal under § 3731 and the United States Attorney makes the required certification, COA cannot evaluate the materiality of the excluded evidence to decide whether or not to hear the appeal. Because COA did acquire jurisdiction upon filing of the government?s notice of appeal, the district court was divested of jurisdiction to take further action in the case. The Fifth Circuit vacated all orders issued by the district court following the filing of the notice of appeal.

(2) On the merits, district court erred, in a RICO conspiracy trial, in excluding evidence of defendant?s prior convictions for bribery and obstruction of justice for purposes of impeaching the defendant?s testimony. These offenses were ones involving dishonesty or false statement, and thus were proper fodder for impeachment pursuant to Fed. R. Evid. 609(a)(2). Moreover, the court had no discretion to exclude these convictions because Rule 609(a)(2) required their admission. The Fifth Circuit vacated the court?s order prohibiting impeachment with these convictions.

Arriaza Gonzalez v. Thaler,**623 F.3d 222 (5th Cir. 2010)**

The Supreme Court?s decision in *Lawrence v. Florida,* 549 U.S. 327 (2007), did not overrule *Roberts v. Cockrell,* 319 F.3d 690 (5th Cir. 2003); thus, defendant?s Texas state conviction became ?final? for AEDPA purposes when the time for seeking discretionary review from CCA expired (August 2006), not when the Texas appellate court issued its mandate (September 2006). Accordingly, defendant?s federal habeas petition was untimely under the AEDPA. The Fifth Circuit noted, but rejected as unpersuasive, the contrary decision in *Riddle v. Kemna,* 523 F.3d 850 (8th Cir. 2008) (en banc).

United States v. Schmidt,**623 F.3d 257 (5th Cir. 2010)**

Defendant?s prior federal conviction for theft of a firearm from a licensed gun dealer, in violation of 18 U.S.C. § 922(u), was a ?violent felony? within the meaning of 18 U.S.C. § 924(e)(2)(B) of the Armed Career Criminal Act (ACCA); therefore, district court did not err in enhancing defendant?s sentence under ACCA.

United States v. Gomez,**623 F.3d 265 (5th Cir. 2010)**

District court did not err in denying defendant?s motion to suppress because the decision to stop defendant?s vehicle was supported by reasonable suspicion. Even if the tip on which the stop decision was based (that the defendant had a pistol) is considered an anonymous tip (which, the Fifth Circuit said, was doubtful under the circumstances), the officers still had reasonable suspicion under the 4-factor test in *United States v. Martinez,* 486 F.3d 855 (5th Cir. 2007).

Hale v. King,**624 F.3d 178 (5th Cir. 2010)**

The Americans with Disabilities Act of 1990 (ADA) validly abrogates a state?s Eleventh Amendment sovereign immunity under § 5 of the Fourteenth Amendment only to the extent that causes of action under the ADA are ?congruent and proportional? to violations of the Fourteenth Amendment. Prisoner?s claim that he was denied educational training and access to prison work programs because of a medical disability did not state an equal protection violation under the applicable rational-basis review, and hence the ADA did not validly abrogate state sovereign immunity for that claim.

***United States v. Mata,*624 F.3d 170 (5th Cir. 2010)**

In alien transporting case, district court did not err in applying the reckless-endangerment enhancement of USSG § 2L1.1(b)(6); the enhancement was supported by findings that (1) a baby stroller, under which the alien was hidden, would impede their ability to exit the vehicle quickly in case of an accident, and (2) the stroller could cause serious injury to the alien in the event of an accident, and those findings were not clearly erroneous. Nor did the court err by applying the use-of-a-minor enhancement under USSG § 3B1.4; a defendant who decides to bring a minor along during the commission of a previously planned crime as a diversionary tactic or in an effort to reduce suspicion is subject to this enhancement. Not every defendant who brings a minor child along while smuggling drugs or aliens will be subject to this enhancement, and the court should consider additional circumstantial evidence to determine whether the defendant used the minor to avoid detection. Here, the district court?s findings, none of which were clearly erroneous, supported its determination that the minor was brought along to avoid de-tection.

***United States v. Templeton,*624 F.3d 215 (5th Cir. 2010)**

(1) In prosecution for (a) using a firearm and committing murder during and in relation to a drug trafficking crime, and (b) possession of cocaine with intent to distribute, district court did not abuse its discretion in admitting, under Fed. R. Evid. 404(b), evidence that defendant had previously sold large amounts of crack cocaine and that defendant had previously been arrested for possession of nine ounces of cocaine. Even though defendant offered to stipulate as to intent to distribute, the evidence was admissible not just to show intent, but also knowledge plus the motive for the decedent?s murder. *United States v. Yeagin,* 927 F.2d 798 (5th Cir. 1991) (finding reversible error in the admission of evidence after an offer to stipulate was refused), was distinguishable because the evidence there went only to intent, to which defendant offered to stipulate, and the admitted evidence in that case was far less relevant and far more prejudicial.

(2) District court did not abridge defendant?s Confrontation Clause rights or otherwise err by preventing defense counsel from cross-examining a witness (defendant?s sister) about abuse allegedly inflicted on her by her husband. Although the defense alleged that the sister had been coerced or intimidated by her husband into testifying against her brother (defendant), questioning of the sister outside the presence of the jury failed to substantiate this theory of bias, and the defense failed to present any other evidence to substantiate this theory.

(3) District court did not abuse its discretion by instructing the jury that evidence of flight could reflect a consciousness of guilt. A flight instruction is proper when the evidence supports four inferences: (1) the defendant?s conduct constituted flight; (2) the defendant?s flight was the result of consciousness of guilt; (3) the defendant?s guilt related to the crime with which he was charged; and (4) the defendant felt guilty about the crime charged because he in fact committed the crime. The evidence here supported each of the four inferences; moreover, even if the court had erred in this regard, any error was harmless in light of the strong evidence of defendant?s guilt.

***United States v. Mendez-Casarez,*624 F.3d 233 (5th Cir. 2010)**

Where Application Note 5 to USSG § 2L1.2 provides that the list of qualifying enhancement predicate offenses ?include[s] the offenses of aiding and abetting, conspiring, and attempting? to commit such offenses, that list does not constitute an exclusive list. Other offenses may be comprehended within

Application Note 5, provided they are sufficiently similar to the listed offenses. The Fifth Circuit then determined that solicitation under North Carolina law was sufficiently similar. Accordingly, defendant?s North Carolina solicitation to commit assault with a deadly weapon inflicting seriously bodily injury was properly countable as a ?crime of violence? for purposes of USSG § 2L1.2(b)(1)(A)(ii).

***United States v. Roberts,*624 F.3d 241 (5th Cir. 2010)**

Where the government agreed in its plea agreement with defendant to a particular base offense level but the parties left open that other adjustments might or might not apply, it was a breach of the plea agreement for the government to support the PSR?s application of the career offender Guidelines to defendant. The career offender Guidelines were not simply an adjustment to the Guidelines (as to which the government retained its discretion to advocate) but rather resulted in a new base offense level, in contravention of the government?s plea-bargain stipulation to a base offense level of 30. The government?s conduct was inconsistent with defendant?s reasonable understanding of the plea agreement, and defendant was entitled to specific performance of the agreement. The Fifth Circuit vacated defendant?s sentence and remanded to the district court for reassignment to a different judge and for resentencing consistent with this opinion. Judge DeMoss dissented, being of the view that the career offender enhancement was a Guideline *adjustment* for which the government remained free to advocate.

***United States v. Banks,*624 F.3d 261 (5th Cir. 2010)**

Where (following a limited remand for clarification) it was determined that defendant had proceeded to a bench trial on stipulated facts, the evidence was sufficient to support defendant?s conviction for aggravated identity theft under 18 U.S.C. § 1028A. Particularly, the Fifth Circuit noted that in a Memorandum of Agreement attached to the Stipulation of Evidence, defendant expressly stipulated that the facts in the Stipulation ?constitute[d] sufficient evidence for the [c]ourt to find him guilty as charged . . . beyond a reasonable doubt.? Because defendant?s agreement on this point foreclosed any challenge to the sufficiency of the evidence, the Fifth Circuit affirmed the conviction.

***Pearson v. Holder,*624 F.3d 682 (5th Cir. 2010)**

Where Texas state prisoner sued under 42 U.S.C. § 1983, challenging SORNA and state sex-offender registration laws as unconstitutional, district court reversibly erred in dismissing prisoner?s claims as not ripe. In determining ripeness, a court must balance the issues? fitness for judicial decision against the hardship to the parties resulting from withholding court consideration. Inasmuch as the prisoner?s release date was only some two years hence, the Fifth Circuit concluded that his case was sufficiently ripe for adjudication; there was no further factual uncertainty, and the prisoner could suffer harm if his claims were not adjudicated as soon as practicable. The Fifth Circuit reversed the judgment dismissing the prisoner?s claims and remanded for further proceedings.

***United States v. Jeong,*624 F.3d 706 (5th Cir. 2010)**

Where defendant, a South Korean national, was prosecuted for bribery in an American court on the basis of the same bribery scheme for which he had been previously convicted in South Korea, his subsequent American conviction was not barred by the Convention on Combating Bribery of Foreign Officials. Article 4.3 of this Convention does not prohibit two signatory countries from prosecuting the same offense. Rather, it imposes an obligation only to consult on jurisdiction when one of the countries so requests; here, no such request was made. Nor did the United States waive its jurisdiction to prosecute defendant by dint of assisting South Korea in that country?s investigation of defendant or by dint of the United States? representation, in its request for mutual legal assistance, that it was ?not seeking to further prosecute [defendant]?; no source of domestic or international law suggested that the United States either impliedly or expressly ceded its right of prosecution to South Korea.

***United States v. Fisher,*624 F.3d 713 (5th Cir. 2010)**

Where district court *sua sponte* declared a mistrial after two prosecution witnesses became unavailable to testify as scheduled, defendant did not impliedly consent to the mistrial by failing to sufficiently object. This is a case-by-case determination, and under the circumstances here?most prominently the district judge?s finding that defendant had sufficiently objected?there was no implied consent to the mistrial. That being the case, to retry defendant after this mistrial would violate his double jeopardy rights unless there was a manifest necessity for the mistrial. Because the basis for the mistrial was the unavailability of critical prosecution evidence, the district court?s decision was subject to the strictest scrutiny, which requires the government to show that the district court carefully considered whether reasonable alternatives existed but that the court found none. Here, the government did not show, nor did the record independently show, that the court carefully considered reasonable alternatives before declaring a mistrial. Nor was the mistrial excused by defendant?s refusal to stipulate to the testimony of the two witnesses. Because defendant did not consent to the mistrial and because the district court did not carefully consider reasonable alternatives to a mistrial, defendant?s prosecution was barred by double jeopardy. The Fifth Circuit reversed the district court?s denial of defendant?s motion to dismiss the indictment, and it rendered a dismissal.

***United States v. Wanambisi,*624 F.3d 724 (5th Cir. 2010)**

In denying defendant?s motion for reduction of sentence under 18 U.S.C. § 3582(c)(2), the district court erroneously treated defendant?s motion as having been filed under Amendment 706 (pertaining only to crack cocaine offenses) rather than under Amendment 505 (applicable to heroin offenses like defendant?s). This was harmless error. The Fifth Circuit agrees with COA, affirming the denial of defendant?s motion on the alternate ground that Amendment 505 did not reduce the base offense level for the amount of heroin for which defendant was responsible.

***Wiley v. Epps,*625 F.3d 199 (5th Cir. 2010)**

District court did not err in holding a federal evidentiary hearing on death-sentenced Mississippi defendant?s claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), that he was ineligible for the death penalty due to being mentally retarded. Because the Mississippi Supreme Court improperly denied defendant?s *Atkins* claim without a hearing, the district court was not required to afford the state court decision deference under the AEDPA. Finally, the district court did not clearly err in finding defendant mentally retarded under the 4-prong test applicable in Mississippi. The Fifth Circuit affirmed the district court?s grant of federal habeas relief invalidating the death sentence imposed.

***Maldonado v. Thaler,*625 F.3d 229 (5th Cir. 2010)**

Death-sentenced Texas defendant was not entitled to federal habeas relief on his claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), that he was ineligible for the death penalty due to being mentally retarded; defendant did not overcome the presumption of correctness attached to the state habeas court?s conclusion that he did not meet his burden of establishing mental retardation. Therefore, the state court?s denial of relief was neither an unreasonable application of federal law nor an unreasonable determination of the facts in light of the evidence, as required for federal habeas relief under the AEDPA. The Fifth Circuit affirmed the district court?s denial of federal habeas relief.

***United States v. Gonzalez,*625 F.3d 824 (5th Cir. 2010)**

Where defendant sought to argue that he was not the person convicted in a 1988 drug conviction used to enhance his sentence to mandatory life imprisonment under 21 U.S.C. § 851, defendant?s challenge was not barred by the 5-year time limit contained in 21 U.S.C. § 851(e). That time limit applies only to challenges to the *validity* of the prior conviction; it does not prevent a defendant from arguing that he was not the person who was convicted of the offense. However, on the merits, defendant?s challenge to the enhancement failed

because the government carried its burden of proving beyond a reasonable doubt?*see* 21 U.S.C. § 851(c)(1)?that defendant was the person convicted in that prior case, notwithstanding the absence of fingerprint exemplars or other physical evidence to that effect.

Court of Criminal Appeals

Appellee?s PDR

***State v. Woodard,*__S.W.3d__ (Tex.Crim.App. No. PD-0828-10, 4/6/11); Affirmed**

Appellee drove his car off the road into a ditch and then abandoned it by walking away. Appellee filed a pretrial motion to suppress, claiming his warrantless arrest for DWI about a quarter mile from the accident was unlawful.

HELD: COA correctly held that the initial interaction on the sidewalk between appellee and officer, which began with officer asking appellee if he had been involved in a reported accident, was a consensual encounter. Further, the encounter, which eventually escalated into appellee?s arrest for DWI, was supported by probable cause.

State?s PDRs

***State v. Rodriguez,*__S.W.3d__ (Tex.Crim.App. No. 04-07-00436-CR, 4/6/11); Affirmed**

Rodriguez was charged with recklessly discharging a firearm. CCA granted the State?s petition to review whether COA correctly held that the information was defective because it failed to apprise defendant of ?the circumstances that indicate [Rodriguez] pulled the trigger of a loaded firearm in a reckless manner.? The issue is not ?how? did defendant discharge a firearm (by pulling the trigger), but how did he act ?recklessly? in discharging the firearm.

HELD: The State failed to allege with reasonable certainty the act or circumstance which indicated Rodriguez discharged the firearm in a reckless manner. When it is alleged that the accused acted recklessly, Tex. Code Crim. Proc. art. 21.15 requires additional language in the charging instrument. This language must set out ?the act or acts relied upon to constitute recklessness[.]? But, as CCA noted in *Smith v. State,* 309 S.W.3d 10 (Tex.Crim.App. 2010), there is some conceptual difficulty about the specific terms used in Article 21.15. The language of Article 21.15 assumes that the culpable mental state of recklessness can be ?constituted? by some ?act.? However, the definition of ?act,? added in 1974, made this a ?conceptual impossibility.? In *Smith,* CCA explained that because of the ?conceptual impossibility, the ?act or acts constituting recklessness? under Article 21.15 are really those ?circumstances? surrounding the criminal act from which the trier of fact may infer that the accused acted with the required recklessness.

***Hereford v. State,*__S.W.3d__ (Tex.Crim.App. No. PD-0144-10, 4/6/11); Affirmed**

Appellant was arrested for misdemeanor traffic warrants. After officers placed appellant in the back of the police car, they noticed he was hiding something in his mouth that they assumed was cocaine, which they were able to remove after repeated use of Tasers on his groin area and with the assistance of medical personnel. Appellant was charged with and convicted of possession of a controlled substance with intent to deliver: cocaine. Appellant filed a motion to suppress the evidence based on his claims that the officers lacked probable cause to arrest him and used unreasonable force to recover the drugs.

HELD: Emphasizing that neither this opinion, nor that of COA should be construed to imply that the use of a Taser is per se unreasonable, CCA held that the circumstances presented by this case show an excessive use of force that violated the Fourth Amendment prohibition against unreasonable seizures. Officer Arp deliberately chose to administer numerous electrical shocks to an area of appellant?s body chosen because of

its exceptional sensitivity, long after the initial arrest was made, when there admittedly was no ongoing attempt by appellant to destroy the evidence, little concern about a drug overdose, and while appellant was restrained in handcuffs behind his back. The unreasonableness of this behavior is shown by comparison with the decisions made by his fellow officers, who stopped using the Taser when its use failed to effect compliance. While those officers could have chosen to continue to shock appellant to recover the drugs, they chose to pursue other methods. Officer Arp should have done the same.

***State v. Elias*, __S.W.3d__ (Tex.Crim.App. No. PD-0735-10, 4/6/11); Vacated, remanded**

In this felony prosecution for possession of marijuana, the State appealed from the trial court?s grant to suppress evidence that appellee contended was obtained as a result of an illegal traffic stop. COA affirmed the court?s ruling, holding that appellee?s initial detention was not justified by specific articulable facts to show a traffic violation occurred, and that the search could not be otherwise justified by the fact that after the initial stop, appellee was found to have an outstanding arrest warrant that might give rise to a valid search incident to arrest because by the time the search of the vehicle was conducted, appellee had been secured in the back of a squad car.

HELD: COA erred in two respects in its disposition of the State?s appeal. First, it erred to affirm the trial court?s grant of appellee?s suppression motion on the basis that the initial detention was illegal without first remanding the cause to the trial court for specific findings of fact with respect to whether the appellee failed to signal his intention to turn within a hundred feet of the intersection. Second, it also erred to affirm the trial court?s grant of appellee?s suppression motion without first addressing the State?s alternative argument that the arrest warrants attenuated the taint of any initial illegality, and that the K-9 sniff provided probable cause to justify the warrantless search of the van under the automobile exception. In the event that COA, on remand, rules in the State?s favor with respect to the second issue, it should reverse the trial court?s ruling on the suppression motion and remand the cause for trial. But if COA rules in appellee?s favor with respect to the second issue, it should then remand the cause to the trial court for specific findings of fact and a ruling of law as to the first issue, *viz:* whether the initial detention was justified by at least a reasonable suspicion that appellee failed to signal within a hundred feet of the intersection.

***Blackman v. State*, __S.W.3d__ (Tex.Crim.App. No. 01-08-00138-CR, 4/13/11); Reversed & remanded**

Appellant was convicted of possessing a controlled substance (three kilograms of cocaine) with intent to deliver. The cocaine was found behind the driver?s seat of a van in which appellant was a front-seat passenger. During its closing arguments, the defense claimed that the State did not prove beyond a reasonable doubt that appellant ?either put [the cocaine] in his car or was aware of it? or that he ?aided, assisted and encouraged? any of the others to commit the offense. The State claimed that this defied common sense. COA decided the evidence was legally insufficient to support the possession element.

HELD: COA misapplied the *Jackson v. Virginia* standard by asking itself whether it believed that the evidence is sufficient to support appellant?s guilt instead of asking whether a rational trier of fact could have found appellant guilty beyond a reasonable doubt.

***State v. McLain*, __S.W.3d__ (Tex.Crim.App. No. PD-0946-10, 4/13/11); Reversed & remanded**

A grand jury indicted appellee on possession with intent to deliver meth. Appellee?s trial counsel filed a motion to suppress the contraband seized as a result of a search authorized by a search warrant. The trial court granted the motion to suppress, and COA affirmed.

CCA granted review on the following grounds: (1) Does an appellate court violate the prohibition on ?hypertechnical? review of a warrant affidavit when it strictly applies rules of grammar and syntax in its analysis? (2) Is it appropriate for an appellate court to base its opinion on implications found within a warrant affidavit, rather than deferring to any reasonable inferences the reviewing magistrate could have

drawn from the affidavit? (3) Did the appellate court err by failing to address whether the trial court afforded appropriate deference to the reviewing magistrate?s implicit finding that the informant described in the affidavit saw the meth ?in the past 72 hours??

HELD: Reviewing courts should only be concerned with whether the magistrate?s determination in interpreting and drawing reasonable inferences from the affidavit was done in a commonsensical and realistic manner, which bars a ?hypertechnical? review of syntax and grammar. Furthermore, reviewing courts should defer to all reasonable inferences that the magistrate could have made.

Writs of Habeas Corpus

***Ex parte Ramey*, __S.W.3d__ (Tex.Crim.App. No. WR-74,986-01, 4/6/11); Filed & set**

CCA voted to file and set this case to decide how or whether CCA?s opinion in *Coble v. State*, 330 S.W.3d 253 (2010), impacts Ramey?s claim that the trial judge erred to admit an expert witness? future-dangerousness testimony because it violated the federal Eighth Amendment and Due Process Clause. Dissent argues that Ramey?s claim was rejected in *Barefoot v. Estelle*, 463 U.S. 880 (1983), and the law has not since changed.

***Ex parte Spencer*, __S.W.3d__ (Tex.Crim.App. No. AP-76, 244, 4/20/11); Denied**

Applicant was convicted of murder and sentenced to 35 years? confinement. His motion for new trial was granted. On retrial, he was convicted of aggravated robbery and sentenced to life in prison. The conviction was affirmed on appeal. Applicant filed an application for writ of habeas corpus claiming that he is innocent, that trial counsel rendered ineffective assistance, and that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Mooney v. Holohan*, 294 U.S. 103 (1935).

Having been remanded to the trial court for consideration twice already, CCA filed and set this case for submission and ordered the parties to brief whether applicant properly raised a free-standing actual innocence claim, whether the evidence he relies on is newly discovered or newly available, whether CCA should consider advances in science and technology when determining whether evidence is newly discovered or newly available, and whether applicant has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence.

HELD: Both CCA and the trial court rejected all claims except for the bare innocence claim. The most relevant piece of evidence is whether certain eyewitnesses could have facially identified the applicant under various light conditions, as determined by expert witness testimony. CCA concluded that even if the evidence was reviewed as new, it does not unquestionably establish applicant?s innocence and fails to meet the threshold elucidated in *Ex parte Franklin*, 72 S.W.3d 671 (Tex.Crim.App. 2002).

Writ of Mandamus

***In re Brown*, __S.W.3d__ (Tex.Crim.App. No. WO-75,485-01, 4/13/11); Denied**

Relator requests CCA order the trial court to enter a judgment *nunc pro tunc* awarding him a certain period of pretrial jail-time credit.

HELD: COA rightly denied relator mandamus relief. In denying the motion again, CCA wrote additionally to alert unwary trial counsel of the need to address an issue such as the one presented in this case at the appellate level rather than relying upon the illusory promise of a post-conviction remedy. A motion for judgment *nunc pro tunc* or a writ of mandamus to the appellate court, if such a motion is denied, will provide a remedy only if the right to pretrial jail-time credit is absolutely indisputable under the terms of Tex. Code Crim. Proc. art. 42.03, § 2(a)(1). In summary, if a claim of pretrial jail-time credit involves a

question of the proper construction of the statute trial counsel would do well to try to preserve the issue for appellate resolution; post-conviction remedies will prove to be of no avail.

Court of Appeals

Summaries by Chris Cheatham of Cheatham Law Firm, Dallas

***Thomas v. State,*No. 01-08-00902-CR, 2010 WL 4925846 (Tex.App.?Houston [1st Dist] 11/30/10)**

Officer?s statement to D during traffic stop, to the effect that officer was going to take D?s refusal to answer as a refusal to consent to breath test, did not render D?s consent to breath test involuntary. Officer, after repeatedly asking D whether he was willing to consent to a breath test and failing to get a clear answer, stated to D that he was going to take D?s refusal to answer as a refusal to consent. Said statement did not impose the level of psychological pressure necessary to render D?s consent involuntary.

***Overshown v. State,*329 S.W.3d 201 (Tex.App.?Houston [14th Dist] 12/2/10)**

?[A] traffic stop made for the purpose of issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.?

***Flores v. State,*No. 13-09-00413-CR, 2010 WL 4901408 (Tex.App.?Corpus Christi 12/2/10)**

Even though D sustained head lacerations in car accident, D?s post-accident behavior (*e.g.,* unsteady gait) was attributed to intoxication to provide sufficient evidence that D was intoxicated at the time of the accident. ?Each officer testified that he believed [D] was intoxicated. Each based his opinion on one or more of the following: (1) the smell of alcohol on [D?s] breath; (2) the smell of alcohol emanating from his vehicle; (3) [D?s] non-compliance, his red, bloodshot eyes, his slurred, loud speech, and his unsteady gait and balance; (4) the results of his field sobriety tests; and (5) the results of the portable breath test. . . . When [officer] and [D] arrived at the Cameron County Jail, the medic advised [officer] that, because of the lacerations, the bleeding, and the dried blood, the jail personnel would not accept [D] until he received a medical clearance. According to [officer], this decision had nothing to do with a head injury.?

***Alford v. State,*333 S.W.3d 358 (Tex.App.?Fort Worth 2010)**

Although D was in custody when officer held up a flash-drive and asked D what it was and if it belonged to D, the question was deemed an administrative booking question rather than a custodial interrogation. The court likened the flash-drive inquiry to cases holding that officer?s asking arrestee for his name, address, name of spouse, and like information deemed ?routine booking questions.?

***Woodruff v. State,*330 S.W.3d 709 (Tex.App.?Texar-kana 2010)**

A defendant?s age and whether or not he engages in arguments with investigators deemed relevant factors in determining whether a non-custodial or post-*Miranda* statement is made voluntarily. Here, D ?was a 19-year-old college student and did not appear to be unduly intimidated during the interview.?

Prosecutors, by instructing sheriff?s office to record D?s phone communications with his attorneys and provide prosecutors with copies of recordings, did not prejudice D in manner as to require dismissal of indictment; recordings supposedly did not provide State with useful information and district attorney?s office recused itself, letting State?s Attorney General?s Office prosecute. ?The State does not challenge the trial court?s conclusion that [D?s] Sixth Amendment right to counsel was violated. . . . In our review of the record, we have reviewed the telephone calls recorded by the Hunt County Sheriff?s Office at the request of the Hunt County District Attorney?s Office. . . . Approximately 54 of the calls were made to [D?s] defense counsel or his office staff. . . . Our review failed to discover any privileged information of even the most

marginal value to the State. Although not for lack of trying, the Hunt County District Attorney?s Office failed to discover anything of value when it violated [D?s] constitutional rights.?

***State v. Pina,*No. 05-10-00026-CR, 2010 WL 4946140 (Tex.App.?Dallas 12/7/10)**

The nervousness with which gun show patron purchased a gun, along with what appeared to officer to be a prison-gang tattoo on patron?s neck, provided RS that patron was a felon in possession of firearm. ?[Officer in parking lot] was notified that officers inside the complex had seen three individuals ?acting in suspicious manners . . . [with] tattoos indicative of gang affiliations . . . purchasing weapons and ammunition.? One of those individuals, later identified as [D], had a star tattoo on his neck that allegedly was ?indicative of an affiliation to the Tango Blast gang.? Although [officer] did not specialize in gang affiliation, he did have some knowledge of the Tango Blast Gang. He knew that Tango Blast was a prison gang and, to be a member, the person had to have had a conviction and been to prison.? The appellate court, in finding RS existed, reversed the trial court?s granting of D?s motion to suppress.

***Valdez v. State,*No. 04-09-00420-CR, 2010 WL 5269818 (Tex.App.?San Antonio 12/15/10)**

Purported common-law spouse of D did not have actual or apparent authority to consent to officer?s warrantless search of D?s lock box stored in bedroom of home, given that she did not know where box was located and that she reportedly knew nothing about box.

D?s mother had apparent authority to consent to search of the lock box, even though she was not owner of box and did not have authority to unlock it, where she appeared to officer to be owner of home (even though she did not own it), she invited officer directly to bedroom upon officer?s request to collect adult videos for evidence, she retrieved box from closet, unlocked box with key, and placed adult videos on bed. ?[Mother?s] recollection of the event, however, was very different. She stated that she did not give [officer] permission to enter the house. She explained that [officer] told her [D] had given consent to search, and that she needed to accompany him to the bedroom. She stated that [officer] took the lock box from the closet, and ordered her to unlock it. She had a key ring in her pocket, and after unsuccessfully trying several keys, [officer] got mad, grabbed the keys from her, and opened the box himself. [Mother] claimed the police threatened to arrest her if she did not cooperate.? However, the appellate court, in viewing the evidence in the light most favorable to the trial court?s ruling, adopted the officer?s account, to wit: ?[Officer] testified that he believed that [mother] was the owner of the home because she was the person in control. It appeared to [officer] that [mother] had common authority over the lock box because she knew exactly where it was located and had the key.?

***State v. Kidd,*No. 03-09-00620-CR, 2010 WL 5463893 (Tex.App.?Austin 12/30/10)**

Even though D admitted he failed to signal lane change 100 feet in advance of turn, the trial court granted motion to dismiss based on conclusion that strict enforcement of the 100-foot requirement was ?a violation of one?s right to be free from unreasonable seizures.? The appellate court, in reversing the trial court, observed that a driver?s unfamiliarity with the neighborhood and indecisiveness about which direction to turn simply does not excuse his turn-signal violation. ?Although the trial court concluded that enforcement of the 100-foot rule ?leads to unreasonable, perhaps unforeseen, circumstances,? we cannot say that the statute?s mandatory requirement that a driver intending to turn must ?signal continuously for not less than the last 100 feet? leads to absurd results.?

***Farhat v. State,*No. 02-10-00030-CR, 2011 WL 56056 (Tex.App.?Fort Worth 1/6/11)**

D?s erratic driving plus the presence of an empty pill bottle found in D?s vehicle was insufficient to support issuance of a blood-draw search warrant. ?[C]ontrary to the trial court?s finding that the officer saw ?pills in the console? of [D?s] vehicle, the affidavit states only that the officer saw two pill bottles in the center console. The affidavit does not state that the bottles actually contained pills, and even if a reasonable

inference could be drawn that the bottles did contain pills, the affidavit was silent as to the type of pill bottles, whether they were prescription or over-the-counter medicine bottles, whether [D] admitted to consuming pills from the bottles, or whether [D?s] demeanor or appearance suggested that he had consumed them. . . . The remaining facts contained in the affidavit show that [D] was driving ten miles below the speed limit shortly before 1:00 a.m., that he ?was weaving from sided [*sic*] to side,? that he turned on his right-turn signal before turning the opposite direction into the parking lot, and that he refused field sobriety tests. We do not know from the affidavit the extent of [D?s] weaving or whether he was weaving outside of his lane or into oncoming traffic nor is it reasonable to infer such facts. . . . [W]e hold that the magistrate did not have a substantial basis for concluding that there was a fair probability or substantial chance that [D] had committed the offense of DWI or that evidence of intoxication would be found in [D?s] blood.?

***Alleman v. State,*No. 09-10-00173-CR, 2011 WL 193496 (Tex.App.?Beaumont 1/19/11)**

D?s act of pretending to talk on his cell phone during the traffic stop was among the circumstances that provided officer RS to expand scope of stop. ?While looking in the console, [D] opened his cellular telephone and held it to his ear. [Officer] did not hear the phone ring and he noticed that [D] was not speaking into the phone. [Officer] found this ?kind of odd.? . . . While conducting the traffic stop, [officer] observed several facts that led him to believe that another offense was occurring: (1) [D] stepped out of his vehicle almost immediately after being stopped, (2) [D] silently held his telephone to his ear, (3) [D] claimed to be on a business trip, but had no clothing or other items to corroborate this claim, (4) [officer] smelled marijuana when [D] retrieved his insurance papers, and (5) [officer] saw what appeared to be marijuana residue when he walked to the drivers side door of the vehicle.?

***Arroyo v. State,*No. 01-10-00136-CR, 2011 WL 286136 (Tex.App.?Houston [1st Dist] 1/27/11)**

?Sunday at 4:50 a.m.? deemed ?a time at which more individuals drive intoxicated.? Driving below the speed limit weighed in favor of RS for DWI.
