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Supreme Court

The U.S. Supreme Court has jurisdiction to decide that a state collateral review court improperly refused to give retroactive effect to the Supreme Court?s 2012*Miller v. Alabama,* prohibiting mandatory sentences of life without parole for juveniles.*Montgomery v. Louisiana,* 136 S. Ct. 718 (2016).

D was 17 years old in 1963 when he killed a Louisiana sheriff. The jury returned a verdict of ?guilty without capital punishment,? which carried an automatic sentence of life without the possibility of parole. Nearly 50 years later, the Supreme Court decided that mandatory life without pa-role for juvenile homicide offenders violated the U.S. Const. amend. XVIII prohibition on ?cruel and unusual punishments.? *Miller v. Alabama*, 132 S. Ct. 2455 (2012). D sought state collateral relief, arguing that *Miller* rendered his mandatory life-without-parole sentence illegal. The trial court denied his motion, and his application for a supervisory writ was denied by the Louisiana Supreme Court, which had previously held that *Miller* does not have retroactive effect in cases on state collateral review. The Court here reversed and remanded.

When a new substantive rule of constitutional law controlled the outcome of a case, the Constitution required state collateral review courts to give retroactive effect to that rule. The Court therefore had jurisdiction to review the Louisiana courts? decision that the *Miller* rule did not apply retroactively. *Miller*?s holding that mandatory life imprisonment without parole for juvenile homicide offenders violated the Eighth Amendment announced a new substantive rule that, under the Constitution, was retroactive in cases on collateral review. Giving *Miller* retroactive effect did not require states to relitigate sentences in every case. Instead, states could remedy *Miller* violations by permitting juvenile homicide offenders to be considered for parole.

The law-of-the-case doctrine did not require the sufficiency of the evidence be measured against the elements described in the jury instructions where those instructions, without objection, required the Government to prove additional or more stringent elements than the statute and indictment. *Musacchio v. United States,* 136 S. Ct. 709 (2016).

D resigned as Exel Transportation Services (ETS) president in 2004 but accessed ETS?s computer system until 2006 without ETS?s authorization. In 2010, D was indicted under 18 U.S.C. §?1030(a)(2)(C), which makes it a crime to intentionally access a computer without authorization *or* exceed authorized access and thereby obtain information from any protected computer. D was charged with conspiring to commit unauthorized access and making unauthorized access. He did not argue in trial court that his prosecution violated the 5-year statute of limitations. 18 U.S.C. §?3282(a). At trial, the Government did not object when the court instructed the jury that §?1030(a)(2)(C) ?makes it a crime . . . to intentionally access a computer without authorization and exceed authorized access,? even though the conjunction ?and? added an additional element. The jury found D guilty of conspiring to commit unauthorized access. On appeal, D challenged the sufficiency of the evidence supporting his conspiracy conviction and argued, for the first time, that his prosecution was barred by §?3282(a)?s statute of limitations. In affirming his conviction, the Fifth Circuit assessed D?s sufficiency challenge against the charged elements of the conspiracy count rather than the heightened jury instruction and concluded that he waived his statute-of-limitations defense by failing to raise it at trial. The Court unanimously affirmed the Fifth Circuit.

A sufficiency challenge should be assessed against the ele-ments of the charged crime, not the elements in an erroneous jury instruction. Sufficiency review essentially addresses whether the Government?s case was strong enough to reach the jury. A reviewing court conducts a limited inquiry tailored to ensuring that a defendant receives the minimum required by due process. It does this by considering only the ?legal? question ?whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.? *Jackson v. Virginia,* 443 U.S. 307 (1979). The Government?s failure to introduce evidence of an additional element does not implicate these principles, and its failure to object to a heightened jury instruction does not affect sufficiency review. Because D did not dispute that he was properly charged with conspiracy to obtain unauthorized access, or that the evidence was sufficient to convict him of the charged crime, the Fifth Cir-cuit correctly rejected his sufficiency challenge.

Secondly, D could not successfully raise the statute of lim-itations bar under §?3282(a) for the first time on appeal. Because §?3282(a) does not impose a jurisdictional limit, the fail-ure to raise the defense at or before trial is reviewable on ap-peal?if at all?only for plain error. A district court?s failure to enforce an unraised limitations defense under §?3282(a) cannot be a plain error, however, because if a defendant fails to press the defense, it does not become part of the case; thus, there is no error for an appellate court to correct.

Fifth Circuit

A USSG §?3B1.1 sentencing adjustment may be based on either control over people or management of assets; because the district court could plausibly determine that D exercised management responsibility over the property, assets, or activities of a criminal organization, that court did not clearly err in applying a §?3B1.1 enhancement.*United States v. Ochoa-Gomez,* 777 F.3d 278 (5th Cir. 2015).

Although USSG §?3B1.1 and its commentary provide that a defendant may not receive an aggravating-role adjustment where he does not exercise control over a person (as opposed to property), the Fifth Circuit has held, in *United States v. Delgado,* 672 F.3d 320 (5th Cir. 2012), that the adjustment may be applied even where the defendant did not exercise control over another participant if he exercised management responsibility over the property, assets, or activities of a criminal organization.

In sentencing D convicted of alien harboring, district court did not err in applying, pursuant to USSG §?2L1.1(b)(5)(B), a four-level enhancement for ?brandishing? a deadly weapon.*United States v. Reyna-Esparza,* 777 F.3d 291 (5th Cir. 2015).

Given the circumstances of the case, the district court did not clearly err in finding that D displayed the

weapon to the harbored aliens with intent to intimidate.

Ds adequately preserved their objection that the Government improperly withheld a motion for a third-level reduction under USSG §?3E1.1(b) on the basis of Ds? refusal to waive their right to appeal. *United States v. Torres-Perez,* 777 F.3d 764 (5th Cir. 2015).

This was improper under *United States v. Villegas Palacios,* 756 F.3d 325 (5th Cir. 2014). Moreover, the error was not harmless because there was insufficient evidence that that the sentencing court would have imposed the same sentence even in the absence of the error. The Fifth Circuit remanded for resentencing.

D, ultimately convicted of possession and distribution of child pornography, was not ?in custody? for *Miranda* purposes when, while numerous officers were executing a search warrant on D?s residence, D went into a police vehicle and was questioned for an hour by two officers; D was told he was not under arrest and was free to leave.*United States v. Wright,* 777 F.3d 769 (5th Cir. 2015).

(2) Even if the Government violated *Doyle v. Ohio,* 426 U.S. 610 (1976), by commenting, during closing argument, on D?s refusal to answer certain questions during his interrogation, any error was harmless beyond a reasonable doubt under the circumstances of this case.

(3) District court did not violate D?s right, under Fed. R. Crim. P. 32(i)(4)(A)(i), to have his attorney speak on his behalf. Although the district court did not permit defense counsel to respond to the Government?s oral presentation, defense counsel was given a full opportunity to speak before the prosecutor spoke, and the matters the prosecution referenced were in the presentence report and hence were not new.

In sentencing D convicted of failing to register as a sex offender, district court did not plainly err in imposing a special condition of supervised release prohibiting D from ?residing or going to places where a minor or minors are known to frequent without prior approval of the probation officer,? especially given D?s repeated failure to comply with registration requirements and the fact that the probation officer could authorize D to go such places in appropriate instances.*United States v. Fields,* 777 F.3d 799 (5th Cir. 2015).

District court committed reversible plain error in applying a 16-level ?drug trafficking offense? enhancement to illegal-reentry D under USSG §?2L1.2(b)(1)(A)(i); the statute of D?s prior conviction (Fla. Stat. §?893.135(1)(f)), although referred to as ?trafficking? in Florida law, included simple possession of a controlled substance, which is not a ?drug trafficking offense? under §?2L1.2.*United States v. Sarabia-Martinez,* 779 F.3d 274 (5th Cir. 2015).

Moreover, no documents allowed the offense of conviction to be narrowed under the modified categorical approach; the district court erred in relying on facts in the presentence report to determine D had been convicted of drug distribution rather than mere possession. The error affected D?s rights, and the Fifth Circuit exercised its discretion to correct the error by vacating the sentence and remanding for resentencing.

District court reversibly erred in applying a 16-level ?crime of violence? enhancement under USSG §?2L1.2(b)(1)(A)(ii) based on D?s Florida manslaughter conviction, Fla. Stat. §?782.07; Florida manslaughter does not have as an element the use, attempted use, or threatened use of physical force. *United States v. Garcia-Perez,* 779 F.3d 278 (5th Cir. 2015).

Nor is Florida manslaughter equivalent to generic manslaughter because the Florida offense can be committed with a mens rea less than recklessness; although the Fifth Circuit had previously held to the contrary in an unpublished decision, that decision did not have the benefit of a later, clarifying decision of the Florida Supreme Court. Because the Government did not meet its burden of proving the error was harmless, the Fifth Circuit remanded for resentencing.

District court did not err in applying a 12-level ?crime of violence? enhancement to illegal-reentry D because the record adequately narrowed his prior Texas conviction to one that qualified as the

enumerated ?crime of violence? of aggravated assault.*United States v. Sanchez-Sanchez,*779 F.3d 300 (5th Cir. 2015).

The record showed D was indicted for, and pleaded guilty to, a violation of Tex. Penal Code §?22.02(a)(4) (1989)?aggravated assault with a deadly weapon?which meets the generic, contemporary definition of ?aggravated assault.? The fact that the Texas judgment did not contain an affirmative deadly-weapon finding did not cast doubt on the fact of his conviction under §?22.02(a)(4) because, in Texas, a defendant could stand convicted of aggravated assault with a deadly weapon even if the trial court did not enter a separate and affirmative deadly-weapon finding.

After Amendment 775 (effective Nov. 1, 2013) to USSG §?3E1.1 and its commentary, the Government may withhold a §?3E1.1(b) motion (for an additional one-level reduction for acceptance of responsibility) based on an interest identified in subsection (a) or (b) of §?3E1.1; however, if a defendant has a good-faith dispute as to the findings in the presentence report, it is impermissible for the Government to refuse to move for a §?3E1.1(b) reduction simply because the defendant requests a hearing to litigate the dispute.*United States v. Castillo,* 779 F.3d 318 (5th Cir. 2015).

Accordingly, the Fifth Circuit vacated D?s sentence and remanded to allow the district court to determine whether her challenge to the amount of funds stolen (on which a Guideline ?loss? enhancement turned) was made in good faith.

District court did not err in granting qualified immunity and dismissing Texas state prisoner?s 42 U.S.C. §?1983 suit against various prison officials; prisoner alleged his due-process rights were violated by being classified as a sex offender.*Toney v. Owens,* 779 F.3d 330 (5th Cir. 2014).

The Fifth Circuit concluded that neither the prisoner?s classification as a sex offender nor the consequences flowing from that classification implicated the prisoner?s liberty interests under the U.S. Const. amend. XIV Due Process Clause where prisoner was never mandated to undergo sex-offender treatment or subjected to sex-offender conditions of parole.

Court of Criminal Appeals

Where D plead guilty to possession of a controlled substance (Count I) and no contest to possession of certain chemicals with intent to manufacture a controlled substance (Count II) in exchange for the State?s agreement to a sentencing cap on Count II, his successful challenge to his conviction for Count II negated the entire plea bargain.*Ex parte Cox,* 482 S.W.3d 112 (Tex.Crim.App. 2016).

D plead guilty to one count of possession of a controlled substance (Count I) in violation of Tex. Health & Safety Code §?481.115(a), (b) and no contest to one count of possession of cer-tain chemicals with intent to manufacture a controlled sub-stance (Count II). The trial court sentenced him to 20 years? imprisonment on Count I and 35 years on Count II, to run concurrently. D appealed his conviction on Count II, arguing that it failed to sufficiently allege an offense. The State argued that COA should dismiss D?s appeal because he had entered his pleas and waived appeal as part of the plea bargain, and COA agreed. D filed this habeas application. CCA granted relief and remanded.

?After review, we find that, because the plea bargain was a package deal and part of this plea bargain cannot be fulfilled, the entire plea bargain is unenforceable, thus the parties must be returned to their original positions. We remand this case to the trial court for re-sentencing.? The plea agreement was a package deal because the consideration was D?s waiver of a constitutional right in one count for the reduction of sentence on a different count. Because Count II did not state an offense, the terms of the plea bargain were unenforceable; the parties had to be returned to their original positions.

CCA affirmed without analysis that the warrantless, non-consensual blood draw of D suspected of DWI, con-ducted pursuant to the implied-consent and mandatory-blood-draw provisions in the Texas

Transportation Code, violated U.S. Const. amend. IV.*Reeder v. State,*480 S.W.3d 544 (Tex.Crim.App. 2016).

?[Appellant] skidded off the road and hit a tree. During the ensuing investigation, police began to suspect that Appellant was intoxicated while operating his vehicle, and they took a blood specimen (over Appellant?s objections) pursuant to Section 724.012(b)(3)(B) of the Texas Transportation Code. Because the police concluded that Appellant was driving while intoxicated and had twice before been convicted of DWI, he was charged with felony DWI. Appellant filed a motion to suppress, which the trial court denied. He then pled guilty. . . .

?On appeal, Appellant argued that his conviction should be reversed in light of . . . *Missouri v. McNeely*, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). On January 8, 2014, the court of appeals issued an opinion affirming the judgment of the trial court and concluding that *McNeely* did not render Section 724.012(b)(3)(B) of the Texas Transportation Code unconstitutional. However, on February 4, 2014, [COA] granted the State?s motion for rehearing and substituted its opinion with a new one granting relief and finding Section 724.012(b) unconstitutional as applied to Appellant. . . . The State Prosecuting Attorney subsequently filed a timely petition . . . arguing that the mandatory blood-draw provision in this case did not violate the Fourth Amendment despite the Supreme Court?s ruling in *McNeely*.

?Before we could resolve the petition filed by the SPA, we issued an opinion in another case, *State v. Villarreal*, [475 S.W.3d 784 (Tex.Crim.App. 2014)], in which we resolved the same issue against the State. Although we subsequently granted rehearing in *Villarreal*, we later concluded that the State?s motion was improvidently granted and denied the State?s motion for rehearing. Therefore, in light of our decision in *Villarreal* and the reasoning therein, we overrule the State?s single ground for review and affirm [COA].?

Due to a lack of scientific evidence, CCA upheld habeas relief for murder-convicted D.*Ex parte Robbins,*478 S.W.3d 678 (Tex.Crim.App. 2016).

CCA?s entire opinion stated: ?Having granted the State?s motion for rehearing in this case, and having considered its merits, we now conclude that the State?s motion for rehearing was improvidently granted. We deny the State?s motion for rehearing. No further motions will be entertained.?

Alcala concurred: ?This concurring opinion marks the third time in less than five years that I must document my po-si-tion in favor of granting post-conviction relief to applicant, who is incarcerated for capital murder in a case in which there is no competent evidence that a murder even occurred. . . . This is the correct result. But it is five years too late and it comes at the high cost of diminishing this Court?s credibility. Today?s decision should give no one any comfort about the actual viability of the current version of Article 11.073 of the Texas Code of Criminal Procedure, the new-science statute in Texas.?

CCA upheld D?s capital sentence; the punishment evidence was sufficient, and jury selection and the voir dire of an expert witness were proper.*Daniel v. State,* No. AP-77,034 (Tex.Crim.App. Feb 10, 2016).

?[A] jury convicted appellant of the capital murder of peace officer Jaime Padron. Tex. Penal Code §?19.03(a)(1). Pur-suant to the jury?s answers to the special issues set forth in Texas Code of Criminal Procedure article 37.071, sections 2(b) and 2(e), the trial judge sentenced appellant to death. Tex. Code Crim. Proc. art. 37.071, §?2(g). Direct appeal to this Court is automatic. Art. 37.071, §?2(h). Appellant raises three points of error. After reviewing appellant?s points of error, we find them to be without merit.?

The evidence was sufficient to support the jury?s affir-ma-tive answer to the future-dangerousness special issue. It showed D went to the store intending to shoplift; he brought a loaded gun because he foresaw that police officers would pre-vent him from leaving the store; he had demonstrated an es-ca-lating pattern of disrespect for the law prior to the commission of the crime; he displayed a lack of remorse after

the crime; and an expert did not think D?s brain was damaged to the extent that he could not control his behavior or impulses. Furthermore, D could not demonstrate harm from the trial court?s refusal to grant his challenge for cause against a prospective juror where he did not request additional strikes or identify an objectionable juror who sat on the jury.

Habeas applicant showed specific enough facts for CCA to conclude his claim alleged that?and alleged only that?his judgment was incorrect; therefore, CCA dismissed the claim because applicant?s proper remedy was to seek a nunc pro tunc judgment or a mandamus writ.*Ex parte Molina,* 483 S.W.3d 24 (Tex.Crim.App. 2016).

?This is a post-conviction application for writ of habeas corpus. Tex. Code. Crim Proc. art. 11.07. Applicant brings eight claims for relief, including one claim alleging that the judgment in his case did not adequately reflect credit for the time he served in county jail before his sentence was pronounced. Applicant, however, does not claim to have exhausted all his administrative remedies to this alleged error. . . . [A]n applicant must exhaust all administrative remedies before he may bring a claim in an 11.07 writ application that he is not being properly credited with time served on his sentence. Tex. Gov. Code §?501.0081. This writ application involves the persistent issue of whether applicants must exhaust their administrative remedies under Section 501.0081 of the Texas Government Code before they may bring a post-conviction application for writ of habeas corpus alleging that the judgment is incorrect for failing to credit them for time that they served in jail before their sentence was imposed. We conclude that such claims are not subject to the Section 501.0081 exhaustion requirement.? CCA denied D?s claims.

?[I]f the only claim that an applicant raises in a post-conviction application for writ of habeas corpus is one that attacks the accuracy of the judgment with respect to presentence jail-time credit, but he does not claim to have exhausted his ad-ministrative remedies, then we will not dismiss it under Section 501.0081, since that provision does not apply. . . . Applicant alleges that he was ?magistrated for this charge in Fort Bend County on December 7th, 2011,? and that ?The Honorable Judge is the one that shall give defendant credit on his sentence for time that defendant has spent in jail on ?said cause? from time of his arrest and confinement until his sentence[.]? The claim that Applicant was arraigned on December 7, 2011, conflicts with the portion of the judgment reflecting that Applicant should receive time served starting from October 31, 2012?almost a year later than December 7, 2011?and running until January 14, 2014. This apparent discrepancy, coupled with Applicant?s argument that a judge shall give a defendant credit for time spent in jail starting from his confinement until his sen-tence, provides sufficient context to justify the determination that his only time-credit claim is that the judgment is incorrect. . . . Therefore, we dismiss this claim, not under Section 501.0081 of the Texas Government Code, but under [our prior case law]. Applicant?s proper remedy is to seek a nunc pro tunc judgment or, failing that endeavor, an application for writ of mandamus.?

The evidence was sufficient to support D?s conviction for first-degree aggravated assault of a family member under Tex. Penal Code §?22.02(b)(1) where the jury could have rationally inferred that his girlfriend?s injuries caused her a substantial risk of death and constituted serious bodily injury under Tex. Penal Code §?1.07(a)(46).*Blea v. State,* 483 S.W.3d 29 (Tex.Crim.App. 2016).

The State?s sole ground for review contended that COA erred by reversing D?s conviction for first-degree aggravated assault of a family member against his then-girlfriend. The State challenged COA?s determination that the evidence was legally insufficient to establish the element of ?serious bodily injury.? Tex. Penal Code §?22.02(b)(1). The State asserted that in deciding whether D caused serious bodily injury, COA should have examined the injuries as they were inflicted by D rather than assessing the injuries in their improved or ameliorated condition after medical treatment.

CCA agreed. In light of the evidence that D?s actions lacerated the girlfriend?s liver and collapsed her lung; she was taken to the hospital due to her trouble breathing; she was hospitalized for four days; her lung injury required a tube to permit breathing; and in light of testimony describing her risk of death from the

type of injuries she sustained, the jury could have rationally inferred that her injuries caused her a substantial risk of death. Concluding the evidence was legally sufficient, CCA reversed COA and reinstated the trial court?s judgment.

D made an adequate showing of deficient performance because counsel failed to advise him regarding the man-da-tory deportation consequence of his guilty plea; however, D?s prejudice claim failed because he did not demonstrate that but for counsel?s errors, he would have rejected the plea bargain. *Ex parte Torres,* 483 S.W.3d 35 (Tex.Crim.App. 2016).

The trial court denied D the habeas relief he requested pur-suant to *Padilla v. Kentucky,* 559 U.S. 356 (2010). *See* U.S. Const. amends. VI, XIV. COA reversed.

Under *Strickland v. Washington,* 466 U.S. 668 (1984), CCA determined trial counsel performed deficiently by failing to adequately advise D regarding the presumptively mandatory deportation consequences of his guilty plea. CCA also determined the record supported the trial court?s conclusion that D was not prejudiced as a result of counsel?s error in view of the lack of any evidence from D as to how he was prejudiced and in the absence of any credible facts in the record showing that but for counsel?s erroneous advice, D would have rationally decided to reject the plea bargain and pursue a trial. The record supported a conclusion that D did not place any special emphasis on avoiding deportation consequences as a result of his plea because his concern at the time was getting out of jail, and he disregarded counsel?s advice to seek counsel from an immigration attorney as to how his residency status would be impacted by his plea. Accordingly, CCA overruled the State?s third ground for review that contended trial counsel did not render deficient performance, and CCA sustained the first two grounds asserting that COA erred by determining D was prejudiced. CCA reversed COA and reinstated the judgment denying relief.

Court of Appeals

D?s convictions for aggravated assault with a deadly weapon against a public servant were proper because the jury was free to disbelieve D?s testimony and infer that he knew the men in the bedroom were officers serving a search warrant and intentionally or knowingly pointed a gun at the officer. *Parker v. State,* No. 06-15-00144-CR (Tex.App.?Texarkana May 4, 2016).

During a police raid of his residence, D allegedly pointed a shotgun at two police officers. By two separate indictments, D was charged with aggravated assault with a deadly weapon against a public servant. After a jury trial, he was found guilty on both counts. Here, D contended that the evidence supporting his convictions was legally insufficient. COA affirmed the trial court.

D?s convictions for aggravated assault with a deadly weapon against a public servant under Tex. Penal Code §§?22.01(a)(2), and 22.02(a)(2) and (b)(2)(B), were proper because the jury was free to disbelieve D?s testimony that he was hiding in a closet and did not see the officers, and to infer that he knew that the men were sheriff?s officers serving a search war-rant and he intentionally or knowingly pointed the shotgun at each officer, thereby threatening him with imminent bodily injury. As such inferences were more than reasonable under the facts and circumstances of the case, the jury?s verdict was supported by legally sufficient evidence.

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