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Voice for the Defense Volume 46, No. 7 Edition

Editor: Michael Mowla

From editor Michael Mowla:

1.?I summarize each opinion in a manner that allows readers to **generally** use this SDR instead of reading every opinion.

2.?If you determine that a summarized opinion is relevant to one of your cases, I urge you to read the opinion and **not** rely solely upon these summaries.

3.?The summaries reflect the facts and relevant holdings and do **not** reflect **my opinion** of whether the cases correctly: (1) recite the facts presented at trial; or (2) apply the law. My opinions (if any) are preceded by ?Editor?s Note.?

4.?This SDR is for you. Send me suggestions on how I may improve it.

Supreme Court of the United States

No significant decisions have been handed down by the SCOTUS since July 4, 2017. The Court is on summer recess.

United States Court of Appeals for the Fifth Circuit

***United States v. All Funds on Deposit at Sun Secured Advantage Account Number *3748, Held at the Bank of NT Butterfield & Son Limited in Bermuda,* 16-41164, 2017 U.S. App. LEXIS 13032 (5th Cir. July 19, 2017) (designated for publication)**

(1) Under 28 U.S.C. §?2466(a), a person charged with a crime is disallowed from using the resources of the courts in furtherance of a claim in any related civil forfeiture action if the district court finds that the person: (1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution (A) purposely leaves the jurisdiction of the United States; (B) declines to enter or reenter the United States to submit to its jurisdiction; or (C) otherwise evades

the jurisdiction of the court in which a criminal case is pending against the person; and (2) is not confined in another jurisdiction for commission of criminal conduct in that jurisdiction.

(2) Under the principles of international comity and the act of state doctrine, United States courts ordinarily refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries. For the act of state doctrine to apply, a foreign authority must have decided the issues after hearing evidence.

***United States v. Arrieta,* 16-40539, (5th Cir. July 7, 2017) (designated for publication)**

(1) Under 18 U.S.C. §?922(g)(5)(A), it is unlawful for an alien who is illegally or unlawfully in the United States to possess a firearm or ammunition. ?Illegally or unlawfully in the United States? means a person whose presence here is forbidden or not authorized by law.

(2) Deferred Action for Childhood Arrivals (DACA) ?is a form of prosecutorial discretion by which the Secretary deprioritizes an individual?s case for humanitarian reasons, administrative convenience, or in the interest of the Department?s overall enforcement mission.? It is ?legally available so long as it is granted on a case-by-case basis? and ?it may be terminated at any time at the agency?s discretion.?

(3) To qualify for DACA, an individual must: (1) have arrived in the United States under the age of 16; (2) have continuously resided in the United States for at least 5 years prior to the issuance of the first DACA memorandum and have been present in the United States on the date of issuance; (3) be currently in school, have graduated from high school, have obtained a general education development certificate, or be an honorably discharged veteran of the Coast Guard or Armed Forces; (4) not have been convicted of a felony, a significant misdemeanor, multiple misdemeanors, or otherwise pose a threat to national security or public safety; (5) not be older than 30.

(4) DACA ?does not confer or alter any immigration status,? and ?confers no substantive right, immigration status or pathway to citizenship? because ?only Congress, acting through its legislative authority, can confer these rights.? Recipients of DACA relief are permitted to apply for work authorization.

(5) Because DACA relief neither confers nor alters any immigration status, a DACA applicant may be convicted under 18 U.S.C. §?922(g)(5)(A) for mere possession of a firearm or ammunition that is otherwise legal to possess.

Editor?s Note: It is *patently absurd* that a DACA applicant may serve in our military (and in fact doing so is a qualifying fact for DACA relief), is entrusted with weapons capable of destroying buildings and causing mass casualties on the battlefield, and can win medals for valor, but when on leave or after honorary discharge, the applicant *cannot* possess a pistol or ammunition that would otherwise be legal to possess. This kid was not in the military, but he came here legally with his parents when he was two and was otherwise doing nothing wrong when stopped while in possession of a pistol and ammunition.

[3]

***United States v. Fidse*, 16-50250, 2017 U.S. App. LEXIS 12216 (5th Cir. July 7, 2017) (designated for publication)**

(1) The U.S.S.G. §?3A1.4 terrorism enhancement applies if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism. Under 18 U.S.C. §?2332b(g)(5), a crime is a ?federal crime of terrorism? if: (1) the crime of conviction is itself a federal crime of terrorism, and (2) the act is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government con-duct (intended to promote a federal crime of terrorism). Its application equals an automatic increase to an offense level of 32 and the maximum criminal history category of VI.

(2) The U.S.S.G. §?3A1.4 terrorism enhancement does not hinge upon a defendant?s ability to carry out terrorist crimes or the degree of separation from their implementation, but it if the defendant?s purpose is to promote a terrorist crime, the enhancement is triggered.

(3) An obstruction offense may support the U.S.S.G. §?3A1.4 terrorism enhancement under the ?intended to promote? prong because although the relevant offense of conviction, conspiracy to make false statements, is not a crime of terrorism, when combined with other relevant conduct, it could qualify for the enhancement if it was intended to promote a federal crime of terrorism.

(4) Where a defendant was not convicted of a federal crime of terrorism or the defendant?s relevant conduct did not include such a crime, for the U.S.S.G. §?3A1.4 terrorism enhancement to apply, a district court must: (1) identify which federal crime of terrorism the defendant intended to promote; (2) satisfy the elements of §?2332b(g)(5)(A), which requires that the offense be ?calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct?; and (3) ?support its conclusions by a preponderance of the evidence with facts from the record.?

***United States v. Jimenez-Elvirez*, 16-40560, 2017 U.S. App. LEXIS 12331 (5th Cir. July 10, 2017) (designated for publication)**

(1) Under *Jackson v. Virginia*, 443 U.S. 307, 318?319 (1979), the jury?s verdict will be affirmed if a reasonable trier of fact could conclude from the evidence that the elements of the offense were established beyond a reasonable doubt, viewing the evidence in the light most favorable to the verdict and drawing all reasonable inferences from the evidence to support the verdict.

(2) Under 8 U.S.C. §?1324(a)(1)(A)(v)(I), to convict for conspiracy to transport an undocumented alien, the Government must prove that the defendant: (1) agreed with one or more persons (2) to transport an undocumented alien inside the United States (3) in furtherance of his unlawful presence (4) knowingly or in

reckless disregard of the fact that the alien?s presence in the United States was unlawful.

(3) To prove conspiracy, the Government must prove that each conspirator knew of, intended to join, and voluntarily participated in the conspiracy. Elements of conspiracy may be established solely by circumstantial evidence, including the presence, association, and concerted action of the defendant with others. Mere presence at the scene of the crime or close association with a co-conspirator alone will not support an inference of participation in a conspiracy, but it is a significant factor to be considered within the context of the circumstances under which it occurs.

(4) To prove aiding and abetting under 18 U.S.C. §?2, the evidence must show that the defendant ?associated with the criminal venture, participated in it, and sought by his actions to make the venture succeed.? The evidence supporting a conspiracy conviction is generally sufficient to support an aiding and abetting conviction.

(5) Intrinsic evidence is generally admissible, and its admission is not subject to Fed. Rule Evid. 404(b). Evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are ?inextricably intertwined? or both acts are part of a ?single criminal episode? or the other acts were necessary preliminaries to the crime charged.

(6) Under Fed. Rule Evid. 404(b)(1), evidence of prior crimes, wrongs, or other acts is not admissible to prove the defendant?s character to show that the defendant acted in conformity with that character on the occasion at issue. Under Fed. Rule Evid. 404(b)(2), such evidence may be admissible for proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(7) To determine admissibility under Fed. Rule Evid. 404(b)(2), the *Beechum* test [*see United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc)] provides that the court must determine whether the evidence: (1) is relevant to an issue other than the defendant?s character (similarity of extrinsic act to the offense charged and amount of time that separates the extrinsic and charged offenses); and (2) possesses probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Fed. Rule Evid. 403 (the more closely the extrinsic offense resembles the charged offense, the greater the prejudice to the defendant, but the probative value of extrinsic evidence of similar crimes is great when the defendant based his defense on a claim that he was merely in the wrong place at the wrong time.).

(8) If a defendant pleads *not* guilty in a conspiracy case, the first prong of the *Beechum* test is satisfied because the entry of the plea raises the issue of intent to justify the admissibility of ex-trinsic offense evidence.

***United States v. Reyes-Ochoa,* 15-41270, 2017 U.S. App. LEXIS 11706 (5th Cir. June 30, 2017) (designated for publication)**

(1) To reverse on plain-error because the issue was not preserved before the district court, the reviewing court must find: (1) a legal error that has not been intentionally relinquished or abandoned; (2) the error must be clear or obvious; (3) the error must have affected the appellant?s substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

(2) To determine whether a conviction qualifies as a crime of violence, courts use the ?categorical? and ?modified categorical? approaches. Under the categorical approach, the court lines up the elements of the prior offense with the elements of the generic [enumerated] offense to see if they match. If the elements of the prior offense cover conduct beyond what the generic offense covers, then it is not a qualifying offense. The categorical approach does not consider the conduct of the defendant in committing the offense, but is limited to the conviction and the statutory definition of the offense.

(3) If a statute is ?indivisible,? it enumerates various factual means of committing a single element, and the categorical approach is used.

(4) Under *Mathis,* 136 S.Ct. at 2251?2254, a statute is divisible (and subject to the modified categorical approach) only if it creates multiple offenses by listing one or more alternative elements (as opposed to merely listing alternative means of satisfying an element). The difference is that a trier of fact must agree on one of multiple elements that a statute lists versus not agreeing on the same alternative means so long as the trier of fact concludes that the defendant engaged in one of the possible means of committing a crime.

(5) If a statute is ?divisible,? meaning it sets out one or more elements of the offense in the alternative, the court applies the modified categorical approach to narrow an offense that otherwise would not be a categorical match with an enumerated offense. *Descamps,* 133 S. Ct. 2276, 2281 (2013).

(6) Under the modified categorical approach, a court looks at ?Shepard documents?: indictment or information, terms of a plea agreement, or transcript of the plea hearing in which the factual basis for the plea was confirmed by the defendant. This occurs if state law fails to provide a clear answer to the means or elements question, and the ?Shepard documents? are reviewed only to determine whether the listed items are elements of the offense. If the Shepard documents reiterate all the terms of the law, then each alternative is only a possible means of commission, not an element that must be proved.

***Panetti v. Davis,* 14-70037, 2017 U.S. App. LEXIS 12390 (5th Cir. July 11, 2017)**

(1) Under 18 U.S.C. §?3599(a)(2), in any post-conviction proceeding under 28 U.S.C. §?2254 or 2255 seeking to vacate a death sentence, a defendant who is financially unable to obtain adequate representation or investigation, expert, or other necessary services shall be entitled to the appointment of one or more attorneys because congress contemplated that the prisoner on death row would have the assistance of paid counsel to prepare a federal habeas petition. This entitlement to paid counsel is absolute unless potential procedural bars would ?indisputably? foreclose habeas relief.

(2) Under 28 U.S.C. §?2254(b)(1)(A), a state prisoner must exhaust all state remedies to be entitled to habeas review. But under 28 U.S.C. §?2254(b)(1)(B)(ii), where ?circumstances exist that render the state process ineffective to protect the rights of the applicant,? a federal court may address the claims absent ex-haustion.

(3) Under 18 U.S.C. §?3599(f), the court may authorize the defendant?s attorneys to obtain such services on behalf of the defendant upon a finding that investigative, expert, or other ser-vices are reasonably necessary for the representation of the de-fendant. A district court may deny an inmate?s request for funds to pursue federal habeas relief when a petitioner has: (1) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred, or (2) when the sought-after assistance would only support a meritless claim, or (3) when the sought-after assistance would only supplement prior evidence.

Editor?s Note: This is the best opinion I have read in a long time. With these comments, Judge Higginbotham again shows why he is the best judge on the Fifth Circuit:

(1) Process matters, and gives rise to the aged observation that, in the law, the shortest distance between two points is seldom a straight line. Truncated hearings and exacting strictures can squeeze the life from due process, while perversely creating years of delay, all for a refusal to give a few days of time?this most seriously so when the issue is not whether a defendant is mentally ill, but the more subtle reaches of his disability. There is no justification for executing the insane, and no reasoned support for it, as only a glance at the brief of amici?filed by able and fervent citizens spanning the spectrum of political views?will confirm.

(2) Panetti?s counsel, Greg Wiercioch, has, in our best traditions, served his client for years with limited resources and time. To refuse to give him the time and resources critical to review Panetti?s present

condition is error, borne of understandable but nevertheless error-producing frustration over the delay baked into our death penalty jurisprudence?with its twists and turns between two sovereigns.

(3) Delivery of due process protects the prisoner, and in doing so, protects us all.

Texas Court of Criminal Appeals

***Ash v. State,* PD-0244-16, 2017 Tex. Crim. App. LEXIS 579 (Tex. Crim. App. June 28, 2017) (designated for publication)**

(1) If the record contains evidence that a witness may have been an accomplice, the issue should be submitted to the jury to decide whether the witness was an *accomplice as-a-matter-of-fact.*

(2) A witness is an accomplice as-a-matter-of-law in the following situations: (1) the witness has been charged with the same offense as the defendant or a lesser-included offense; (2) the State charges a witness with the same offense as the defendant or a lesser-included of that offense, but dismisses the charges in exchange for the witness? testimony against the defendant; and (3) the evidence is uncontradicted or so one-sided that no reasonable juror could conclude that the witness was not an accomplice (court uses phrases like *could have been charged, susceptible to prosecution, the evidence clearly shows, or there is no doubt*).

***Ex parte Bowman,* PD-0208-16, 2017 Tex. Crim. App. LEXIS 582 (Tex. Crim. App. June 28, 2017) (designated for publication)**

(1) Under *Strickland v. Washington,* 466 U.S. 668, 687 (1984), to prove IATC, an applicant must show by a preponderance of the evidence that: (1) trial counsel?s performance was deficient by showing he failed to satisfy an objective standard of reasonableness under prevailing professional norms, with reasonableness assessed under the circumstances of the case viewed as of the time of counsel?s conduct and under the totality of the representation; and (2) he was prejudiced by the deficient performance.

(2) An IATC claim must identify with particularity the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.

(3) A trial counsel?s strategic decisions must be informed by a reasonable preliminary investigation. A decision not to investigate an issue must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel?s judgments. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.

***Ex parte Ingram,* PD-0578-16, 2017 Tex. Crim. App. LEXIS 588 (Tex. Crim. App. June 28, 2017) (designated for publication)**

(1) Pretrial habeas, followed by an interlocutory appeal, is an extraordinary remedy. This remedy is reserved for situations in which the protection of the applicant?s substantive rights or the conservation of judicial resources would be better served by interlocutory review. Except when double jeopardy is involved, pretrial habeas is not available when the question presented, even if resolved in the defendant?s favor, would not result in immediate release. And, pretrial habeas is generally unavailable when the resolution of a claim may be aided by the development of a record at trial. The only recognized exception to the general prohibition against record development on pretrial habeas is when the constitutional right at issue includes a right to avoid trial, such as the constitutional protection against double jeopardy.

(2) Ordinarily, a facial challenge to the statute defining the offense can be brought on pretrial habeas, such as an overbreadth challenge. However, anti-defensive issues (an issue that benefits the State?s position in the case but is not something the indictment required the State to prove from the outset, such as voluntary intoxication) may not be brought on pretrial habeas corpus because it is not law applicable to the case.

(3) Overbreadth is a First Amendment doctrine that allows a facial challenge to a statute even though the statute might have some legitimate applications. The overbreadth of a statute must be substantial, not only in an absolute sense, but also relative to the statute?s plainly legitimate sweep. To be overbroad, a statute must prohibit a substantial amount of protected expression, and the danger that the statute will be applied in an unconstitutional manner ?must be realistic and not based on fanciful hypotheticals. The person challenging the statute must demonstrate from its text and from fact that a substantial number of instances exist in which the statute cannot be applied constitutionally.

(4) In an overbreadth analysis, a court must construe the statute with the plain meaning of its text unless the language is ambiguous or the plain meaning leads to absurd results that the legislature could not have possibly intended. In determining plain meaning, a court may consult dictionary definitions and read words in context applying rules of grammar and giving effect to every word in the text if reasonably possible. Text in a statute is ambiguous if it may be understood by reasonably well-informed persons in two or more different senses. If the text is ambiguous or the plain meaning leads to absurd results, a court may consider extratextual factors including the object sought to be attained, the legislative history, and the consequences of a construction. If possible, a court must employ a reasonable narrowing construction to avoid a constitutional violation.

(5) Tex. Penal Code §?33.021(c) is not facially unconstitutional because it is designed to protect children from sexual exploitation, not merely ?speech.? It proscribes only those communications that are intended to cause certain types of individuals to engage in sexual activity, who are those whom the actor believes to be under age 17 and those who represent themselves be under age 17, when the actor is more than three years older than the believed or represented age. When a person represents herself to be under age 17, the actor who solicits such a person will ordinarily be aware of a substantial risk that the person is underage.

***Long v. State*, PD-0984-15, 2017 Tex. Crim. App. LEXIS 589 (Tex. Crim. App. June 28, 2017) (designated for publication)**

(1) In reviewing the legal sufficiency of the evidence to support a conviction, a reviewing court considers whether any rational finder of fact could have found the essential elements of the offense beyond a reasonable doubt by viewing the evidence in a light most favorable to the prosecution by resolving any factual disputes in favor of the verdict and deferring to the fact-finder regarding the weighing of evidence and the inferences drawn from basic facts. In some cases, a legal-sufficiency issue turns upon the meaning of the statute under which the defendant is being prosecuted: Does certain conduct constitute an offense under the statute.

(2) Under Tex. Penal Code §?16.02(b)(1), a person commits a crime if she ?intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication.? Under Tex. Penal Code §?16.02(b)(2), a person commits a crime if she ?intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if the person knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation? of Tex. Penal Code §?16.02(b).

(3) Tex. Penal Code §?16.02 incorporates definitions in Tex. Code Crim. Proc. Art. Section 18.20: ?Oral communication? means ?an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation. ?Intercept? means ?the aural or other acquisition of the contents of a wire, oral, or electronic communication using an electronic, mechanical, or other device.? ?Contents? when used with respect to a wire, oral, or electronic communication, ?includes any information concerning the substance, purport, or meaning of that communication.?

(4) Affirmative defenses to Tex. Penal Code §?16.02 are: if a party to the communication recorded it, and someone who intercepts an oral communication has an affirmative defense if one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing an unlawful act, and a parent may vicariously consent on behalf of his or her child to a recording of the child?s conversations so long as the parent has an objectively reasonable, good-faith basis for believing that recording the conversations is in the child?s best interest.

(5) A person has an expectation of privacy in a place if: (1) the person, by his conduct, has ?exhibited an actual (subjective) expectation of privacy,? meaning that he seeks to preserve [something] as private; and (2) the person?s subjective expectation of privacy is ?one that society is prepared to recognize as ?reasonable,?? meaning whether when viewed objectively, the expectation of privacy is ?justifiable? under the circumstances.

(6) Courts look to a variety of factors when deciding whether a person has a reasonable expectation of privacy in a place or object searched, such as whether: (1) the person had a proprietary or possessory interest in the place searched; (2) the person?s presence in or on the place searched was legitimate; (3) the person had a right to exclude others from the place; (4) the person took normal precautions, prior to the search, which are customarily taken to protect privacy in the place; (5) the place searched was put to a private use; and (6) the person?s claim of privacy is consistent with historical notion of privacy.

(7) A locker room is not a classroom. Unlike a department-store dressing room, where there is no legitimate expectation of privacy if there is a sign informing the patron that the dressing room was under surveillance, in a school locker room, a person has a subjective expectation of privacy that society is prepared to regard as objectively reasonable.

Editor?s Note: I understand the TCCA?s real concern here, which is that we do not want people making video recordings in locker rooms where children may be. What if C.L.?s phone recorded the girls changing, and this recording was disseminated? On the other hand, I understand that a parent may want to know what is going on with their kids, including in the locker rooms. If a parent suspects that her child is being abused or bullied in the locker room, do we prosecute that parent for making a recording to turn into the police as evidence? Perhaps the legislature should amend Tex. Penal Code §?16.02 to exclude situations where the intent of the person making the recording is to capture evidence of a crime or other misfeasance.

***Prichard v. State*, PD-0712-16, 2017 Tex. Crim. App. LEXIS 586 (Tex. Crim. App. June 28, 2017) (designated for publication)**

(1) Deadly-weapon findings apply only where the ?victim? is a human.

(2) In a review of the legal sufficiency of the evidence to sup-port a deadly-weapon finding, a court examines the statutory requirements necessary to uphold the conviction or finding by determining the meaning of statutes de novo. A court interprets statutes by effectuating the collective intent or purpose of the legislators who enacted the legislation by focusing on the literal text of the statute and attempts to discern the fair, objective meaning of the text at the time of its enactment. The court applies the plain meaning of a term if the statute is clear and unambiguous, and reads words and phrases in context and construe them according to the rules of grammar and common usage. But when a statute is ambiguous or its plain language would lead to absurd results not possibly intended by the legislature, a court may consult extratextual factors, including legislative history.

(3) Extratextual factors of determining a statute?s intent are the: (1) legislative history, (2) objective of the statute, and (3) consequences of a construction.

Editor?s Note: Although I agree that deadly-weapon findings should be reserved for acts of misfeasance

against other humans, as the owner of three dogs (German Shepherd, Rottweiler, and Pit Bull mix), I believe it takes a ?special? kind of person to hit a dog on her head with a shovel and drown her under the pretense of ?disciplining? her. I am curious to see how brave this person would be with the shovel if he tried to ?discipline? this handsome 160-lb Presa Canario. I would not interfere in the exchange.

Texas Courts of Appeals

***Alberty v. State*, 06-16-00204-CR, 2017 Tex. App. LEXIS 6348 (Tex. App. Texarkana July 11, 2017) (designated for publication)**

When an exhibit contains both admissible and inadmissible evidence, the burden is on the objecting party to specifically point out which portion of the evidence is inadmissible. Otherwise, error is waived.

Sufficient evidence linked appellant to the previous convictions.
