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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

***Dunn v. Madison*, No. 17-193, 2017 U.S. LEXIS 6630, 583 U. S. ____ (U.S. Nov. 6, 2017)**

(1) Under 28 U. S. C. §?2254(d), to prevail on a federal habeas petition, the petitioner must prove by preponderance of the evidence that the state trial court?s adjudication of the claim: (1) was contrary to or involved an unreasonable application of clearly established Federal law as determined by the SCOTUS; or (2) was based on an unreasonable determination of the facts considering the evidence presented in state court.

(2) Neither *Panetti* nor *Ford* ?clearly established? that a prisoner is incompetent to be executed because of a failure to remember the commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case.

Editor?s Note: Because this case does not provide a sufficient background on *Panetti*, I provide it here:

- In *Panetti*, six experts testified: Anderson and Parker (court-appointed), and Conroy, Rosin,

Silverman, and Cunningham (defense). *Panetti v. Dretke,* 401 F. Supp.2d 702, 704, 707 (W.D. Tex. 2004). Anderson and Parker concluded that some portion of Panetti?s behavior could be attributed to malingering, but they believed that his illness was to some degree genuine. *Id.* at 707. Parker and Anderson believed that Panetti understood the reason for his execution because he could cognitively function since in letters Panetti often communicated in lucid, socially appropriate thoughts. *Id.* at 708.

- Panetti?s experts agreed that he had the cognitive functionality to communicate coherently much of the time, but he still suffers from delusions about the world around him. *Id.* Conroy and Rosin believed that despite his delusions, Panetti understands the State?s stated reason for seeking his execution is for his murders, but does not appreciate the connection between his crimes and his execution. *Id.* Silverman concluded that Panetti does not associate his execution with the murders he committed in any way. *Id.* Cunningham concluded that although Panetti understands that the State is going to execute him, his delusions prevent him from recognizing the State as ?a lawfully constituted authority,? and instead is ?in league with the forces of evil to prevent him from preaching the Gospel.? *Id.* at 708?709; *Panetti v. Dretke,* 448 F.3d 815, 817 (5th Cir. 2006).
- The testimony of experts supports a finding that Panetti suffered from some form of mental illness, which some have diagnosed as a schizoaffective disorder. *Panetti,* 401 F. Supp.2d at 707, *Panetti,* 448 F.3d at 817.
- One of Panetti?s witnesses testified that when a person is schizophrenic, it does not diminish their cognitive ability. ?[I]nstead, you have a situation (schizophrenia thought-disorder) where the logical integration and reality connection of their thoughts are disrupted, so the stimulus comes in, and instead of being analyzed and processed in a rational, logical, linear sort of way, it gets scrambled up and it comes out in a tangential, circumstantial, symbolic . . . not really relevant kind of way.? *Panetti,* 591 U.S. at 955.
- And, when a person is schizophrenic, he may have interactions that are ?[r]easonably lucid . . . whereas a more extended conversation about more loaded material would reflect the severity of his mental illness.? *Id.* at 684.
- Per the Fifth Circuit, Panetti knew that: (1) he had committed the murders; (2) he was about to be executed; and (3) the State?s given reason for executing him was the fact that he had committed the murders. *Panetti,* 448 F.3d at 819?821.
- The SCOTUS rejected the Fifth Circuit?s conclusions on three grounds.
- *First,* Panetti?s delusions did not render him incompetent: First, ?[a] prisoner?s awareness of the State?s rationale for an execution is not the same as a rational understanding of it,? and although *Ford* requires mere awareness of the State?s reason for executing him rather than a rational understanding of it, ?[*F*]*ord* does not foreclose inquiry into the latter.? *Panetti,* 591 U.S. at 959.
- *Second,* the SCOTUS observed that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the com-munity, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. *Panetti,* 591 U.S. at 958. However, the potential for a prisoner?s recognition of the severity of the offense and the objective of community vindication are called in question if the prisoner?s mental state is so distorted by a mental illness that his awareness of the crime and pun-ishment has little or no relation to the understanding of those concepts shared by the community. *Panetti,* 591 U.S. at 958?959 [emphasis supplied].
- *Third,* a prisoner?s awareness of the State?s rationale for an execution is not the same as a rational understanding of it. *Id.* at 959. As the SCOTUS notes, a person sentenced to death for ?an atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality.? *Id.* at 959?960. ?[T]he beginning of doubt about competence in a case like (Panetti?s) is not a misanthropic personality or an amoral character. It is a psychotic disorder.? *Id.* at 960.

United States Court of Appeals for the Fifth Circuit

***United States v. Iverson*, No. 16-51034, 2017 U.S. App. LEXIS 21654 (5th Cir. Oct. 31, 2017) (designated for publication)**

(1) Under U.S.S.G. §?3C1.1, a two-level enhancement for obstruction of justice applies when: (1) the defendant willfully obstructs or impedes, or attempts to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct relates to: (A) the defendant?s offense of conviction and any relevant conduct; or (B) a closely related offense.

(2) Lying to a judicial officer to obtain appointed counsel qualifies as obstruction of justice under U.S.S.G. §?3C1.1.

(3) Allowing private therapists to set restrictions on a defendant?s conduct, without the court having to approve those restrictions, usurps a judge?s exclusive sentencing authority.

***United States v. Marroquin*, Nos. 16-40367 & 16-40368, 2017 U.S. App. LEXIS 21651 (5th Cir. Oct. 31, 2017) (designated for publication)**

(1) Under U.S.S.G. §?4A1.1, criminal history points are assigned for ?each prior sentence? rather than each offense, and the single sentence is assigned one score.

(2) Under *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1345 (2016), when a defendant is sentenced under an incorrect U.S.S.G. range, the error will usually result in prejudice to the defendant. The prejudice is even stronger when the correct Guide-lines range is below the defendant?s sentence.

***United States v. Soza*, No. 16-41689, 2017 U.S. App. LEXIS 21656 (5th Cir. Oct. 31, 2017) (designated for publication)**

(1) Under U.S.S.G. §?2K2.1(a)(4)(B), a base offense level of 20 applies if the offense involved a ?semiautomatic firearm that is capable of accepting a large capacity magazine? and the defendant was a ?prohibited person? when he committed the offense. A ?prohibited person? means: (1) per 18 U.S.C. §?922(g)(1), a person ?who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year,? and (2) per 18 U.S.C. §?922(g)(2), a person ?who is a fugitive from justice.?

(2) Review of a district court?s interpretation and application of the U.S.S.G. is de novo, and factual findings is for clear error. Whether the evidence was sufficient to support a U.S.S.G. enhancement requires a finding of fact that is reviewed for clear error. The government has the burden of demonstrating, by a pre-ponderance of the evidence, the facts that are necessary to support the enhancement.

(3) Failure to object to either the PSR or the district court?s sentence results in review for plain error. Plain error exists if: (1) there is an error, (2) the error is plain, (3) the error affects sub-stantial rights, and (4) the error seriously affects the fairness, in-tegrity or public reputation of judicial proceedings.

(4) If party wishes to preserve an argument for appeal, the party must press and not merely intimate the argument during the proceedings before the district court. An argument must be raised to such a degree that the district court has an opportunity to rule on it. The raising party must present the issue so that it places the opposing party and the court on notice that a new issue is being raised.

(5) Under 18 U.S.C. §?921, a fugitive from justice is ?any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.? One cannot be a fugitive from justice without having ?fled? a state with the express intent of avoiding either prosecution or testimony.

(6) Where the government has the burden of production and persuasion as it does on issues like

enhancement of the offense level, its case should stand or fall on the record it makes the first time around. The district court may provide the government with an additional opportunity to present evidence on remand if it has tendered a persuasive reason why fairness so requires.

Texas Court of Criminal Appeals

***Burch v. State*, No. PD-1137-16, 2017 Tex. Crim. App. LEXIS 1171 (Tex. Crim. App. Nov. 15, 2017) (designated for publication)**

(1) Under *State v. Herndon*, 215 S.W.3d 901 (Tex. Crim. App. 2007), review of a trial court?s grant or denial of a motion for new trial is for an abuse of discretion. The court abuses its discretion only if its ruling is not supported by any reasonable view of the record. When deciding whether a trial court erred in granting a new-trial motion, the reviewing court views the evidence in the light most favorable to the court?s ruling and gives almost total deference to the court?s findings of historical fact. When the court does not issue findings of fact, however, the reviewing court will imply findings necessary to support the ruling if they are reasonable and supported by the record. An appellate court must not substitute its own judgment for that of the trial court, and it must uphold the trial court?s ruling if it is within the zone of reasonable disagreement (when there are two reasonable views of the evidence).

(2) Under *Strickland*, 466 U.S. 668 (1984), a defendant is entitled to relief on an IATC claim if he demonstrates by a preponderance of the evidence that: (1) trial counsel?s performance was deficient and; (2) the applicant was prejudiced because of that deficient performance. Trial counsel?s performance is deficient if it falls below an objective standard of reasonableness. The prejudice prong of *Strickland* requires a defendant to show a ?reasonable probability that, but for counsel?s unprofessional errors, the result of the proceeding would have been different.?

(3) Under *Strickland*, counsel enjoys a ?strong presumption? that his ?conduct fell within the wide range of reasonable professional assistance,? so when ?a legal proposition or a strategic course of conduct is one on which reasonable lawyers could disagree, an error that occurs despite the lawyer?s informed judgment should not be gauged by hindsight or second-guessed.? However, to be reasonably likely to render reasonably effective assistance to his client, ?a lawyer must be sufficiently abreast of developments in criminal law aspects implicated in the case at hand? because the Sixth Amendment guarantees a defendant the benefit of trial counsel who is familiar with the applicable law. Thus, ignorance of well-defined general laws, statutes, and legal propositions is not excusable, and if it prejudices a client, IATC may be found.

(4) As it relates to IATC on probation eligibility, to show prejudice, a defendant must show that: (1) the defendant was ini-tially eligible for probation; (2) counsel?s advice was not given as a part of a valid trial strategy; (3) the defendant?s election of the assessor of punishment was based upon his attorney?s erroneous advice; and (4) the results of the proceeding would have been different had his attorney correctly informed him of the law.

Editor?s Note: The TCCA finds that we must assume the trial judge disbelieved Burch?s affidavit as well as those of his siblings. However, what about trial counsel?s affidavit (the one that counts), in which counsel also stated that he thought that the judge could grant deferred-adjudication probation? If the hope was to obtain deferred adjudication and the trial court was prohibited by law from granting it, what difference does it make whether trial counsel also believed that juries tended to assess longer sentences on sexual assault cases than judges typically do?

***State v. Elrod*, Nos. PD-0704-16, PD-0705-16, & PD-0706-16, 2017 Tex. Crim. App. LEXIS 1075 (Tex. Crim. App. Oct. 25, 2017) (designated for publication)**

(1) In determining whether a warrant sufficiently establishes probable cause, a court is bound by the

four corners of the affidavit. In interpreting affidavits for search warrants, courts must do so in a common-sense and realistic manner. Probable cause exists when the facts and circumstances shown in the affidavit would warrant a man of reasonable caution in the belief that the items to be seized were in the stated place. A magistrate, in assessing probable cause, may draw inferences from the facts. Although the magistrate?s determination of probable cause must be based on the facts contained within the four corners of the affidavit, the magistrate may use logic and common sense to make inferences based on those facts.

(2) A magistrate?s decision to issue a search warrant is subject to a deferential standard of review, even in close cases. Under *Illinois v. Gates,* the process of determining probable cause does not deal with hard certainties, but with probabilities. The evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

(3) A magistrate?s decision to issue a search warrant will be upheld so long as he has a substantial basis for concluding that probable cause exists. A magistrate?s action cannot be a mere ratification of the bare conclusions of others. A magistrate should not be a rubber stamp. To ensure that such an abdication of the magistrate?s duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.

(4) When a probable cause affidavit specifies a named informant as supplying the information upon which probable cause is based, the affidavit is sufficient if it is sufficiently detailed to suggest direct knowledge on the informant?s part.

***Gibson v. State*, No. PD-1043-16, 2017 Tex. Crim. App. LEXIS 1142 (Tex. Crim. App. Nov. 8, 2017) (designed for publication)**

(1) An argument on appeal must merely comport with the trial objection. Under Tex. Rule App. Proc. 33.1(a)(1)(A), to pre-serve a complaint for review, a party must have presented a timely objection or motion to the trial court stating the specific grounds for the ruling desired. There is no requirement that to preserve error of appeal on an evidentiary issue, a party must make sure the appellate argument comports with the related mo-tion when there is a trial objection that comports with the appellate argument.

***Hallmark v. State*, No. PD-1118-16, 2017 Tex. Crim. App. LEXIS 1143 (Tex. Crim. App. Nov. 8, 2017) (designed for publication)**

(1) If a condition of a plea-bargain agreement that was not agreed-to between a defendant and the State is added by the trial court during the plea-hearing (but before sentencing), and the trial court discusses the added condition during the hearing, if the defendant does not object to the added condition, it becomes part of the plea-bargain and enforceable.

***Ex parte Macias*, No. PD-0480-17, 2017 Tex. Crim. App. LEXIS 1111 (Tex. Crim. App. Nov. 1, 2017) (designed for publication)**

(1) The double jeopardy clause of the Fifth Amendment attaches when the jury is empaneled and sworn, but does not attach if the trial court lacks jurisdiction over the case.

(2) When the State appeals under Tex. Code Crim. Proc. Art. 44.01, which includes an appeal of the granting of a MTS, the State is entitled to a stay in the proceedings pending the disposition of the appeal. Under Tex. Rule App. Proc. 25.2(g), once the appellate record is filed in the appellate court, proceedings in the trial court except as provided otherwise by law or by the rules are suspended until the trial court receives the appellate court mandate.

***Ex parte McClellan*, No. WR-83,943-01, 2017 Tex. Crim. App. LEXIS 1173 (Tex. Crim. App. Nov. 15, 2017) (designated for publication)**

(1) On June 28, 2017, in *Ex parte Ingram*, PD-0578-16, 2017 Tex. Crim. App. LEXIS 588 (Tex. Crim. App. June 28, 2017) (designated for publication), the TCCA held that 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 3 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.

(2) The TCCA refused to answer the question of whether he can raise the issue of the constitutionality of §?33.021(c) for the first time on appeal.

***Owings v. State*, No. PD-1184-16, 2017 Tex. Crim. App. LEXIS 1112 (Tex. Crim. App. Nov. 1, 2017) (designed for publication)**

(1) When one act of sexual assault is alleged in the indictment, and more than one incident of sexual assault is shown by the evidence, upon a timely request by the defense, the State must elect the act upon which it would rely for conviction once the State rests its case in chief.

(2) When conducting a constitutional harm analysis of an election error, the reviewing court must reverse a judgment of conviction unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or pun-ish-ment. This determination is made by analyzing the error in the context of the purposes underlying the election requirement: (1) protect the accused from the introduction of extraneous offenses; (2) minimize the risk that the jury might choose to convict, not because one or more crimes were proved beyond a reasonable doubt, but because all of them together convinced the jury the defendant was guilty; (3) ensure unanimous verdicts (all jurors agreeing that one specific incident, which constituted the offense charged in the indictment, occurred); and (4) give the defendant notice of the offense the State intends to rely upon for prosecution and afford the defendant an opportunity to defend. To find beyond a reasonable doubt that the erroneous failure to require an election was harmless (did not contribute to the conviction), the court must determine that these four purposes behind the election requirement were met.

***Proenza v. State*, No. PD-1100-15, 2017 Tex. Crim. App. LEXIS 1168 (Tex. Crim. App. Nov. 15, 2017) (designated for publication)**

(1) Under Tex. Code Crim. Proc. Art. 38.05, a trial judge is prohibited from commenting on the weight of the evidence in criminal proceedings or otherwise divulging to the jury her opinion of the case. If raised as a freestanding statutory complaint, error under Article 38.05 is subject to non-constitutional harm analysis.

(2) A trial judge?s improper comment on the evidence is not forfeited by a failure to object to the comment. Although every unscripted judicial comment does not cause reversible error, compliance with Article 38.05 is fundamental to the proper functioning of our adjudicatory system, and it should enjoy special protection on par with other nonforfeitable rights.

Texas Courts of Appeals

***Aguillen v. State*, No. 06-17-00004-CR, 2017 Tex. App. LEXIS 10159 (Tex. App. Texarkana Oct. 31, 2017) (designated for publication)**

(1) A trial court?s ruling on the admissibility of extraneous offenses is reviewed for an abuse of discretion. An appellate court must uphold a trial court?s ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. An appellate court will not reverse a trial

court?s ruling to admit evidence unless its ruling falls outside the zone of reasonable disagreement.

(2) Under Tex. Rule Evid. 404(a), evidence of a person?s bad character is not admissible to prove that he acted in conformity with that character on any specific occasion. Under Tex. Rule Evid. 404(b), evidence of other bad acts may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) Under Tex. Code Crim. Proc. Art. 38.37 §?1(b)(1), (2), notwithstanding Tex. Rule Evid. 404 and 405, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including: (1) the state of mind of the defendant and the child; and (2) the previous and sub-sequent relationship between the defendant and the child. Before a trial court can admit such evidence, it must first determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt, then conduct a hearing out of the presence of the jury for that purpose. However, an extraneous offense committed against a third party must have some similarity to the charged offense.

(4) Extraneous-offense evidence may be admissible as contextual evidence (1) same-transactional evidence (other offenses connected with the primary offense) if the evidence is essential for the State to rationally present evidence of the charged offense, and the facts and circumstances of the instant offense would make little or no sense without also bringing in the same trans-action contextual evidence; and (2) background-contextual evidence (general background evidence), which fills in the background of the narrative and gives it interest, color, and lifelikeness, but is not admissible for one of the other purposes for which evidence may be admitted under Rule 404(b) if it includes an impermissible character component.

Hughitt v. State, **Nos. 11-15-00277-CR & 11-15-00278-CR, 2017 Tex. App. LEXIS 10227 (Tex. App. Eastland Oct. 31, 2017) (designated for publication)**

(1) Under Texas Penal Code. Tex. Penal Code §?71.02, a person engages in organized criminal activity if, with the intent to establish, maintain, or participate in a combination or in the prof-its of a combination, he commits or conspires to commit one or more [enumerated offenses]. A conviction requires an offense enu-merated in the statute.

(2) Under Tex. Health & Safety Code §?481.112(a), a person need not have exclusive possession of a controlled substance to be guilty of possession?joint possession will suffice. A person commits possession with intent to deliver a controlled substance if she knowingly possesses a drug with the intent to deliver it. Possession is actual care, custody, control, or management. The State must show: (1) that the accused exercised control, management, or care over the substance and (2) that the accused knew the matter possessed was contraband. The evidence must establish that the accused?s connection with the drugs is more than just her fortuitous proximity to someone else?s drugs.

(3) Under the affirmative-links rule of *Deshong v. State*, 625 S.W.2d 327, 329 (Tex. Crim. App. 1981), if the accused is not in exclusive possession of the place where the substance is found, it cannot be concluded that the accused had knowledge of and control over the contraband unless there are additional independent facts and circumstances which affirmatively link the accused to the contraband. The rule restates the common-sense notion that a father, son, spouse, roommate, or friend may jointly possess property like a house but not jointly possess the contraband found in that house.

One 2006 Harley Davidson Motorcycle v. State, **No. 02-16-00450-CV, 2017 Tex. App. LEXIS 10082 (Tex. App. Oct. 26, 2017) (designated for publication)**

(1) In a civil case, a legal sufficiency challenge may be sustained only when: (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred by legal or evi-dentiary rules from giving

weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014) (op. on reh.). In determining whether legally sufficient evidence exists to support the finding, the reviewing court must consider evidence favorable to the finding if a reasonable factfinder could, and must disregard evidence contrary to the finding unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). Anything more than a scintilla of evidence is legally sufficient to support the finding. *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996). More than a scintilla exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about the existence of a vital fact. Any ultimate fact may be proved by circumstantial evidence. *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993).

(2) Under Tex. Code Crim. Proc. Art. 59.02(a), contraband is subject to forfeiture, and property is contraband if used in the commission of certain offenses. A final conviction for an underlying offense is not a requirement for forfeiture.

(3) Under Tex. Code Crim. Proc. Art. 59.05(b), the State must prove by a preponderance of the evidence that property is subject to forfeiture.

(4) To prove that property is contraband subject to forfeiture, the State must establish a substantial nexus or connection between the property to be forfeited and some statutorily defined criminal activity. The State may establish the required nexus by showing that a driver of a vehicle was in possession of a felony weight of a controlled substance.
