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| 2016 Criminal Justice Conference | Court of Criminal Appeals Update |
| Stacey M. Soule  Assistant State Prosecuting Attorney  (512) 463-1660  stacey.soule@spa.texas.gov | An Overview of Court of Criminal Appeals Decisions from the 2015 Term |

**Opinions September 1, 2015 through January 21, 2016**

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| --- | --- | --- | --- |
|  | Majority | Concurring | Dissenting |
| Keller | 10 |  | 4 |
| Meyers | 3 | 2 | 10 |
| Johnson | 3 | 4 | 3 |
| Keasler | 9 | 3 | 5 |
| Hervey | 6 |  | 1 |
| Alcala | 5 | 3 | 8 |
| Richardson | 3 | 8 | 1 |
| Yeary | 2 | 6 | 21 |
| Newell | 4 | 2 | 2 |
| Total | 45 | 28 | 55 |

**FIRST AMENDMENT**

***State v. Johnson*,** **No. PD-0228-14, Oct. 7, 2015, Rehearing denied, December 9, 2015**

Keller, P.J., joined by Johnson, Keasler, Hervey, Alcala, and Richardson, JJ. Alcala, J., filed a concurrence. Meyers, J., filed a dissent. Yeary, J., filed a dissent. Newell, J., dissented.

The flag-desecration statute, Penal Code Section 42.11, is overbroad and therefore unconstitutional on its face.

Third-party standing requirements are relaxed with respect to First Amendment overbreadth claims. The Article III jurisdiction (injury-in-fact), which requires a personal stake, would be satisfied here (if applicable) because Appellee was arrested and prosecuted.

The question, the Court stated, is whether the applications that do implicate the First Amendment (theoretically there are some that will not implicate freedom of speech) are so substantial that the statute must be held invalid.

The Court declined to apply a narrowing construction that would limit criminal liability to the destruction of another’s flag. The text unambiguously applies to intentionally or knowingly damaging any U.S. or Texas flag and therefore applies to anyone’s flag, regardless of who owns it or whether the owner consented to the conduct.

The majority of conduct that falls within the statute and would come to the attention of authorities is protected expression. The Court identified only two circumstances in which flag mistreatment does not involve protected behavior: (1) conduct that is secretive or hidden, which is in turn less likely to be expressive and prosecuted, and (2) a person who drags a flag in the mud as a result of being tired without the intent to communicate any idea. The Court determined that cases involving criminal mischief should not be considered in examining legitimate applications of the statute because the flag-destruction statute does not require a showing that the conduct constituted criminal mischief and the State could prosecute under both statutes. Based on the numerous decisions involving the statute, the Court held that its application to expressive conduct in actual fact is substantial; cases involving non-expressive conduct are uncommon as a matter of historical fact. Next, the deterrent effect and popular understanding of cases addressing flag-destruction statutes should not be considered in the overbreadth analysis. “[U]pholding a statute on the basis that its unconstitutional applications are so glaringly obvious that prosecutors will avoid them and speech will not be chilled by them” stands First Amendment law on its head.

**Alcala, J., concurring**: To honor the principles that the American flag represents, its destruction must be permitted. Further, the statute is so broad that it can make criminals of a vast majority of homeowners who fly the flag in honor of our country, but dispose of used flags improperly. Also, the state does not have the authority to adopt a more stringent standing requirement, as suggested by dissenting Judge Yeary, which is dependent on a person raising an as-applied challenge as a condition precedent.

**Meyers, J., dissenting**: Appellee’s conduct was not protected by the First Amendment because he was not attempting to make any kind of statement. The flag, as a symbol of expression, is exempted from prosecution and this limited enforcement will not produce a chilling effect. The real question is whether the State had enough evidence to convict, so it is “overkill” to declare the statute unconstitutional.

**Yeary, J., dissenting**: The Court errs to think it has the power and obligation to find the statute unconstitutional when it has not been unconstitutionally applied to Appellee. He should be required to show that his own rights were violated. “[W]hen a court judges a statute’s potential unconstitutional breadth has actually become known by application, the court risks entering into the realm of speculation and conjecture . . . .” Standing is a matter of state law, and the First Amendment involves an element of “standing” employed by the Supreme Court that is distinct from the merits issue, *i.e.*, deciding overbreadth. Standing, in this context, unlike the Fourth Amendment context, does not involve the violation of personal rights. The relaxed standing requirement is not a substantive part of the First Amendment overbreadth doctrine.

The Court also errs to find that it is substantially overbroad in relation to its legitimate sweep. The majority finds overbreadth when there is a violation in “some” circumstances. The statute is directed at conduct and is no different than a law that prohibits disorderly conduct. And it is only when an individual who violates the law with the addition of intent to communicate a message that the First Amendment violation might occur. Law enforcement’s chances of applying it unconstitutionally have been reduced by Supreme Court decisions striking down flag destruction statutes under the First Amendment.

***Faust v. State*, Nos. PD-0893/94-14, November 9, 2015**

Richardson, J., joined by Meyers, Johnson, Keasler, Hervey, and Alcala, JJ. Johnson, J., filed a concurrence. Yeary, J., filed a concurrence. Keller, P.J., filed a dissent. Newell, J., filed a dissent.

Appellants and other members of the Kingdom Baptist Church protested Fort Worth’s Gay Pride Parade. They were convicted of interference with public duties under Tex. Penal Code § 38.15(a)(1) for disobeying a police officer’s directive to remain behind a skirmish line that provided a safe time/distance buffer between pride supporters and protestors.

The Court rejected Appellants’ First Amendment, as-applied challenge to the statute. Contrary to Appellants’ claim, the police were performing a duty granted by law because they were acting to preserve the peace, as mandated by Tex. Code Crim. Proc. art. 2.13. The alleged violation of the First Amendment did not mean that they acted outside the authority of the law. The Court assumed, without deciding, that the skirmish line regulated protected speech. It then concluded that the skirmish line did not have the purpose of regulating speech because of a disagreement with Appellants’ message; the purpose was to prevent confrontation between Appellants and parade-goers. Therefore, it was content neutral, despite any incidental effect on Appellants’ delivery of their message. Next, the Court held that the line was narrowly tailored to serve the significant government interest of public safety and order. The line was reasonable as the officers knew of previous violent confrontations between the two groups. Finally, the line left open ample alternative channels of communication. They were free to proceed in any other direction, and they would have been free to proceed past the line after a temporary wait.

**Johnson, J., concurring**: Allowing self-help to prevent an unlawful arrest is too great of a threat to the safety of individuals and society to be sanctioned. The same reasoning applies here. The remedy lies in 42 U.S.C. § 1983. Crossing a street is neither speech nor expressive conduct and therefore Appellants are not entitled to First Amendment protections. They were arrested for interfering with public duties. The skirmish line was justified here based on past physical abuse and this form of separation has been used and approved in the past.

**Yeary, J., concurring**: Judge Newell may be correct that Appellants’ claim was not preserved. But the Court did not grant for that reason, and the record is not entirely clear. The issue is not whether Appellants had a First Amendment right to speak out or whether the line had an incidental effect of delaying their ability to exercise those rights; instead, the issue is whether they were charged for exercising their rights or for interfering with police performing their duties. There is logic in the rule that prohibits interference with officers even when citizens believe officers are wrong. The matter should be settled in court. The risk of injury or death that may result from opposition to law enforcement justifies the deprivation of a right. Imperfect vindication may be had later in court.

**Keller, P.J., dissenting**: The Court’s application of intermediate scrutiny for content-neutral “time, place, or manner” restrictions is wrong. There is a difference between a general law that imposes restrictions and police officers who impose them. The circumstances here are similar to those involving injunctions. The injunction standard should apply; therefore, the question is whether the provision (line) “burdens no more speech than necessary to serve a significant governmental interest.” Here, there were less restrictive means, like those used in the past. Also, strict scrutiny applies because the line was viewpoint- and content-based; it was the result of what Appellants said. Next, the mere possibility of violence did not justify the restriction. Strict scrutiny is also warranted, even if the restriction was content-neutral, because the line was not subjected to the injunctive relief standard, which includes procedural protections, and the circumstances did not allow for detailed advance notice. Lastly, a police order that violates the First Amendment cannot be used to justify a conviction.

**Newell, J., dissenting**: The case should be remanded for the court of appeals to determine if Appellants’ request that the trial court enter an acquittal, when the proper remedy for an as-applied challenge is a dismissal, preserved review. Appellants made two separate arguments--an as-applied challenge and a defense to prosecution. By combining the two and asking for an acquittal, Appellants attempted to insulate themselves from appellate review but, by the same token, ran the risk of procedural default.

If the trial court’s denial of an acquittal covers both claims, then the case should be remanded to the court of appeals to address the sufficiency of the evidence, which would result in greater relief. By assuming that Appellants’ conduct was speech, the court of appeals also denied them the benefit of the defense to the statute for pure speech.

**SEARCH AND SEIZURE**

***Douds v. State*, No. PD-0857-14, October 14, 2015**

Alcala, J., joined by Keller, P.J., Johnson, Richardson, and Yeary, JJ. Keasler, Hervey, and Newell, JJ. concurred. Meyers, J., filed a dissent.

The Court held that isolated statements in a motion to suppress claiming that blood was drawn without a warrant were not sufficient to preserve Appellant’s claim that the draw was not justified by exigent circumstances. The motion to suppress, arguments at the suppression hearing, and post-hearing briefing only apprised the trial court that Appellant was challenging whether the requirements of the blood-draw statute had been met. The Court observed that Appellant implicitly conceded that the statute constitutes a valid exception to the warrant requirement.

**Meyers, J., dissenting**: It was the State’s burden to prove that the draw was reasonable. Therefore, Appellant had no burden to show a lack of exigency and he did not abandon his claim by focusing on the statute at the hearing.

***Jaganathan v. State*, No. PD-1189-14, Sept. 16, 2015**

Keller, P.J., joined by Keasler, Hervey, Alcala, Richardson, and Yeary, JJ. Meyers, J., filed a dissent. Johnson and Newell, JJ., concurred.

The traffic stop of the appellant was supported by reasonable suspicion when the Trooper observed him driving in the left-hand lane, without passing any vehicles in the middle lane, for approximately 15-20 seconds after he passed a “Left Lane for Passing” only sign. The inquiry is not whether Appellant violated the law but whether the Trooper had reasonable suspicion of a violation. Further, the Trooper’s suspicions are not unreasonable just because the facts may show a possible defense to the conduct, *e.g*., it was unsafe for Appellant to move over. “[A] defense would matter only if the facts establishing it were so obvious that an objective officer viewing the situation would be unreasonable in failing to realize that the person’s conduct was allowed by the law.” Further, the court of appeals erred to consider the law’s purpose as the Trooper was not authorized to do so when deciding whether to conduct the stop.

**Meyers, J., dissenting**: The sign (in conjunction with the law that requires persons to obey all road signs) *does* not provide sufficient notice of the prohibited conduct. There are too many questions. “Is a driver required to actually pass another vehicle while in the left lane?” “Is there a specific amount of time in which this pass must occur?” “What if a driver never comes upon cars to pass, but intended to pass any that were on the roadway?” The benefit of the doubt, built into the reasonable suspicion analysis, should not go to the State.

***Ford v. State*, No. PD-1369-14, December 16, 2015**

Newell, J., joined by Keller, P.J., Meyers, Johnson, Keasler, Hervey, Alcala, and Richardson, JJ. Yeary, J., not participating.

The Fourth Amendment is not violated when law enforcement obtains four days of passive historical cell-site-location data without a warrant or probable cause pursuant to Tex. Code Crim. Proc. art. 18.21 § 5(a). There is no reasonable expectation of privacy in location data collected by a third-party cell-phone carrier for business purposes. A subscriber voluntarily submits to such collection by choosing a carrier. The Court was careful to note that privacy interests may be implicated by real-time or long-term prospective location data collection or content-based data collection.

***State v. Rendon*, Nos. PD-0013-15-15, December 16, 2015**

Alcala, J., joined by Meyers, Johnson, Richardson, and Newell, JJ. Richardson, J., filed a concurrence. Yeary, J., filed a dissent, joined by Keller, P.J., Keasler and Hervey, JJ.

The Fourth Amendment is violated when a drug-detection dog is used to sniff at the threshold or area immediately outside the front door of an apartment located on a semi-private outdoor landing. Under the *Florida v. Jardines*, 133 S. Ct. 1409 (2013), property-rights doctrine, it constitutes an unlicensed physical intrusion into the curtilage. The Court observed that it did not need to decide whether a renter’s expectation of privacy is implicated under these circumstances or whether the immediate area beyond the threshold can be considered part of the curtilage.

**Richardson, J., concurring**: Because the dog sniffed at the apartment door, *Jardines*’ property-based curtilage decision is on point. There is no need to examine privacy expectations. However, Justice Kagan’s concurring opinion in *Jardines* discussing sense-enhancing technology is worthy of discussion. Such technology, which is not generally used by the public, supports the determination that a dog-sniff outside an apartment door intrudes on privacy interests inside the home; such information was previously unknowable in the absence of a physical intrusion.

**Yeary, J., dissenting**: That the walkway led only to the apartment does not change the fact it remained fully available to the public and therefore fails to show a degree of intimate use and privacy necessary to establish curtilage under either the property or privacy based doctrines. Unlike the homeowner in *Jardines*, apartment renters do not have the right to exclude others from the landing. Thus, there can be no physical intrusion into an area belonging to the renter. Under the privacy doctrine, there is no evidence of a subjective expectation of privacy in this case. Appellee did not put the area to any use associated with intimacies of the home. Justice Kagan’s view that there is a search even if the dog is not on the curtilage is not consistent with prior cases that a dog-sniff for contraband, which does not implicate a legitimate privacy interest, is not a search.

***State v. Villarreal*, PD-0306-14, November 26, 2014**

Alcala, J., joined by Price, Womack, Johnson, and Cochran, JJ. Keller, P.J., filed a dissent, joined by Hervey, J. Meyers, J., filed a dissent. Keasler, J., dissented.

A warrantless blood-draw conducted under the repeat offender provision to the implied consent, mandatory blood draw statute, Tex. Trans. Code § 724.12(b), violates the Fourth Amendment. Neither consent (applicable via a prior waiver), or the auto, special needs, or search-incident-to-arrest exceptions provide a basis to validate a warrantless draw. While Fourth Amendment rights may be waived, consent is conditioned on the right to withdraw or revoke it. Because the statute requires a refusal, voluntary consent cannot be implied. And there is no precedent to support the State’s argument that the consent should be deemed irrevocable based on the privilege of driving. This type of quid-pro-quo waiver principle has only been applied in federal regulatory, parole and probation, and non-criminal contexts.

The automobile exception has been strictly limited to search a vehicle, not a person. The State’s claim that privacy interests are reduced due to the highly regulated nature of driving is inconsistent with the Supreme Court’s understanding of the privacy rights implicated by a blood draw.

Special needs do not stand as a justification because that exception has only been applied in circumstances beyond law enforcement and when obtaining a warrant would be impracticable. Those circumstances are not present here.

Search-incident-to-arrest applies only when the defendant attempts to conceal or destroy evidence. There is no possibility of that here. BAC dissipates at a predictable rate without any action by the suspect.

Finally, under a general Fourth Amendment balancing test, the State’s interest in curbing DWI; a serious offense; preference for a bright-line rule; the constitutionality presumption applicable to a statute; an arrested DWI driver’s reduced expectation of privacy; and the minimal intrusion of a draw does not outweigh the privacy interests of a DWI suspect. The Court also observed that the statute’s language is unclear about whether the Legislature intended to dispense with the warrant requirement. But to the extent that it authorizes a warrantless draw, it violates the Fourth Amendment. The Court noted that the statute itself was not unconstitutional; it was merely applied in an unconstitutional manner.

**Keller, P.J., dissenting**: The draw falls between the two types of approved warrantless searches—reasonable suspicion to justify the search of a probationer believed to have committed an offense and the collection of DNA with a buccal swab when a person is arrested for a serious offense. So though a blood draw is more intrusive than the other searches, the act of recidivism justifies the search under a reasonableness analysis.

**Meyers, J., dissenting**: Contrary to the majority’s determination, the “shall” obtain a sample indicates that the Legislature intended to dispense with a warrant. A draw is reasonable because DWI suspects had notice that blood would be taken under the specific circumstances provided. This is similar to requiring sex-offenders to register after discharging probation or a sentence. And because the statute will not impact the average driver, it does not overreach. The State has a special interest in protecting the public from drunk drivers, and the statute applies when this special need is present.

**Per Curiam Rehearing, December 16, 2015**:

Meyers, J., filed a concurrence. Richardson, J., filed a concurrence. Newell, J., filed a concurrence. Keasler, J., filed a dissent, joined by Hervey, J. Yeary, J., filed a dissent, joined by Keller, P.J.

Rehearing was improvidently granted; it is now denied.

**Meyers, J., joining and concurring**: It is not proper to imply consent based on past convictions; this is no different than requiring voluntariness for a jury trial waiver.

**Richardson, J., joining and concurring**: A statute cannot lawfully authorize searches that fall outside the Fourth Amendment or a recognized exception. The repeat offender aspect does make the statute constitutional; a DWI repeat offender status is not a recognized exception. The repeat offender status significantly lessens privacy interests so as to permit a blood draw, but that is not the law, according to recognized exceptions.

**Newell, J., joining and concurring**: If a new exception should be recognized, the totality of the circumstances approach should not “pick[] among the desired qualities of established exceptions while discarding the rationales that justify those exceptions.” “[A] proper Fourth Amendment balancing test . . . weighs the State’s interest in the detection and prevention of crime against an individual’s privacy interest in his own blood.” A per se warrantless draw is not permissible based on a suspect’s criminal status and dissipation.

The circumstances that justify a diminished privacy interest in probationers and parolees is not present in DWI repeat offenders; they are not part of a punishment continuum. Further, relapse into criminal activity does not dictate the degree Fourth Amendment protections.

The Supreme Court has declined to make exigent circumstances, like seriousness of an offense, a per se exception. Blood draws have no relation to officer safety, like other recognized exigency exceptions.

The State’s interest does not extend beyond crime control. BAC evidence and repeat offender status are not required for an arrest or license suspension. And pretrial release and post-conviction probation are independent of any BAC evidence. Blood draws do not further the State’s compelling interest of getting drunk drivers off the road before they cause an accident but do serve a law enforcement purpose.

The search here does not have the hallmarks of an administrative search. A felony DWI suspect is not part of the closely regulated “industry” of driving, and only four industries with a history of government oversight have been recognized.

The limited nature of the majority’s opinion should be noted.

**Keasler, J., dissenting**: Reasonableness is the test, and it is satisfied by a suspect’s repeat offender status, the regulatory hallmarks of the offense, the reasonableness of blood draws, and the Legislature’s enactment of the repeat-offender provision. Because the search was reasonable, there’s no need to consider implied consent or mistake of law. Society is not willing to recognize an expectation of privacy equal to non-repeat DWI offenders, and that status implicates the State’s interest in preventing the specific act of DWI recidivism, just as the Supreme Court has recognized with probationers. Further, repeat offenders have notice that they will subject to a draw upon a third offense, and the search is based upon an arrest supported by probable cause for DWI.

Blood drawn will also be used for the regulatory purpose of preventing recidivism, which should result in a diminished expectation of privacy as other regulatory search schemes.

The same sort of supervision applicable to railways should be applicable to vehicles, where the state has an even more compelling interest. Blood draws are reasonable and are the most accurate source for showing intoxication. Blood draws are far more reasonable than the visual body cavity search upheld by the Court previously.

Lastly, the Legislature is well-equipped to clarify the concepts of reasonableness, privacy expectations, and the nature and weight of the State’s interests, even though it cannot enact legislation violating the Fourth Amendment.

**Yeary, J., dissenting**: Repeat-offender status and probable cause of DWI may substitute for a warrant because they make it imperative to obtain the best evidence of intoxication. The presumption in favor of a warrant is not all that clear in Supreme Court precedent. The majority on original submission should have acknowledged the balancing approach. Section 724.012(b) requires an officer to obtain a sample, regardless of whether there is a warrant. The addition of a magistrate adds little practical value in repeat-offender cases; the statute is activated upon arrest for DWI and trustworthy information of two priors. A magistrate will rarely doubt that the two elements are satisfied. Blood draws are a reasonable means to obtain evidence and an arrest reduces privacy expectations. Additionally, the only information the State wants is drug and alcohol content; medical history information is not included. Repeat offender status does not minimize privacy interests but it is properly considered as an interest of the State. Personal safety, property interests, and combating recidivism are interests of the highest order. Exigency, in combination with the seriousness of the offense, should permit obtaining the best evidence. This respects the Legislature’s balance-based judgment in enacting the statute.

**RIGHT AGAINST SELF-INCRIMINATION**

***In re Medina*, No. WR-75,835-02, November 4, 2015**

Newell J., joined by Keller, P.J., Meyers, Johnson, Keasler, Hervey, Richardson, and Yeary, JJ. Johnson, J., filed a concurrence. Alcala, J., filed a dissent.

Relator was not entitled to a writ of prohibition to prevent his compelled testimony on his ineffective assistance of counsel claim when his conviction was final and he was granted use and derivative immunity, which guaranteed that he would not be subject to criminal liability as a result of testifying. Because the precise scope of the Fifth Amendment’s protections under the circumstances here is unsettled, the habeas court had no ministerial duty to prohibit the State from calling him to ask if he was aware of and agreed to counsel’s punishment strategy. The Court observed that the applicability of the Fifth Amendment turns on the exposure to criminal liability, not the type of proceeding.

**Johnson, J., concurring**: Because Relator was granted immunity, he has not established a clear right to the relief sought. The Court has conflated   
“privilege” with “right” when referring to the Firth Amendment. The “right” against self-incrimination is a category two *Marin*, waivable right. “Privilege” is a statutory creation that can be revoked by the legislature at its discretion.

**Alcala, J., dissenting**: Death-penalty habeas proceedings are part of the defendant’s criminal case. In death-penalty cases, it’s the functional equivalent of a direct appeal because a convicted person generally cannot challenge ineffective assistance until habeas. The promise of immunity cannot be used to compel a defendant to testify at guilt or punishment, and it should not be used as a basis to compel testimony on habeas. Fifth Amendment law clearly prohibits compulsion under these circumstances. The Constitution does not require a person to choose between constitutional rights. If Relator testifies, then he reveals his trial strategy, which could be used against him at a retrial if he obtains relief. If he refuses to testify, then he gives up the right to attempt to obtain relief.

**SUFFICIENCY**

***Liverman v. State*, Nos. PD-1595-96-14, Sept. 23, 2015**

Keller, P.J., joined by Keasler, Hervey, Alcala, Richardson, Yeary, and Newell, JJ. Johnson, J., concurred. Meyers, J., dissented.

The conduct of “filing and recording” a false mechanic’s lien by a county clerk did not constitute causing “another” to “execute” it for purposes of securing the execution of documents by deception under Penal Code Section 32.46(a)(1). The Court adopted the Texas Supreme Court’s definition of “execute”---“to bring (a legal document) to its final, legally enforceable form.” A mechanic’s lien affidavit is “executed” when it is “filed” with the county clerk. But the clerk’s “filing” of the affidavit does not constitute “execution” of the affidavit. The Property Code describes the clerk as the recipient of the filing who does not have any active involvement. Therefore, the person filing it brings it into its legal, enforceable status. Because Appellants did not cause “another,” as required by the statute, to “execute” the documents when they filed them with the clerk, the Court held that evidence was insufficient to support their convictions.

***Ramsey v. State*, No. PD-007-15, Oct. 28, 2015**

Hervey J., joined by Keller, P.J., Johnson, Keasler, Richardson, Yeary, and Newell JJ. Meyers, j. filed a dissent. Alcala, J., concurred.

There was sufficient evidence that Appellant forged a check belonging to his elderly employer. The court of appeals erred to conclude that, without evidence of the number of checks previously written and the name appearing on the signature line, a jury could not “logically” infer that Appellant knew it was fake. Reasserting that a reviewing court decides whether *any* rational factfinder could have found each element of the offense, the Court held that jurors could have rejected Appellant’s defensive theory that: (1) his employer, who suffered from a faulty memory, wrote the check; or (2) some other unidentified person gained access to the checkbook kept in an unlocked truck in the garage where Appellant lived, that the unidentified person then made the check out to Appellant, and Appellant innocently came into possession of the check.

**Meyers, J., dissenting**: The evidence is not sufficient to support the offense charged because it was alleged to have been committed against the victim but the check was from the business’ account. Also, the evidence does not support the offense level enhancement based on the victim’s age because the offense was committed against a victim’s business; the age of one of the partners should not be invoked for enhancement purposes. The law was intended to protect the elderly, not any business entity that an elderly person has an interest in.

***Cornwell v. State*, No. PD-1501-14, October 7, 2015**

Yeary J., joined by Keller, P.J., Meyers, Hervey, Keasler, Richardson, and Newell JJ. Johnson, J., concurred.

Appellant contacted an ADA and falsely claimed to be a former prosecutor, referenced past cases he was involved with, and then requested a favorable disposition on a friend’s DWI case. He was convicted of impersonating a public servant.

The Court rejected Appellant’s sufficiency challenge to the element that he had intended to induce the ADA to rely on a “pretended official act,” as opposed to asking for leniency as a personal favor. Tex. Penal Code § 37.11(a)(1) requires the State to prove the conduct of impersonation and the specific intent to induce another to submit or rely on. Focusing on the second prong, the Court noted that the relevant question here is whether the “pretended official act” requires an *actus reus* beyond impersonation. Must the act of a pretend official be an “official” act of the office to prove intent to induce another to rely on the false representation? The Court answered in the negative. No second *actus reus* is required. As a result, the Court expressly rejected precedent applying the construction of a distinctly different predecessor statute that did require a second act. However, the Court pointed out that to satisfy the intent element, the State will likely need to put on evidence of “a pretended official act.”

Appellant fabricated and presented official acts he did as a former prosecutor---reviewing case files, putting his nephew in jail, investigating matters---and portrayed himself as being on the “same team” to induce the ADA to help him. This clearly showed that he did not ask for help as an ordinary citizen or friend. The jury was entitled to believe that Appellant’s fabricated former status made the ADA “predisposed” to grant his request.

The Court also noted that the State had inexplicably alleged “by trying to resolve a pending litigation” as a non-elemental, descriptive averment in the indictment to accompany “pretended official act.” Because such a description is not necessary, the Court made clear that it should not be part of any hypothetically correct jury charge that is used to weigh evidentiary sufficiency on appeal.

***McKay v. State*, No. PD-1133-14, November 4, 2015**

Meyers, J., joined by Johnson, Alcala, Yeary, and Newell, JJ. Hervey, J., filed a dissent, joined by Keller, P.J., Keasler and Richardson, JJ.

Appellant was convicted of injury to a child for spilling hot water on his girlfriend’s daughter while cooking dinner. The Court held that the evidence was insufficient to prove that Appellant’s actions created a substantial and unjustifiable risk to the girl and that his failure to perceive the risk was far from the ordinary standard of care. It is too much of a logical leap to conclude that, because the girl was habitually underfoot when her mother cooked, that she also behaved the same way with Appellant. The girl’s mother did not make any statement to indicate that she acted that way around anyone else or that Appellant had any knowledge that she was commonly underfoot. To “[h]old[] otherwise would criminalize the actions of most parents and caretakers in the State who cook meals for their children every day.”

**Hervey, J., dissenting**: A rational jury could have inferred that Appellant should have been aware that his cooking created a substantial risk because the girl was known to run around in the kitchen while he cooked. His failure to perceive the risk was a gross deviation from the standard of care an ordinary person would have exercised.

***Fernandez v. State*, No. PD-0123-15, January 13, 2016**

Keller, P.J., joined by Meyers, Keasler, Hervey, Alcala, Richardson, Yeary, and Newell, JJ. Johnson, J., filed a concurrence.

The evidence was sufficient to prove that Appellant, a justice of the peace, committed theft by deception by using a South West Airline’s voucher, resulting from a cancelled business trip, for personal travel. He obtained the county’s apparent consent when his son called the county clerk and requested the voucher number on his behalf. Deception was established because Appellant left intact the impression he created when he first purchased the ticket that it would be used for county-approved travel.

**Johnson, J., concurring**: The voucher was county property but the county clerk did not have the authority to give consent. Deception was proven by Appellant’s failure to tell the county auditor or remit the voucher when he did not use it for business travel. He did not correct the impression he previously created that it was going to be used for business travel.

***Donaldson v. State*, Nos. PD-0572-73-14, December 16, 2015**

Newell, J., joined by Keller, P.J., Meyers, Johnson, Hervey, Alcala, Richardson, and Yeary, JJ. Keasler, J., concurred.

The court of appeals erred to imply a finding of true to a punishment enhancement by virtue of the defendant’s plea of true when the trial court specifically declined to make a finding based on doubts about the propriety of using the prior for enhancement.

**HABEAS**

***Ex parte Fournier*, Nos. WR-82,102-01 & WR-82,103-01, Oct. 28, 2015**

Keasler, J., joined by Meyers, Hervey, Richardson, and Newell, JJ. Alcala, j. filed a concurrence. Yeary, J., filed a dissent, joined by Keller, P.J. Johnson, J., concurred.

*Ex parte Lo*, 424 S.W3d 10 (Tex. Crim. App. 2014), which held that part of the online solicitation of a minor statute is overbroad and therefore unconstitutional, does not provide a basis for an actual innocence claim on habeas. *Ex parte Lo* removed the criminal sanctions associated with Applicants’ past conduct and is not relevant to whether the conduct was in fact committed. Whether an applicant engaged in the conduct, as a matter of historical fact, has been the test for actual innocence under the Court’s jurisprudence. Applicants’ claims here resemble the gateway, *Schlup v. Delo*, 513 U.S. 298 (1995), actual innocence claims that provide a mechanism to overcome a procedural bar. The Court nevertheless set aside the convictions, recognizing that a challenge to a conviction based upon a statute that had already been declared unconstitutionally overbroad is not subject to procedural default and could thus be raised for the first time on habeas.

**Alcala, J., concurring**: Applicants seek relief on actual innocence grounds so that they can gain the benefits associated with obtaining that form of relief, which includes compensation for the time wrongly incarcerated. The Texas Supreme Court has interpreted the compensation act to apply to straight and *Schlup* actual innocence claims. Because of the interrelationship between the civil and criminal law, it is important for “actual innocence” to be used consistently as a term of art. Applicants here are not actually innocent of the facts of their cases; there is no new evidence that changes the facts. A change in the law alone is inadequate to meet the actual innocence standard. “Legal innocence” is a different than “factual innocence” recognized in *Ex parte Elizondo*, 947 S.W.2d 202, 206-07 (Tex. Crim. App. 1996). Further, *Ex parte Lo* should apply retroactively on habeas. And such application should not be narrowed on the basis of an as-applied attack because the statute, having been declared overbroad, was void from its inception and should be treated as if never enacted.

**Yeary, J., dissenting**: Though not briefed or argued, *Ex parte Lo* should not be applied retroactively in some situations. A statute that is overly broad is not unconstitutional as to all applications, as compared to a traditional facial challenge. It is possible that an individual convicted under the statute, prior to it being declared unconstitutional, engaged in conduct that was within the statute’s legitimate sweep. So to set aside such convictions constitutes a windfall. Recognizing invalidity prospectively may be sufficient to satisfy the purpose of the overbreadth doctrine, which is to remove any chilling effect. It also serves to notify the Legislature that changes are needed. Setting aside final convictions is unduly critical of a co-equal branch and punitive. Applicants made no showing that it was unconstitutionally applied to them.

***Ex parte Marascio*, Nos. WR-80,939-01-03, October 7, 2015**

Per Curiam. Keasler, J., filed a concurrence, joined by Hervey and Yeary, JJ. Richardson, J., filed a concurrence, joined by Newell, J. Yeary, J., filed a concurrence, joined by Keasler, J. Meyers, J., filed a dissent. Johnson, J., filed a dissent. Alcala, J., filed a dissent, joined by Johnson, J.

The Court summarily denied relief on Applicant’s claim that his three convictions for bail jumping and failure to appear violated the Double Jeopardy Clause’s prohibition against multiple punishments. The Court noted that it had filed and set the case to address several issues associated with the applicant’s claim.

**Keasler, J., concurring**: Applicant is not entitled to relief in light of *Ex parte Townsend*, 137 S.W.3d 79 (Tex. Crim. App. 2004), which held that an improper stacking order claim is not cognizable because the issue could have been raised on direct appeal. The Court should reevaluate whether double jeopardy claims are subject to procedural default. In *Gonzalez v. State*, 8 S.W.3d 640 (Tex. Crim. App. 2000), the Court held that a double jeopardy claim can be raised for the first time on appeal if (1) the undisputed facts show a violation on the face of the record, and (2) enforcement of procedural default rules would serve no legitimate state interest. But this is contrary to *Marin* v. State, 851 S.W.2d 275 (Tex. Crim. App. 1993), and has proven to be unworkable because it requires a merits review to decide whether the two threshold prongs, which are largely undefined and vague, are met. Double jeopardy should be deemed a category two right that cannot be procedurally defaulted and must be expressly waived. As a result, double jeopardy would be immune from procedural default and thus always subject to remedy on appeal. This, in turn, would foreclose such claims from being cognizable on habeas because, as a general rule, matters that could have been raised on direct appeal are not cognizable.

**Richardson, J., concurring**: Though jeopardy claims are generally cognizable under *Ex parte Townsend*, the claim here is not because the face of the record does not show a violation. *Gonzalez*’s recognition of the fundamental nature of a jeopardy claim as a basis for foreclosing procedural default on direct appeal also justifies its cognizability on habeas. Determining a violation based on the face of the record means the record as it would have been on direct appeal; there is no opportunity to develop more evidence, as is typical in the habeas forum. The gravamen of the bail jumping and failure to appear statute is the failure to appear in a particular case. Here, Applicant was supposed to appear for each case on the same day, so he committed three offenses. Any other reading is untenable because liability hinges on whether cases are scheduled together or apart; a statute’s application cannot be based upon administrative convenience.

**Yeary, J., concurring**: The case was filed and set to consider the tension between *Ex parte Townsend* and *Gonzalez*, especially in light of *Ex parte Moss*, 446 S.W.3d 786 (Tex. Crim. App. 2014), which recognized that category one rights under *Marin* are always cognizable on habeas. Adhering to *Gonzalez*’s categorization of jeopardy claims as fundamental without considering the right’s place under *Marin* and whether *Ex parte Townsend* bars habeas review begs the question.

**Meyers, J., dissenting**: The majority opinion provides no legal basis for denying relief. The majority continues to restrict habeas, even in the face of legislation expanding writ avenues, and persists in side-stepping important issues that need to be decided.

**Johnson, J., dissenting**: Though inartful, counsel objected on jeopardy grounds at trial; therefore, Applicant did not waive his claim. Appellate counsel failed to raise the claim on direct appeal, but Applicant was not involved in deciding which issues to appeal. His only recourse then is to raise an ineffective assistance of appellate counsel claim on habeas. The Court should raise this issue on its own motion. *Ex parte Townsend* is inapplicable because it did not address double jeopardy. Failure to appear in a single instance on three counts should count as a single unit of prosecution. Prohibiting the number of offenses according to the number pending cases does not undermine the deterrent effect of the bail jumping statute. The charges would likely be tried together and, therefore, the sentences would have to run concurrently. Further, the State’s argument that the statute also punishes for a bond violation (in addition to the failure to appear) is not persuasive. Criminal liability should not take into account the contractual relationship between a bondsman and client. The harm to be redressed is the impact on the administration of justice.

**Alcala, J., dissenting**: Current precedent, which is based on principles of equity that do not apply on direct appeal, permits the Court to address double jeopardy claims on habeas if the two *Gonzalez* prongs are satisfied. Thus, there is no procedural default. Even though the prongs may be difficult to apply, it is better than no remedy at all. In light of the procedural similarities between *Schlup* actual innocence and jeopardy, they should be treated the same for purposes of cognizability. *Ex parte Townsend* is not applicable to jeopardy claims. On the merits, the multiple punishments violate the Double Jeopardy Clause. Applicant could have only been released once on bond, even though he had multiple charges, so the gravamen treats the release as a single act.

***Ex parte Barnaby*, WR-80,099-01, November 4, 2015**

Per curiam.

Applicant sought habeas relief, claiming his lab test results were fabricated by the technician. He argued that he was entitled to a new trial because the State was unable to rebut the inference of falsity, the initial burden satisfied by Applicant. The Court recognized, in non-guilty plea cases, that the established harm standard for the use of material, false evidence is whether there is a reasonable likelihood that the evidence affected the factfinder’s judgment. However, in cases involving a guilty plea, as here, the Court announced that the standard is whether, having known the evidence was false, is there a reasonable likelihood that the defendant would still have pled guilty. If not, then the false evidence impacted the voluntariness of his plea.

The Court held that Applicant’s contention that he would not have pled guilty was unpersuasive because he received the benefit of a package plea deal. When this charge was pending, he had three other possession-with-intent-to-deliver cases pending, which, like this case, were enhanced under the habitual statute. All the cases therefore had an applicable punishment range of 25-99 years. He received four concurrent fifty-year sentences, with the State waiving a drug-free zone finding on three of the cases, which will benefit the applicant’s parole eligibility. If he had been found guilty on the three other cases, the trial judge would have had the discretion to impose consecutive sentences. The Court then concluded that, by a preponderance of the evidence, the value of the plea bargain outweighed the value of knowing, before entering his plea, that the lab results in this case were false.

***Ex parte Reyes*, No. PD-1277-14, November 4, 2015**

Keller, P.J., joined by all.

Appellee filed for 11.072 habeas relief, alleging actual innocence and that trial counsel rendered ineffective assistance under *Padilla* for failing to inform him of the deportation consequences of his plea. The trial court held a hearing during which it heard evidence in support of both claims but, concluding that he was entitled to relief on his ineffective assistance/*Padilla* claim, it recommended granting a new trial. The State complained on appeal that the trial court’s findings and conclusions were inadequate, so the court of appeals abated. By then the Supreme Court had held that *Padilla* is not retroactive, so the trial court recommended denying relief, but it did not provide a recommendation regarding Appellee’s actual innocence claim.

The Court held that actual innocence claims provide a greater form of relief due to its impact on a person’s reputation than simply granting a new trial. Therefore, the trial court was obligated to address that claim before, or in conjunction with, the ineffective assistance claim. Therefore, actual innocence claims are an exception to the rule that a court is not required to address all habeas claims if one ground entitles a person to relief. Further, Appellee did not forfeit his actual innocence claim by failing to pursue it when the case was abated.

***Ex parte Cooke*, WR-81,360-01, October 7, 2015**

Keller, P.J., joined by Keasler, Hervey, Alcala, Richardson, Yeary, and Newell, JJ. Johnson, J., concurred. Meyers, J., dissented.

Applicant was convicted of family assault violence in New Mexico. The New Mexico conviction was later used to enhance an assault family violence offense in Tarrant County. Applicant was placed on deferred community supervision. During that time, he was charged in Hood County with assault family violence, enhanced by the Tarrant County offense. Due to the new Hood County offense, Applicant’s supervision was revoked in Tarrant County, and he was sentenced to imprisonment. He was later convicted in Hood County.

Applicant sought habeas relief under Tex. Code Crim. Proc. art. 11.07, alleging that his sentence is illegal because his New Mexico conviction could not be used to enhance the Tarrant County offense. Noting that Applicant’s Tarrant County sentence discharged, the Court filed and set the case to determine whether Applicant was suffering collateral consequences because the Hood County offense was enhanced by the Tarrant County offense.

The Court held that Applicant failed to satisfy 11.07’s requirement that a person suffer collateral consequences from a “final conviction.” The Tarrant County case did not constitute a “final conviction” because Applicant was on deferred in Tarrant County when that offense was used to enhance the Hood County offense. The Court dismissed the application because the Tarrant County “conviction” was not used to enhance the Hood County offense.

**PROCEDURE**

***Guthrie-Nail v. State*, PD-0125-14, Sept. 16, 2015 (Rehearing Granted Nov. 18, 2015; Reset for Submission December 2, 2015)**

Keller, P.J., joined by Johnson, Alcala, Richardson, Newell, JJ. Richardson, J., filed a concurrence. Meyers, J., filed a dissent. Keasler, J., filed a dissent, joined by Hervey and Yeary, JJ. Yeary, J., filed a dissent, joined by Keasler and Hervey, JJ.

The Court held that a deadly weapon finding *nunc pro tunc* order issued two months after the judgment was improper because discrepancies in the record made it unclear as to the trial judge’s original intentions. A trial judge has the discretion to decline to enter a deadly weapon finding even when it’s an essential element of the offense like conspiracy to commit capital murder, the offense here. This determination is consistent with the discretion a jury has in deciding whether to enter a finding under the same circumstances. The Court remanded for the trial court to state whether the finding was intended at the time of the plea.

**Richardson, J., concurring**: The record is indeed unclear as to what the trial judge intended. Remand will also be helpful to allow the trial judge to explain why no mention of the finding was made at the time of the plea.

**Meyers, J., dissenting**: The majority has now created an exception to *nunc pro tunc* law, which has been limited to correcting clerical errors. There is no clerical error because the judgment is not incorrect or invalid as is. Further, the majority has created precedent allowing deadly weapon findings for inchoate crimes.

**Keasler, J., dissenting**: The majority relies on precedent that did not address the propriety of a judge’s discretion to not enter the finding. The prior case dealt with the fallout from a situation in which it was not entered. Additionally, Article 42.12 Section 3(g) does not give a judge the discretion to not enter a finding once it has been made by virtue of the elements of the offense. Regardless of the foregoing, the record here shows that the *nunc pro tunc* was used to correct a clerical error. By remanding, the majority disregards the trial court’s intent, evidenced by the subsequent order, and imputes a bad motive to the judge.

**Yeary, J., dissenting**: The Court has never before squarely addressed whether a judge has discretion in this circumstance, so the Court should not rely on precedent that implies a resolution. Once an affirmative finding has been made by the factfinder, it must be entered. Permitting a judge to have discretion in the matter subverts the prohibition on judges granting regular community supervision when a deadly weapon was used. Finally, the record shows that such a finding was made here.

**State’s Motion for Rehearing**: The Court concluded that the record is ambiguous but it failed to consider the written-printed docket sheet, which stated “Deadly Weapon Finding 42.12.” Though not a substitute for a written order, it may be used to consider the validity of a *nunc pro tunc*. Because the docket entry was not handwritten by the judge, the Court needs to clarify its utility. Second, the Court needs to reconsider the fact that there was a plea bargain that included language that the Court has previously recognized as constituting a deadly weapon finding. Regardless of a trial court’s ordinary discretion not to enter a finding, a trial court is not free to change the terms of a plea agreement it accepted. Finally, even if the trial court had the discretion to decline to make the finding, the Court should hold that an express statement doing so is required given the Court’s prior cases holding that such a finding is automatically made in certain cases as a matter of law.

***State v. Wachtendorf*, PD-0280-15, November 18, 2015**

Yeary, J., joined by Meyers, Johnson, and Richardson, JJ. Newell, J., filed a concurrence. Keller, P.J., filed a dissent, joined by Keasler, Hervey, and Alcala, JJ.

The plurality reaffirmed the rule that a notice of appeal must be filed within 20 days of the “signing” of an appealable order. It determined that the State’s notice of appeal was untimely because it was filed after the order granting the motion was “file-stamped” by the district clerk, which was over seven months after it was “signed.” The plurality rejected the State’s argument not to strictly apply the “signing” rule because it had not received notice until the order was file-stamped. The plurality observed that the State could have preserved its right to appeal in two ways. First, it could have monitored the clerk’s file after the trial judge orally granted Appellee’s motion. Second, it could have filed its notice on the day of the suppression hearing; even had it been premature, it would have been deemed filed on the day the appealable order was entered (i.e., “signed”). The State’s request that the filing deadline provisions be construed to require the clerk to notify the parties when an order is signed, in the absence of express or implied language, is best left to the Rules Committee.

**Newell, J., concurring**: The PDR should be dismissed as improvidently granted. The court of appeals correctly laid out and applied well-settled, applicable law.

**Keller, P.J., dissenting**: An appealable order should be deemed entered when it is stamped file by the clerk. The former interpretation of “entered” to mean “signed” is not consistent with the term’s plain meaning. Nevertheless, the trial court has a way to remedy this situation if it concludes the State was denied timely notice. It may rescind the original order and issue a new one, thereby restarting the appellate timetable.

**EXPERT TESTIMONY**

***Blasdell v. State*, No. PD-0162-14, Sept. 16, 2015**

Hervey, J., joined by Keller, P.J., Johnson, Keasler, Alcala, Richardson, Yeary, and Newell, JJ. Meyers, J., filed a dissent.

Appellant failed to present any evidence that the weapon-focus-effect theory has been generally recognized as a valid hypothesis. Further, he failed to show (by clear and convincing evidence) that his expert’s methodology, based on self-education through peer-reviewed literature, properly relied upon or used scientific principles in the field. The Court specifically criticized the expert’s lack of published articles or studies of his own and noted that the resources he cited addressed eye-witness identification generally, not the weapon-focus-effect aspect. As such, the Court concluded that the reliability prong was not satisfied.

**Meyers, J., dissenting**: The State never objected to the testimony on the basis that the theory was unreliable. Thus, it is unfair for the majority and lower court to procedurally default Appellant for something that was never questioned.

**GUILTY PLEA HARM AND REMEDY**

***Rodriguez v. State*, No. PD-0278-14, Sept. 23, 2015**

Meyers,J., announced the Judgment and Delivered an Opinion, joined by Alcala, Richardson, and Newell, JJ. Keller, P.J., Johnson, Keasler, and Hervey, J., concurred. Yeary, J., did not participate.

Appellant rejected the State’s ten-year plea offer on ten counts of various sex-based offenses. A jury found him guilty on nine counts and imposed eight life sentences and a twenty-year sentence. The trial judge granted his motion for new trial, finding that trial counsel rendered ineffective assistance for advising him to reject the State’s offer. The judge then ordered the State to reinstate the offer, which Appellant accepted. The judge rejected the agreement, however, and advised Appellant that he could either withdraw his plea or accept twenty-five years. Appellant withdrew his plea and filed a motion to recuse, complaining that the judge was biased or prejudiced towards him. The judge granted the motion, and a new judge was assigned. The new judge denied Appellant’s motion to reinstate the ten-year offer, stating that the former judge’s recusal wiped the slate clean. The judge presented him with two options: accept a plea agreement, if one could be reached, or go to trial. Appellant accepted the State’s twenty-five-year offer on five counts, and the trial court accepted it.

On appeal, Appellant challenged the remedy. Citing *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), he claimed that he was entitled to have the ten-year offer reinstated and accepted by the trial court because he demonstrated (1) he would have accepted the offer, (2) the State would not have withdrawn it, and (3) the trial court would have accepted it. The court of appeals held that the first two requirements were satisfied. As to the third, the court observed that *Lafler*’s companion case, *Missouri v. Frye*, 132 S. Ct. 1399 (2012), suggests that the determinative factor is whether there were any intervening circumstances between the time the offer was made and would have been accepted that could have impacted the decision whether to accept the offer. Because the original judge recused herself, the court of appeals concluded the judge’s rejection of offer was “tainted” and therefore irrelevant. The court ordered the State to reinstate the ten-year offer but noted that the trial court retained the discretion to reject it.

A plurality of Court of Criminal Appeals’ Judges agreed with the lower court that Appellant was prejudiced by counsel’s ineffectiveness at the plea-bargaining stage. He would likely have accepted the plea offer; it is unlikely that the State would have withdrawn it, and there was nothing in the record to indicate that the trial court would have rejected the agreement. The new judge was not required to order the State to re-offer the ten years. The court of appeals, it determined, erred to conclude that the recusal was the result of any bias or prejudice. “Upon recusal of the trial judge, the case started over from the beginning, and it was as if no plea negotiations had evert occurred.” The twenty-five-year sentence was reinstated.

**JURY CHARGE ERROR**

***Beltran v. State*, No. PD-1076-14, October 14, 2015**

Richardson, J., joined by all.

Appellant woke up while he was being sexually assaulted by the victim. He screamed and fought with the victim. Appellant’s friend then entered the room and stabbed the victim to death while Appellant held the victim.

The Court held that Appellant was entitled to a punishment instruction on sudden passion. In reaching its decision, the Court addressed whether and, if so, how the law of parties impacts the analysis. The determinative issue is whose conduct is considered, Appellant’s or his friend’s? Analogizing it to death penalty punishment phase law, the Court concluded that the defendant’s conduct controls entitlement. “[T]he derivative aspect of the law of parties (criminal responsibility *for the conduct of another*) does not factor into whether a defendant is entitled to an instruction on sudden passion.” Thus, it was immaterial whether Appellant’s friend acted under sudden passion.

The court of appeals erred in failing to look at the evidence in the light most favorable to giving the instruction. Instead, it looked at the evidence refuting it. There was evidence that, if believed, would support sudden passion. The Court remanded for an *Almanza* harm analysis.

***Marshall v. State*, No. PD-0510-14, January 13, 2016**

Keasler, J., joined by Hervey, Alcala, Richardson, and Newell, JJ. Yeary, J., filed a concurrence and a dissent, joined by Meyers, J., and Keller, P.J., as to Part I. Keller, P.J., dissented.

Appellant held a pillow over his girlfriend’s face during a fight. She did not pass out or completely lose her ability to breathe but her breathing was affected and the weight pinned her down. The jury was instructed to find Appellant guilty of felony assault on a family member if it believed that Appellant intentionally, knowingly, or recklessly impeded his girlfriend’s normal breathing. The charge omitted the “bodily injury” element of assault, which would have required the jury to determine whether Appellant caused bodily injury.

The Court held that the charge was erroneous but that Appellant did not suffer egregious harm because impeding normal breathing causes bodily injury per se. “Bodily injury” means “any impairment of physical condition,” and “physical impairment” includes “diminished function of a bodily organ.” Further, “impeding the normal breathing” includes “hindrance or obstruction.” The Court then held that the evidence was sufficient.

**Yeary, J., dissenting**: Impeding normal breathing is not bodily injury per se; it is a manner and means of the result-oriented offense of assault. Impeding breathing will not invariably cause bodily injury; likewise, impediment does not always amount to an impairment. The trachea and lungs are not “impaired” if the momentary “hindrance or obstruction” is removed because they will resume normal function immediately. There is no “bodily injury.” And if the majority is correct, then there is no charge error from which to assess harm. Because of the marked difference between the elements, Appellant was egregiously harmed. The charge error was compounded by the prosecutor’s argument. There is no compelling proof that Appellant caused any physical impairment or even pain. She was able to breathe to a limited extent.

Next, the evidence was sufficient because Appellant strangled his girlfriend before smothering her. The indictment permitted a conviction under this alternative theory because it included the allegation that Appellant impeded “circulation of the blood” in addition to normal breathing. Under the hypothetically correct jury charge, the application paragraph would have included “applying pressure to a person’s throat or neck” that corresponds with strangulation. And the family violence finding enhancement would have been permissible based on the fact that strangulation causes physical pain.

**COMPETENCY TO BE TRIED**

***Owens v. State*, No. PD-0967-14, Oct. 28, 2015**

Hervey, J., joined by Keller, P.J., Meyers, Johnson, Keasler, Richardson, Yeary, and Newell, JJ. Alcala, J., filed a dissent.

Appellant claimed he had amnesia after causing a fatal accident when fleeing police. At his competency hearing her asserted that the expert was not qualified as required by the competency statute. The court of appeals held that the admission of the expert’s testimony was erroneous and that Appellant was harmed. In reversing, it granted a new trial.

The Court proceeded under the assumption that there was error, but concluded that Appellant was not harmed under the non-constitutional harm standard. The only evidence of incompetence was Appellant’s attorney’s statement that the amnesia caused him to be unable to confer about the reality of the events of the offense and thus prevented him from developing a *mens rea* defense. Defense counsel, the Court observed, did not claim that Appellant could not rationally communicate with him. And the circumstances of the offense could have been used to develop a *mens rea* defense. Additionally, there was evidence that Appellant understood the charge and the proceedings. He had written a letter to the judge (which was admitted into evidence) suggesting that he should actually be tried for vehicular-manslaughter (not felony-murder) because, among other things, he had no intent to hurt anyone and planned to compensate the victim’s family.

The Court also stated that the court of appeals applied the wrong remedy. It observed that the proper procedure is to remand to the trial court to determine whether a retrospective competency hearing is feasible and, if so, to hold a competency hearing. If competency is established, then there is no due process violation, and the conviction stands.

**Alcala, J., dissenting**: Even accepting the presumption of competency, there was inadequate evidence to find Appellant competent. His letter to the judge does not address two other necessary considerations---whether a defendant can disclose facts, events, and states of mind and whether the defendant can testify. Appellant’s understanding of the events is based only on a video, not his own recollection. If the Court intends to hold that amnesia can never be a basis for incompetency, then it should cite supporting authority.

**CHAPTER 64 DNA TESTING**

***State v. Swearingen*, AP-77,043-44, October 28, 2015**

Keasler, J., joined by Keller, P.J., Meyers, Johnson, Hervey, and Richardson, JJ. Yeary and Newell, JJ. joined in part IIB. Yeary, J., filed a concurrence and dissent, joined by Newell, J. Alcala, J., filed a dissent.

Applying the law-of-the-case doctrine, the Court held that Appellee was not entitled to DNA testing under Chapter 64 and vacated the trial court’s order granting testing. The Court rejected previous requests to conduct testing on some of the same items at issue here, the latest of which were fingernail scrapings. Testing was denied because, given the mountain of inculpatory evidence, the presence of another donor would be of no consequence. The Court then held that additional items at issue now---hair and a rape kit---would not show, by a preponderance of the evidence, that Appellee would not have been convicted if exculpatory results were obtained.

The Court also determined that the trial court’s order granting Appellee’s request to release the evidence for testing cannot be challenged on the appeal from the order granting testing. The order was conditional, effective if the CCA reversed its testing decision, and is outside the bounds of Chapter 64; therefore, mandamus may be the appropriate avenue in the future.

**Yeary, J., concurring and dissenting**: The Court should consider the nail scrapings, hair, and rape kit together when deciding whether Appellee met the standard. Reliance on law-of-the-case related to the disposition of the nail scrapings alone is improper. Favorable test results on all three of these items revealing the same third party could have permitted a rational jury to harbor reasonable doubt.

**Alcala, J., dissenting**: The law-of-the-case doctrine does not apply to some of the items because Appellee submitted additional expert opinion evidence stating that there is indeed biological evidence to test on the items. Because the finding of the lack of biological evidence was the basis for the Court’s previous denial, it cannot be applied now as law of the case. The facts have changed. Also, because this is the first request to have the hair and rape kit tested, the doctrine does not apply. The hair and rape kit would satisfy the burden when weighed against the evidence of guilt, while the two other items would not. Appellee is entitled to testing.

**DEATH PENALTY**

***Ex parte Moore*, No. WR-13,374-05, Sept. 16, 2015**

Johnson, J., joined by Keller, P.J., Meyers, Keasler, Hervey, and Richardson, JJ. Yeary, J., concurred. Alcla, J., filed a dissent. Newell, J., not participating.

Despite recent changes in the medical community regarding the diagnostic criteria for assessing intellectual disability, the *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), standard will continue to apply for purposes of determining death-sentence eligibility.

Specific to the case, the Court held that the trial court erred to apply the recently revised American Association on Intellectual and Developmental Disabilities’ definition and further erred to consider whether Applicant’s adaptive behavior deficits are *related* to significantly sub-average intellectual functioning, as opposed to another cause. The Court also concluded that the trial judge only considered Applicant’s weaknesses and failed to consider his prison records and extensive array of evidence showing his functional abilities and.

**Alcala, J., dissenting**: The new standards recognized by the medical community should be used instead of *Ex parte Briseno*, which has received criticism, and courts should analyze the medical diagnosis apart from whether a death sentence would constitute cruel and unusual punishment.

***Mays v. State*, No. AP-77,055, December 16, 2015**

Hervey, J., joined by Johnson, Keasler, Alcala, Richardson, Yeary, and Newell, JJ. Keller, P.J., filed a dissent, joined by Meyers, J.

The Court will review *de novo* a trial court’s determination as to whether a defendant has made a substantial showing of incompetency to be executed when the trial court complied with Tex. Code Crim. Proc. art. 46.05 and due process by considering only evidence of incompetency. A deferential standard is not appropriate because the trial court is not permitted to weigh competing evidence of competency. Likewise, as previously established in *Druery v. State*, 412 S.W.3d 523 (Tex. Crim. App. 2013), when the trial court failed to comply with Article 46.05 and violated due process by weighing competing evidence, the Court will conduct a *de novo* review of the substantial showing determination.

The Court also defined the meaning of “responsive pleading” to include a non-adversarial pleading that may be filed by anyone. So the State’s “responsive pleading” may agree that competency is an issue and that experts need to be appointed to assess competency.

Appellant presented evidence that satisfied the substantial showing. He had a long history of mental illness and the opinion of two experts who expressed substantial doubts about his competency based on a review of historical and current information.

**Keller, P.J., dissenting**: Mental illness and competency are different. While there is evidence that Appellant suffers from mental illness, he has not shown that that he does not understand (1) he is going to be executed and that it is imminent, and (2) the reason he is to be executed.