Mar 12, 2014

Horrible unpublished opinion[4]
Not in custody for purposes of *Miranda*[5]

Estrada v. State,No. PD-0106-13, Keasler, DNP, 3/12/14, Two officer pulled over a car for failure to display a front license plate. Ofcr smelled burnt MJ. He ORDERED the driver and the passenger out of the car, searched the vehicle, discovered make up bag under the seat containing MJ[6] --Ofcr approached driver and passenger and asked whose dope it was. Estrada 'fessed up. No *Miranda* warnings. Although Estrada was not free to leave the officer did not tell her that and the TCCA surmised that she would not have figured out that one on her own—therefore she was not in custody and not entitled to *Miranda* warnings. Uses objective reasonable person standard to determine whether or not in custody and of course that would be a reasonable innocent person. Subjective belief of officer irrelevant unless he tells the defendant what is on his mind. The question as to the ownership of the drugs was addressed to both the passenger and the driver and was an attempt to gather information. No handcuffs. Only one police car and two officers. Okay to ask potentially incriminating questions. Janet's thoughts: Really? If the officer could smell burning marijuana odds are that the occupants of the vehicle could smell it as well, figure out that was against the law and that the two guys with the guns, badges, marked police unit and tazers would get pissy about it. You might also want to look at the PUBLISHED case of *Dowthitt v. State,* 931 S. W. 2d 244, 254 (Tex. Crim. App. 1999).

VOIR DIRE
AN ENORMOUS AMOUNT OF CASE LAW OVER-RULED
It is no longer AUTOMATIC Constitutional error to disallow a proper question on voir dire.

Easley v. State, No. PD-1509-12,Keasler, unanimous, publish, 3/12/14, Trial counsel prohibited from discussing different legal standards of proof and contrasting those with standards with the beyond-a-reasonable-doubt standard applicable in criminal trials. Easley got 20 to do on an asslt fam v. Ouch. *Plair v. State*, 279 S. W. 267, 269 (Tex. Crim. App. 1925) and *Carlis v. State*, 51 S. W. 2d 729, 730 (Tex. Crim. App. 1932) over-ruled. We disagree with the overly broad conclusion that every restriction on counsel's voir dire presentation violates an accused's right to counsel. Essentially the reasoning set forth indicates that a lot of other bigger errors that the TCT can make are not constitutional error so why should this be –such as erroneous admission or exclusion of evidence. The TCCA says that in this case the judge's error (in prohibiting this line of questioning) was harmless. The defendant was guilty. And trial counsel was free to explore reasonable doubt by other avenues. Janet's Thoughts: Really? Guilty people do not have a right to a meaningful voir dire? And how was trial counsel supposed to adequately voir dire on

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[4] **77.3**. **Unpublished Opinions** Unpublished opinions have no precedential value and must not be cited as authority by counsel or by a court.

[5] Miranda v. Arizona*, 384 U.S. 436 (1966).*

[6] Autran v. State*, 887 S. W. 2d 31 (Tex. Crim. App. 1994) states that the Texas Constitution provides greater protection than the federal constitution in the context of inventory searches and requires a warrant to search a closed container such as the makeup bag in this case. Obviously not cited or discussed by anyone in this case.*

reasonable doubt without either a definition or meaningful questioning on it? I think voir dire is going the way of an accurate application paragraph in a jury charge or examining trials. Something us old-timers sigh and say, "I remember when . . ."

THE FOURTH, FIFTH AND FOURTEENTH AMENDMENT MAY BE DEAD BUT THE EIGHTH AMENDMENT BREATHES NEW LIFE

***Miller*[7] applies retroactively**

Ex parte Terrell Maxwell, No. AP-76,964, Cochran, Womack Dissent, Keasler dissent, publish 3/12/14. Applicant was 17 at the time he committed the murder, the state did not seek the death penalty and punishment was automatic life without parole. In *Miller* the SCOTUS held that the 8th Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. –'[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of a disproportionate sentence'. *Teague* is discussed to decide whether this precedent should be applied retroactively—*Teague* applies if the rule is (1) substantive or (2) is a watershed rule of criminal procedure. We conclude that it is a "new substantive rule" that puts a juvenile mandatory life without parole sentence outside the ambit of the State's power. *Miller* alters the range of outcomes available for certain criminal conduct. SEE BELOW: I think the Judges have egg on their face because Miller came out not to long after they so ruled in that case.

Chris Joshua Meadoux v. State, 325 S.W. 3d 189 (Tex. Crim. App. 2010 – cert denied) (Holcomb, publish, 11/17/10, Meyer's dissent).(cert denied). The Eighth Amendment does not bar a sentence of life without parole for a capital crime that he committed at the age of sixteen. Meadoux has not established that there is presently a national consensus against imposing life without parole on a juvenile for the offense of cap murder. A juvenile cap offender's moral culpability, even if diminished as compared to that of an adult cap offender is still great. Life without parole is a severe sentence – especially for a juvenile. Life without parole for juvenile cap offenders finds justification in the penological goals of retribution and incapacitation but not in the goals of deterrence or rehabilitation. We conclude not established grossly disproportionate to the offense. Meyer's dissent – because Appellant's offense occurred in 2007, he is stuck in the period between the commutation of death sentences to life that occurred in 2005 and the Texas Legislature's decision to prohibit life without parole for offenses committed after 9/1/9. Considering that juveniles who were previously on death row, who were found by a jury to be a future danger, and who were sentenced to death had their sentences commuted and now have a chance of parole, it's ridiculous to say that a juvenile who was not even eligible for the death penalty should have received a sentence of life without parole. The sentence in Appellant's case is unreasonably harsh.

ACCESS TO COURTS

THE DISTRICT CLERK CANNOT RELY ON THE GOV'T CODE TO DENY INFORMATION TO AN INMATE AS TO THE COST OF A TRANSCRIPT

In Re Rosali Bonilla, No. WR-76,735-02, Publish, 3/12/14, Alcala, no dissents, Price concurred without an opinion. "When it declined to provide any information about the amount it would cost to purchase a trial and appellate transcript, the district clerk deprived Rosali Bonilla, relator, an imprisoned individual, of his constitutional right to have access to the courts." Tex. Gov't

[7] Miller v. Alabama, *132 S.CT. 2455 (2012)*

Code 552.028 gives the discretion to a governmental body to decline to give information to an imprisoned individual or his agent –unless that agent is an attorney. This was converted by a pro se motion to compel to a writ of mandamus by the TCCA. The district clerk's refusal to provide him with the information about the cost of the trial and appeal transcripts was a denial of his access to courts which is a fundamental right under the constitution. *Bounds v. Smith,* 430 U. S. 817, 821 (1977); *Johnson v. Avery*, 393 U. S. 483, 485 (1969). The right of access to the courts is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). The writ of habeas corpus is a writ of right and should never be suspended. Tex. Const. art I sec. 12. The inmate wanted his transcript so he could file a writ. Initial writ applications are usually done pro se. Only one bite at the habeas apple. Notably this published opinion issued despite it being a moot issue- the clerk by then had given him an estimate. Janet's thoughts: very interesting—Alcala who authored the opinion is in the forefront of the Judges wishing to over-rule *ex parte Graves*, 70 S. W. 3d 103 (Tex. Crim. App. 2002) which holds that there is no entitled to effective assistance of counsel on a writ—even in a death case.

COURT COSTS

When the court assess court costs must timely appeal from the order deferring guilt

Perez v. State, No. PD-0498-13, Johnson, Alcala concurrence, Publish, 3/12/14. In this case, the order of deferred assessed $203 in court costs. To challenge that order an appeal would have had to have been brought within 30 days of the order granting deferred when that condition was assessed--not when his probation was being revoked. A defendant must raise issues relating to the original plea proceeding, including evidentiary sufficiency, only in a timely appeal when deferred-adjudication community supervision is first imposed.

PROBATION REVOCATION

FINANCIAL ABILITY TO PAY MUST BE CONSIDERED FOR EXPENSIVE TERMS AND CONDITIONS OF PROBATION WITH INDIGENT DEFENDANT!!

Mathis v. State, No. PD-0536-13, Cochran, Keller dissent, Meyers dissent, publish, 3/12/14. Case remanded for the TCT to consider appellant's financial ability to pay before ordering him to pay for a SCRAM device. [8] Defense counsel specifically objected to requiring the defendant to pay for this device when he had been indigent for so long. TCT assessed it as a term of the probation that the jury assessed on defendants sexual assault conviction. He also put the poor guy in ISF to address a drinking problem. [9] The TCT set a $250,000 appellate bond so the guy remained in jail while this case was on appeal. This defendant was assessed a total of $23,736.19 over the life of the ten year probation. Ordering the probationer to wear a SCRAM device is a permissible probation condition. Whenever monetary payments are proposed as a term of probation, the court shall consider the ability of the defendant to make payments in ordering the defendant to make payments. That provision is mandatory. Tex. Code Crim. Proc. Art. 42.12 sec. 11(a). The TX legislature and the SCOTUS is sensitive to the treatment of

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[8] *An expensive device that someone wears to monitor whether or not they are drinking. Records alcohol as released by the body.*

[9] *Perhaps not happy about a jury giving a guy in his court probation on a sex offense? Just thinking aloud here.*

indigents in our criminal justice system. *Bearden v. Georgia*, 461 U. S. 660, 672 (1983). The criminal justice may not punish people for being poor and probation is not just for the rich. If a trial judge ignores the defendant's ability to make payments, whether the payments are a condition of probation or for the costs of ones legal defense it is possible that a defendant may be imprisoned solely due to his indigent status. *Ex parte Gonzalez*, 945 S. W. 2d 830, 833-37 (Tex. Crim. App. 1997). Before a trial or appellate court can consider a defendant's ability to make proposed payments, the defendant must provide evidence to support any claim that he is unable to make such payments without undue hardship. He should provide evidence of all assets and income as well as evidence of liabilities and living expenses so that the trial judge may compare one with the other and make any appropriate adjustments. The TCT will undoubtedly require the defendant to get a job and that future income can be considered. But later, the TCCA concedes that finding a job that pays enough in the current market might be difficult. Remanded for the TCT to consider whether probationer could pay for SCRAM device without undue hardship if so that condition need not be deleted. Janet's thoughts: probation has a lot of excellent services which really do benefit our clients and help them to turn their lives around but these services are expensive. This result was obtained because the lawyer objected at the time the condition was assessed and consistently made a record that his client could not pay for these things and why.

APPELLATE STUFF
NOT TO ELEVATE FORM OVER SUBSTANCE
NOTICE OF APPEAL SUFFICIENT IF SHOWS PARTY'S DESIRE TO APPEAL

Gonzalez v. State, NOS. PD-0954, 0955, 0956-13. Publish. Womack. Unanimous. 3-12-14. Timely filed pro se notice of appeal but did not use all the correct cause numbers on all his case. 10th court of appeals dismissed some of his appeals despite appellant amending his notices of appeal. 10th court spanked. Defects in notices of appeal do not affect jurisdiction-since 2002 amendments to the TRAP. A person's right to appeal a civil or criminal judgment should not depend upon tracking through a trail of technicalities. TRAP 25.2(c) (2) states notice is sufficient if it shows a party's desire to appeal. . TRAP 25.2 (f) explicitly allows amendments for purposes of correction "omissions".

SIXTH AMENDMENT
EFFECTIVE ASSISTANCE OF COUNSEL
Habeas grant
Ineffective assistance of counsel to fail to request an interpreter

Ex parte Darrell Lynn Cockrell, No. WR-78, 986-01, 3/12/14, Publish. Alcala, Keller dissent. Trial counsel failed to seek accommodations for his client's deafness. Notably the accommodations that trial counsel did make such as shouting, writing notes, asking the TCT to turn up the sound system is what made the record to support this IAC writ. Trial Counsel's failure to request an interpreter constituted deficient performance and applicant was prejudiced as a result of counsel's error. Counsel did not request an interpreter or special equipment. Notably as the dissent points out, the client did not understand sign language so it is unclear what assistance an interpreter could have provided. TCCP 38.31 provides for interpreters for deaf persons. Case law interpreting this section does provide that if a deaf defendant is unable to understand sign language that the court must make whatever accommodations are necessary to enable someone who is either deaf or just hard of hearing to understand the proceedings. A deaf person is someone whose hearing impairment inhibits his or her understanding of the

proceedings or communications with others. The impairment must limit the range or extent of a person's hearing. Applicant would have been entitled to an interpreter had he requested one and the TCT would have erred in over-ruling an objection to the lack of one. A reasonably competent attorney would have realized that appellant's condition met the definition for deaf person as the Code defines it and would have requested the assistance mandated by the Code. Notably the habeas court found against the applicant and the TCCA re-did the fact findings to grant relief in this case. It also made some fact findings with no support in the record based on "common sense". Prejudice was found because the CW which was his daughter was a liar—because it was a close case that turned primarily on her credibility if he had heard what was going on he could have helped his lawyer cross examine her better. Notably a footnote mentions trial counsel was admonished for being too aggressive with his cross examination of the witnesses and there was some newly discovered evidence that The client was never alone with the Cw and this offense could not have happened.

Habeas grant
Ineffective assistance to make the wrong objection to keep out the video of client confessing
Right objection is TRE 403

Ex parte Adam Brandon Crews, No. WR-76,141-01, Womack, unanimous, DNP, 3/12/14. Trial counsel provided constitutionally ineffective assistance of counsel at the guilt stage of trial by failing to object to a video-recorded statement that repeatedly mentioned previous bad acts and contained the police investigator's opinions that the applicant was lying. Trial counsel did object based on lack of *Miranda* warnings but that was frivolous because there were warnings on the video. The proper objection was TRE 403 which states that evidence can be excluded if the prejudicial value outweighs the probative value which was the case here. Another he said, she said case in which the CW sent nekkid pictures of her bad self to the applicant after he allegedly kidnapped and molested her. On the video client admits to another incident with another cw that was pretty close to identical. Based on the evidence in this case the TCCA does not think that the State could have won this case without the video and that it should not have come in because its prejudicial nature outweighed its probative value.

HOT TOPICS IN INEFFECTIVE ASSISTANCE OF COUNSEL
These have been largely pulled out of unpublished remands to develop the record on ineffective assistance of counsel writs

- *Trial counsel did not know his client was ineligible for shock probation (read the statute 42.12 (3)g)*
- *Would not allow defendant to testify at trial*
- *Filing PDR without consulting with client depriving him of his right to pro se pdr (I am guessing that one is a loser)*
- *Failed to challenge a biased juror*
- *Failed to challenge allegations in MTR*
- *Failed to present defense*
- *Failed to file appeal*
- *Missed appellate deadline or failed to advise client to file pro se pdr*
- *Failed to investigate the authenticity of the evidence*
- *Failed to call or consult with medical expert ref. evidence of penetration in a sex case*
- *Failed to effectively cross state's witnesses*

- *Failed to investigate*
- *Failed to advise deportation consequences.*
- *Told client that state was not opposed to granting deferred when they were. Open pleas can be really dangerous.*
- *Improper advice time credit.*