April 9, 2014

WAIVER OF RIGHT TO AN INTERPRETER
Defense counsel can waive if he finds the interpreter to be distracting

Garcia v. State, No. PD-0646-13, Keller, Alcala Dissent. 4-9-14, The record must affirmatively reflect that an interpreter was waived but does not have to contain a waiver colloquy between the defendant and the TCT. Notably in this case defense counsel told the prosecutor that he did not want an interpreter and that he did not really want his client to know what is going on. Trial counsel testified that he is fully bilingual, he told appellant he did not want an interpreter because it would be distracting for the jury and for him, he provided a brief summary of what the witnesses said on break, and the client told him to do whatever he wanted. The right to an interpreter must be waived. Presuming waiver from a silent record is impermissible. The record here contains evidence that trial counsel told appellant he had a right to an interpreter, that appellant agreed with counsel not to request an interpreter, and that appellant and counsel communicated their desire not to have an interpreter to the trial judge –albeit in the off the record bench conference. Alcala's dissent (joined by Johnson and Cochran) disagrees that the record shows that appellant waived his federal constitutional right to have an interpreter. By asking merely a single question whether appellant wanted an interpreter, the TCT failed to satisfy his burden to ascertain whether appellant's waiver was voluntary or whether it was rather the product of coercion. Further, the record conclusively shows that appellant was coerced by his attorney into declining an interpreter. Appellant assented to his atty's suggestion that he decline an interpreter because counsel presented him with an untenable choice of moving forward either with (1) an interpreter and counsel being unable to concentrate, or (2) no interpreter and counsel being able to concentrate. This choice between implementation of one constitutional right, the right to confront witnesses and[1] , versus abandonment of another constitutional right the right to effective assistance of counsel, renders the resulting choice involuntary. The issue of trial strategy is immaterial[2] this is an issue of voluntariness of waiving a constitutional right to confront the witnesses against one. Alcala further notes it is an unreasonable trial strategy to decline the services of an interpreter. A defendant should personally waive an interpreter—not his lawyer. Janet's thoughts: This is a case of a direct appeal paving the way for an excellent ineffective assistance of counsel writ. This was a murder charge. Since reading this case I am requesting the name of the interpreter on the record and usually the TCT pipes up at that point and opines just how good that interpreter is which even further protects the record and my license.

DOUBLE JEOPARDY; STATE MISTRIAL FOR DEFENSE CROSS
TRIAL PROCEDURE: TRE 104 TCT DETERMINING PRELIM MATTERS
IMPEACHMENT ON COLLATERAL MATTERS

Pierson v. State, No. PD_0613-13, Publish, 4/9/14, Hervey, Price concurrence, State's mistrial was granted, Victim testified, defense counsel's first question on cross was, "Did you also make an allegation that [appellant] did these same things to his own daughter?" State objected and

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[1] *The right to an interpreter is actually the right to confront witnesses.*

[2] *For purposes of this appeal but wait for the IAC writ which will be a clear winner.*

moved straight to mistrial which the TCT granted.[3] Defense moved to bar re-prosecution as jeopardy had attached and there was no manifest necessity for mistrial. He cited *Ex parte Bauder*, 974 S. W. 2d 729 (Tex. Crim. App. 1998) stating that the mistrial was caused either intentionally or recklessly. He lost that writ and the trial and appealed on double jeopardy grounds. Jeopardy attaches when the jury is sworn. A defendant has a valuable right to have his trial completed by a particular tribunal. A criminal defendant may be tried a second time without violating double jeopardy principles if the prosecution ends prematurely as the result of a mistrial if (1) the defendant consents to retrial or (2) there was manifest necessity to grant a mistrial. A TCT abuses its discretion if it declares a mistrial without considering the availability of less drastic alternatives and reasonably ruling them out. SCOTUS has held must accord the highest degree of deference to the TCT's evaluation of whether the jurors were affected by an improper comment. *Arizona v. Washington*, 434 U.S. 497, 504(1978). The defense counsel did not establish the admissibility of the proffered evidence. TRE 104(a)—preliminary questions of admissibility of evidence are determined by the TCT. The record was not made as to what the allegation actually was or that it was false. *Flannery v. State*, 676 S. W. 2d 369, 370 (Tex. Crim. App. 1984) (per curiam) explains the general rule that impeachment of a witness on a collateral matter is impermissible. This rule of evidence might have to give way to a defendants Sixth Amendment right to confront his accuser but cannot in this case because of the state of the record. Gave deference to TCT's decision that a motion to disregard would not undo the harm done by this question that defense counsel asked and that the witness never actually ever answered. Price's concurrence points out some of my thoughts—(1) although appellant in this case did not lay the proper predicate for this question, does not mean that it could not have been done and that in that case it would have been an objectionable question (2) 6th Am right to confrontation may be held to trump the general prohibition against impeachment on collateral matters and the prohibition in TRE 608(b) against impeachment by specific conduct.(3) Trial judges should not lightly dismiss the possibility that a stout[4] instruction to disregard will ameliorate any potential for jury contamination.(4) **If in fact, the complaining witness ever claimed to have had *personal knowledge* that the appellant sexually abused his own daughter, and in fact that claim was *false*, asking such a question as a predicate to impeachment *might* have been a permissible exercise of his Sixth Amendment rights under the Confrontation Clause, notwithstanding any contrary rule of evidence that the State might have interposed against its admissibility.** The real problem in this case is that the appellant was unable to establish the predicate facts by which he could assert admissibility under such a theory, as required by TRE104 (a). **But I wish to emphasize that we have not altogether ruled out the possibility that the Confrontation Clause requires that a defendant be permitted to develop evidence of false accusations by the complaining witness, at least in sex offense prosecutions, as general evidence of the complaining witness's lack of credibility, notwithstanding Rule 608(b).[5]** (5) Finally, when **defendants** request mistrials on

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[3] *Do not try this at home boys and girls, always object, move to disregard and then move for mistrial.*

[4] *As opposed to a puny one?*

[5] *TRE 608 b- Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.*

account of prosecutorial indiscretions, we have been quick to recognize the ameliorative impact of judicial instructions to disregard. A defendant who requests a mistrial without first seeking an instruction that the jury disregard some objectionable and potentially incendiary matter that has made its way into evidence **has only preserved error for appeal if the appellate court can say that the instruction to disregard would not, in any event, have had the desired effect on the facts of the particular case—**the judges must give the same consideration to the remedial potential of the instruction to disregard that they would almost routinely give such an instruction any time that it is the ***defendant*** who seeks a mistrial. Janet's thoughts: this is a case that could have gone the other way had the trial lawyer made a better record. It would have been necessary to make that record on a bill of exception or through a hearing on the MNT. If one alleges evidentiary matters in one's MNT it can be error for the TCT to fail to grant a hearing on it. It would have been necessary to establish EXACTLY what the false accusation was, that it was false and how that was crucial to the defense. Of course it is necessary to cite to Constitutional Provisions such as the Confrontation Clause in the Sixth Amendment and the Due Process Clause in 14. Would not hurt to throw in Article one of the Texas Constitution and the right to effective assistance of counsel in 6 and since this guy got a bunch of time, cruel and unusual punishment in 8.

ELIGILIBILITY FOR PROBATION FROM A JURY PRIOR COMPLETION OF PROBATION

Yazdchi v. State, NOS. PD-0007-13 &PD-0008-13, Alcala, Price concur, Johnson dissent, A defendant is not eligible for community supervision from a jury when his prior community supervision (straight probation) was terminated by a discharge order that permitted him to withdraw his plea of guilty, dismissed the indictment and set aside the verdict.[6] This is mandated by the plain language of TCCP 42.12 (20) (a). Appellants prior was "resurrected" by this new case. A conviction set aside in a discharge order does not equate to an exoneration as if the defendant had never been found guilty. "We hold that, under the entire statutory scheme governing regular community supervision, the statutory language is plain in providing that appellant was ineligible for jury-recommended community supervision because, even though he received judicial clemency on an earlier community supervision, that conviction was resurrected for the limited purpose of probation ineligibility when he was convicted of the present offense. A defendant whose probation is terminated under this section may not be enhanced, trial judge may use his discretion to exercise "judicial clemency"—by terminating early someone who has successfully completed his or her probationary term. If the discharged person is subsequently convicted of another criminal offense, the previously dismissed 'former' felony conviction will resurrect itself and be made known to the TCT. *Cuellar v. State*, 70 S. W. 3d 815, 820 (Tex. Crim. App. 2002).

[6] *Judicial clemency.*

SEX OFFENDER REGISTRATION
When required for non sex offenses

Dewalt v. State & ex parte Dewalt, No. PD-1724-13 & WR-80,782-01,Publish, Cochran concurring statement to denial of PDR and writ of mandamus. Parental kidnapping case, lost custody battle so Mama took baby to Mexico. Eventually arrested and got time. Chapter 62 of the TCCP requires reporting because child under age of 17 although clearly not sex offense. Sex offender registration in these circumstances may be the result of unintentional legislative oversight. Jacob Wetterling Act required the states to conform sex offender registration reqmts to conform the federal standards or lose federal money. That act contains an explicit exception for parental kidnapping case and it seems unfair that these parents who lose custody cases have to register along with perverts.

RESTITUTION TO CRIME VICTIMS
DWI CASES
Victim does not have to be named in information or indictment but causation has to be established by State

Hanna v. State No. PD-0876-13, Publish,Cochran, Plead guilty to DWI, ordered to buy the city of Lubbock a new light pole to the tune of $7,767.88. Restitution may be ordered in a DWI case even though no victim named in indictment/information but the State must prove that the offense is the direct cause of the harm. Just the fact that there was an accident and the defendant was drunk was not there must establish that being drunk caused the accident and the damage. A victim is defined for purposes of the restitution statute –TCCP 42.037 is any purpose that suffered loss **as a direct result** of the criminal offense. This should be easy to do but the State did not do this in this case as the Ofc did not mention that the defendant was intoxicated and that the intoxication caused the accident. Therefore restitution amount deleted from j/s. Keller's dissent—"While appellant was driving while intoxicated, his car struck a utility pole. The pole was broken in half with power lines spread on the ground. I believe that those facts, by themselves are sufficient circumstantial evidence of causation."

FOURTH AMENDMENT
BLOOD DRAW STATUTE UNCONSTITIONAL(Amarillo Court)

Sutherland v. State, No. 07-12-00289-CR, Publish, Amarillo, DWI subsequent , statute provides for blood draw without warrant, See TEX. TRANSP. CODE 724.012(b) (3) (B) which contains MANDATORY language "A peace officer **shall** require" taking a breath or blood specimen on a DWI subsequent. Unconstitutional per SCOTUS case of *McNeely*[7] as no warrant, no consent and no exigent circumstances. This case out of Austin but heard by Amarillo Court and a beautiful record to establish that it would have been fast and easy to get a warrant and that there were no exigent circumstances. FROM THE NIGHT MAGISTRATE: He is in his office all night and gives priority to dwi blood draw warrants and will take them out of turn, phlebotomists down the hall all night,(100 feet away) (They both work in the basement of the jail), it would take him 5-7 minutes to review the affidavit in support of the search warrant, He was the magistrate on duty the evening of appellant's arrest and the phlebotomist was on call THAT NIGHT. THE ARRESTING OFFICER: no collision, no medical emergency, no need to take appellant, or anyone else to the hospital that night, no consent (appellant refused both breath and

[7] Missouri v.McNeely, *133 S. Ct. 1552, 1558 (2013).*

blood tests), distance from arrest to night mag/phlebotomists, how long it would take to drive that distance, did not even try to take appellant to the magistrate. All relevant time periods established on the record to show that the client would not have time to sober up and the police would not have lost their evidence. In Austin, they have the FASTER system where the relevant info is stored online at the arrest sit so that a warrant can be quickly and easily assembled—it would have taken the arresting officer 5-10 minutes to prepare the documents for the magistrate's review.

REMAND LIST: This is a list of issues in which the TCCA has remanded to the TCT for a record to be developed because allegations have been raised which would support an IAC claim if true

- *Failure to investigate*
- *Failure to call defense witnesses*
- *Conceding guilt of the client to the media*
- *Involuntary GP induced by misrepresentations and improper promises*
- *Failure to consult with client prior to trial*
- *Failure to request PSI*
- *Representations prior to GP as to making parole*
- *Misrepresentations prior to GP—'if he took plea would be out in a year, if not life in prison'*
- *Failure to investigate competency*
- *Failure to investigate mental health issues.*