April 30, 2014

FOURTH AMENDMENT
SCOTUS
TRAFFIC STOP

Anonymous call, 'ran me off of the road' provided reasonable suspicion even when Cops see nothing

Prado Navarrette v. California, 4/22/14 Thomas. 911 caller described truck that ran her off road to a T, cops find truck exactly where it is supposed to be looking exactly as described. Truck driving fine when they see it, they stop it anyway and find oodles and oodles of dope. Fourth A allows for traffic stops when the totality of the circumstances show the content of the information is good stuff and that it is reliable. This 911 call bore adequate indicia of reliability: specific vehicle described, little time to fabricate incident, false tipster would think twice before using 911 system, nature of tip created reasonable suspicion of drunk driving, running another car off of the road suggests the kind of impairment that characterizes drunk driving, and finally the officer's failure to observe additional suspicious conduct during the short period that he followed the truck did not dispel the reasonable suspicion of drunk driving and the officer was not required to observe the truck for a longer period. Strong dissent (Scalia authored joined by Ginsburg, Sotomayor, and Kagan) –"Law enforcement agencies follow closely our judgments on matters such as this and they will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop. This is not my concept, and I am sure would not be the Framers', of a people secure from unreasonable searches and seizures. . . Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference."

FIFTH AMENDMENT REMORSE
SCOTUS
2254 WRIT

Absence of 'no inference' instruction did not result in an adjudication that was an unreasonable application of clearly established federal law

White v. Woodall, Scalia, 4/23/24, This is a federal death writ which means there are some hellish procedural hurdles. Not clear that the Fifth Amendment requires a no inference[1] at punishment although it is clear that such instruction is required at guilt innocence. A good discussion of procedural requisites of 2254[2]. (1) no opinion expressed on whether or not a punishment phase no inference instruction would be required on this issue if it were raised on a direct appeal rather than a 2254 writ –however it is important to note that the Supremes denied cert on that very issue (2) the privilege against self incrimination does apply at the penalty phase (3) not uncommon for a constitutional rule to apply differently at the penalty phase than the guilt innocence phase(4)*Mitchell*[3] leaves open the possibility that some inferences might be drawn from a defendants penalty phase silence (5) distinguished is things a state has to prove and other stuff such as lack of remorse. (6)*Estelle*[4] only held that defendants Fifth Amendment rights

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[1] *That you not hold it against a client he failed to testify.*

[2] *A federal post conviction writ.*

[3] Mitchell v. United States*, 526 U.S. 314 (1999) held that a no inference instruction is required at the guilt phase.*

[4] Estelle v. Smith*, 451 U.S. 454 (1981).*

were violated by admission of unwarned shrink report. This means Fifth Amendment protection is available at sentencing but does not specify the scope of that protection. (7) Based on the foregoing the scope of the right to Fifth Amendment protection is unclear and based on the procedural posture of the case applicant is not entitled to relief. Breyer dissent joined by Ginsburg and Sotomayor. A resounding yes that the law is well established that a defendant is entitled a no inference instruction at sentencing. Janet's thoughts, if this case does not scare you—it should. The concept that a prosecutor can comment on and a TCT or a jury can hold against your client his exercise of a Constitutional right essentially eradicates that right. I am guessing do not be fooled by the complicated procedural posture of this case. The Supremes had a chance to bite on this on cert but chose not to. It is, unfortunately a logical extension of the following case.

Right to remain silent, kind of

Salinas v. Texas SCOTUS 6/17/13, 5-4 . 133 S. Ct. 2174 (2013). Alito wrote the majority opinion Breyer authored the dissent. I did not like this case out of TCCA and I like it even less out of the Supremes. The client went to the police station to talk to the cops which he did just fine until they started talking about gun stuff and then he quit talking and started acting nervous. He had not been warned and was not in custody. The state used that as substantive evidence of his guilt at his JT despite the fact that he neither testified nor opened the door to that evidence. SCOTUS aff'd the TCCA because he did not expressly invoke his right to remain silent at the station and there was no allegation of involuntariness or coercion. Actually remaining silent does not invoke the right to remain silent. You have to say you are remaining silent[5] to have the right to remain silent. " A witness' constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim. A really scary concurrence by Thomas and Scalia would find that the Fifth Amendment does not protect against the prosecutors requesting adverse inferences from the jury when the accused fails to explain incriminating circumstances. Dissent (Breyer, Ginsburg, Sotomayor, Kagan) points out that this holding is inconsistent with *Miranda*[6] and that it would be reasonable for the police officers to infer when Salinas quit talking he was invoking his right to remain silent—especially since it coincided with the change of topic in the conversation from the weather to the shotgun. Salinas, not being a lawyer, should not be required to list the constitutional amendment by name. Practice note: raise the Texas Constitution in your motion to suppress and at the hearing on that motion. The Texas Constitution might offer greater protection now on this issue than the United States Constitution. Never concede the second prong, lack of coercion and voluntariness. Nothing happens voluntarily and without coercion when law enforcement is involved. If someone calls you and asks if they should go voluntarily to the station house to talk to cops, tell them no especially if you think they have any exposure at all. If someone really is free to leave they should leave. When telling the police that they do not wish to speak with them it appears that they should mention the Fifth Amendment by name and that they are relying on it not because they are guilty but because they love the Constitution. Hey, maybe even burst into song with *America the Beautiful* at this point. This is a horrible case and I do not think it can be good law forever because it discourages witnesses from talking to the police.

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[5] *Which means you are not actually remaining silent but rather talking. Go figure.*

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

RESTITUTION TO CRIME VICTIMS
SCOTUS INTERPRETATION OF FEDERAL STATUTE
Kiddie porn

Paroline v. United States, Kennedy. 4/22/14. Restitution is proper only to the extent that the defendant proximately caused the victims losses. Defendants should only have to pay for damage caused by their own conduct not that of others. The victim, was claiming a lot of damages such as lost wages, counseling, she had worked through the abuse and then found out that there were pictures of her being raped when she was a little girl all over the internet. She lived in fear of someone recognizing her from those pictures. The defendant only had two images and they did not know each other. He is only responsible for part of the harm done to her—not all of it. "a court should order restitution in an amount that comports with the defendant's relative role in the causal process underlying the victim's general losses." Janet's thoughts: I am thinking that will mean to divide up her damages and apportion it between the number of alleged viewers. Other factors will be the role the individual played was he just looking at the pictures or sending them to others.

TCCA
EVIDENCE/TRIAL PROCEDURE
TRE 606(b) Jury misconduct
Outside influences further defined

Colyer v. State, Cochran, unanimous, publish, 4/30/14. No. PD-0305-13, One of the jurors caved to the rest and voted guilty because in a hurry to go home sick daughter/bad weather. This is an appeal of a denial of a MNT and the TCT's decision is reviewed under an abuse of discretion standard. The purpose of TRE 606(b)[7] is to limit the role that jurors play in attacking the validity of the verdict. It (a) encourages them to candidly discuss the case (b) protects jurors from post trial harassment (c) promotes finality and (d) prevents tampering and fraud. Not allowed—is permitting "a disgruntled juror" to impeach a verdict. An outside influence is limited to what is outside the jury room and outside the juror's personal experience. Must be brought "improperly to bear". That does not include the juror's personal problems but would include if it had been the defendant's doc who called the juror instead of his daughters doc. The foregoing is connected to the issues at trial –the latter is not. Must intended to influence the verdict. Involves a "reasonable person " test not how it actually effected the juror in question.

TRE: AUTHENTICATION OF FOREIGN PUBLIC DOCUMENTS/RECORDS
TRE ARTICLE NINE

Bruton v. State, Keller , unanimous, 4/30/14, No. PD-1265-13, Keller, Documents (clients rap sheet with his priors from Great Britain) were not properly authenticated because not accompanied by a final certification from a diplomatic or consular official as specified in TRE 902(3)[8]. Discussed is the FEDERAL rule of evidence 902 and its interpretation found to be controlling. Seal not required, might be helpful. The final certification must vouch to the genuineness of the document and must be made by someone from the US consulate or such or reasonable cause for failing to do so must be shown—that a party is unable to do so despite diligent efforts to do so i.e. that country has no US employees that work there. The State's ignorance of the requirement of an evidentiary rule is not a valid excuse.

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[7] *TRE 606 COMPETENCY OF JUROR AS A WITNESS*
[8] *TRE 902 SELF AUTHENTICATION* ***(2) Foreign Public Documents***

TRIAL PROCEDURE
PROSECUTOR VIOLATED PRETRIAL ORDER

Francis v. State, Publish, 4/30/14, No. PD-0519-13, Price. Three and a half months prior to trial TCT signed a discovery order giving the defense a right to inspect all physical evidence, weapons. Day of trial defense counsel notices a machete at the prosecution table his interest is peaked. Tries to exclude it because it is the first time he sees it. To be excluded must be willfully excluded by the prosecution[9] which means a calculated effort to frustrate the defense[10]. TCT findings reviewable on an abuse of discretion standard. Deferred to TCT's finding no willful violation of the discovery statute. Notably in this case the defense counsel did not establish how is defense was prejudiced by the late opportunity to inspect the machete in question i.e. by turning down a favorable plea offer that they would have jumped on with both feet if they had known just how big that darn thing was. It is not evident how the tardy revelation of the machete's role in the State's case substantially impaired the appellant's actual defensive posture at trial or how it would have assisted his defensive posture had he known about it earlier. And he did not object that it should be excluded because its prejudicial effect outweighed its probative value. This is a pre 39.14 case but does not matter due to court's standard discovery order, also 39.14 only applies to exculpatory matters and this was not. Note: this case largely rises and falls on trial counsel not developing a good appellate record. What would you have done differently if the State had complied with the discovery order? Advised your guy to plead? Hired an expert? Done different investigation? Subpoenaed different witnesses? The sky is the limit, and do not forget the 6th and 14th Amendments while you are there.

EIGHTH AMENDMENT
CRUEL AND UNUSUAL PUNISHMENT
JUVENILE
LIFE WITH PAROLE JUST FINE DESPITE NO OPPORTUNITY TO PRESENT MITIGATING EVIDENCE

Lewis and Nolly v. State, NOS. PD-0833-13 and PD-0999-13, Johnson, Publish, 4/30/14. Consolidated appeals of two juveniles certified who received automatic life sentences without a punishment phase. The TCCA interprets the SCOTUS case of *Miller*[11] to state that *Miller* does not forbid mandatory sentencing schemes but just denying juveniles the possibility of parole. Individualized sentencing not required for children. Janet's thoughts—this case misinterprets *Miller* greatly. *Miller* does speak to the importance of individualized sentencing. Fortunately one of the best lawyers in the world—Jani Jo is filing a cert petititon.

Miller v. Alabama, SCOTUS, (June 25, 2012),(Kagan). 132 S. Ct. 2455; 183 L.Ed 2d 407 (2012). The Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders. The case contains extremely generous language on the harsh realities of life in prison and the importance of individualized sentencing.

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[9] *This appears to be absolutely impossible to do.*
[10] Oprean v. State*, 201 S. W. 3d 724, 728 (Tex. Crim. App. 2006).*
[11] Miller v. Alabama*, 132 S. Ct. 2455 (2012).*

SUBSEQUENT DEATH WRIT
ATKINS
8TH AMENDMENT

Ex parte Obie D. Weathers III, Per curiam, DNP, 4/30/14. Two concurrences. Price good discussion varying standards of proof on first and subsequent writs. Because *Atkins*[12] had been decided at the time of his first writ he must establish by clear and convincing evidence that no rational fact finder would fail to find him mentally retarded. If he had raised this in his first writ he would only have to establish by a preponderance of the evidence that he was retarded. Notably Price cited with approval the testimony of Dr. Murphey that individuals with mild retardation can commit crimes, adaptive strengths often coexist with adaptive deficits, and reminds us that in the writ context less deference is due to the TCT's findings. Alcala joined by Cochran (and actually I believe that Cochran actually wrote this concurrence) recited all of applicants strengths and the ugly facts of the offense to show he was not retarded.

REMAND LIST
THESE ARE ISSUES IN WHICH A WRIT HAS BEEN FILED, THE TCCA FEEL A CLAIM HAS BEEN STATED AND THE CASE IS REMANDED TO DEVELOP A RECORD IN THE TCT

- Advised as to incorrect punishment range
- Failure to convey plea offer
- Advising to plead guilty
- Waiving issues raised in pretrial suppression motion
- Waive right to concurrent sentences
- Waiver of right to appeal
- Failed to investigate and discuss possible defenses
- Failed to request an interpreter
- Failure to consult with client prior to pleading him
- Tricking him into pleading guilty
- Failure to investigate if priors were final when the ADA threatened to use them to enhance

[12] Atkins v. Virginia*, 536 U.S. 304 (2002) prohibiting the execution of the mentally disabled except in Texas where it has been interpreted into oblivion.*