May 7, 2014

SCOTUS
RESTITUTION
MORE ON FEDERAL RESTITUTION STATUTES

Robers v. State, Sotomayor, Ginsburg concurrence, 5-5-14. Fraudulent mortgage loan applications—federal offense. Returned collateral, the real estate market took a dive. Restitution is determined by the amount of money that the bank loaned out less the money they got back by selling collateral returned not the amount of money they should have gotten if the collateral had sold for the amount it was worth before the real estate market took a dive. Fraudulent "straw buyers" should assume that real estate markets fluctuate. It might be different if it could be shown that the bank was holding on to the property on purpose as opposed to trying to sell it or if the property was destroyed by some sort of natural disaster.

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SUMMARY JUDGMENT PROCEDURE
FOURTH AMENDMENT ISSUE
COPS SHOT KID DUE TO CLERICAL ERROR

Tolan v. Cotton, per curiam, 5/5/14, largely unremarkable procedural case. The cops thought car stolen-- it was not, did not listen when told car not stolen , started throwing the kids mom around and shot the kid when he objected and kid sustained some serious injuries ending a promising baseball career. Lawsuit excessive force which cops won a summary judgment on –this appeal and cert grant followed. [1] The only hope for humans out of this opinion is as the Alito concurrence points out, the Supremes are not an error correction court and maybe the Supremes actually care that the cops are shooting our children by assuming they have stolen cars when they have not. That hope is strengthened by the recitation of the facts in a way that suggests that they care and the granting of the cert and NACCP amici brief.

ERROR PRESERVATION
If a statute it is unconstitutional it is void, no need to preserve error in the TCT

Ex parte Donald Ray Chance, No. WR-81,136-01, Per curiam, Cochran concurrence, Keller dissent, publish, 5-7-14, Applicant was convicted of two counts of online solicitation of a minor, got time. Statute unconstitutional. Writ granted and convictions set aside. Cochran's concurrence (joined by Johnson and Alcala) is a beautiful discussion of when a statute is found unconstitutional : it is void from its inception and cannot provide a basis for any right or relief. "[A] person may always obtain relief from an indictment or a conviction based on a penal statute that has been previously declared unconstitutional. He may obtain relief in a pretrial motion or writ; he may obtain relief on direct appeal; he may obtain relief in a habeas corpus proceeding, and it matters not that he had ever previously objected to the statute or its application to him. The unconstitutional statute disappeared in a puff of smoke. No one can be convicted for a non-existent crime and no prior conviction based upon that unconstitutional statute is valid." The individual is "actually innocent" of any crime. Keller wrote a pretty scary dissent and she is joined by Keasler and Hervey. They would order briefing on whether maybe the statute was a little bit constitutional despite the recent holding in *ex parte Lo*, 424 W. W. 3d 10 (Tex. Crim.

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App. 2013). They are not buying this actually innocent because of void unconstitutional statute stuff.

EVIDENTIARY SUFFICIENCY
STATUTORY INTERPRETATION
MONEY LAUNDERING

God knows we can't be hiding our money because it is valuable and yes you can have too many cell phones

Acosta v. State, No. PD-1211-13, Cochran, unanimous, 5/7/14, publish. Appellant was convicted of money laundering after half a mil in cash was found concealed inside the speaker box of his tractor-trailer, he argued the evidence was legally insufficient[2] to prove that the money represented proceeds from the delivery of a controlled substance. TCCA finds that the cumulative force of the circumstantial evidence is sufficient to prove BRD that the cash was the proceeds of the sale of the controlled substance. To wit: five cell phones, passenger whose last name unknown without a driver's license traveling with him, driving too long in one sitting, drugs go north, money goes south and this truck was going south from north, broke eye contact with cop when asked if he was traveling with large sums of cash, 502,020 in a cavity behind the speakers of the truck, the yellow lab named "Woods" alerted on the money—must have dope dust on it, Woods had been to dope sniffing college for dogs and received a degree. Held: circumstantial evidence is as probative of guilt as direct evidence, the amount of the money is probative of guilt, law abiding folks just do not carry that kind of cash, packaging designed to fool dog is indicative of nexus between the drugs and the money, (vacuum sealed and in a secret compartment), does not matter no admissions, no drugs and no prior connection to drugs, appellant did not know his passenger's last name, broke eye contact with cop when asked about large sums of cash, had been in possession and control of rig for five months, log book should route to El Paso to Chicago and back which is a known drug route,[3] the place where the money was signs that it had been frequently accessed, no surprise when cash found, no legitimate explanation for the origin of the money[4], the five cell phones, and the fact that the appellant was chatting up the codefendant in court. Janet's thoughts: it is interesting that the bailiff testified against the client because he was talking to the codefendant in court. That is why I always tell my clients to not talk to the other defendants while bored in court. Yes, most of the time they get away with it but when it hurts them it really hurts them.

PROBATION REVOCATION

Rule against double counting, the length of the extension of probation is what determines the jurisdiction of the court to revoke probation not the end date that the TCT puts in the order

Whitson v. State, Publish, NO. PD-0514-13, 5/7/14, Johnson, Keller concurrence, Appellant asserted that the TCT lost jurisdiction of her case because her probationary period had expired at the time the MTR was filed. *Nesbit v. State*, 227 S. W. 3d 64 (Tex. Crim. App. 2007) is controlling. That case holds that because an order for community supervision takes effect on the date of its entry, the duration of this period includes this date and excludes the anniversary date on the final year. Due to this rule against, "double counting" days, "in essence . . . his probation

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[3] *Query is there any round trips that are NOT known drug routes?*

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turned into a pumpkin at the stroke of midnight" the day before the anniversary of his end date. The operative rule is that the duration of a time period during which a person suffers specified restrictions upon his freedom by virtue of either a sentence of imprisonment or community supervision includes the first day in which such restrictions upon freedom operate and excludes the anniversary date. *The same day cannot be double counted.* In this case, the order extending her probation specified an end date and the MTR was filed before that end date-- but that end date was wrong. The term of specified extension controlled over the end date in the order extending probation.[5] "[S]hould a TCT elect to provide a specific end-date in addition to the standard terms of years and months, this date must be correctly computed pursuant to *Nesbit.* TCT had no jurisdiction to revoke her probation because MTR filed one day after the correct end date.

APPELLATE STUFF
DNA
INTERLOCUTORY APPEALS

Whitfield v. State, NO. PD-0865-13, Publish, Womack, Price concurrence, Alcala concurrence, Courts of appeals have jurisdiction to hear appeals over unfavorable findings of the TCT from a convicted person's hearing on DNA testing—in this case the biggy finding—no reasonable probability that the appellant would not have been convicted had the results been available at trial. Jurisdiction would lie in intermediate appeals for non death cases and the TCCA for death cases. Our holding in *Holloway* disavowed. *State v. Holloway*, 360 S. W. 3d 480, 490 (Tex. Crim. App. 2012).

INTERLOCUTORY APPEALS 11.071 CASES

Alvarez v. State, No. AP-77,035, 5/7/14, DNP, Per Curiam. Subsequent death writ dismissed as abuse of the writ and while his federal habeas writ was pending he moved the federal district court to stay the proceeding so that he could present an unexhausted claim in state court. He filed for money for an investigator in the state court the TCT denied that motion stating that the TCT was without authority to permit same before the TCCA authorized the filing of a subsequent writ. Appellant filed a notice of appeal from the TCT's order. Appellant's appeal is not permitted and is dismissed.

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