

## **Court of Criminal Appeals Constitutional (Federal and State) Law Topics**

### ***Schlittler v. State***

No. PD-1505-14

Case Summary written by Katherine Mendiola, Articles Editor.

JUDGE ALCALA delivered the opinion of the Court.

Defendant, convicted for aggravated sexual assault of his stepdaughter, alleged a violation of the Fourteenth Amendment. The Defendant's sentence was enhanced when charged under a statute that penalizes contact with a victim of sexual assault. The Defendant argued it was a violation of his constitutional rights to due process and equal protection to be prohibited from contacting his biological son, who was not the actual victim of the crime.

Does the Improper Contact with a Victim Act, under Texas Penal Code Section 38.111, violate a Defendant's constitutional rights when applied to a family member who was not the victim of the crime?

The Court narrowed the inquiry to the Defendant's specific situation. Although the Defendant argued a broad interpretation of the statute, the Court analyzed the facts that a civil court order had been previously entered that modified the parent-child relationship with the Defendant's son. The civil court order permanently enjoined the Defendant from further contact with his son. Therefore, there was no violation of due process because there was no protected liberty interest. Further, there was no violation of his equal protection rights because the statute was neutral in its classification and application. Because it did not discriminate against a particular classification, strict scrutiny did not apply and the statute was rationally related to a legitimate government interest, therefore, the Court rejected Defendant's constitutional challenge and affirmed the judgment of the Court of Appeals.

### ***Ex Parte Irving Magana Garcia***

NO. WR-83,681-01

Case Summary written by Emily Shanks, Staff Member.

JUDGE KELLER filed a concurring opinion, in which JUDGE KEASLER and JUDGE HERVEY joined.

Irving Magana Garcia raised a claim for ineffective assistance of counsel pro se after his counsel represented him through his trial, a motion for a new trial, and on a petition for discretionary review. The concurrence disagreed with the allegations that a pro se applicant's claim for ineffective assistance of counsel on habeas review almost always fails because a pro se applicant is usually unaware of the legal standard and evidentiary requirements necessary to establish his or her claim. The Judges reasoned that this allegation was wrong because the court always construes pro se applications liberally, and most habeas claims fail solely because they lack merit. The court further explained that counties in Texas must implement objective standards for appointing counsel and pointed out that Texas implemented a number of procedures to better ensure effective assistance of counsel. For example, Texas expanded the number of public defender offices, established mental-health and appellate specific defender offices, established regional offices for rural areas, implemented mentoring programs for young lawyers, and provided caseload guidelines for attorneys. The court concluded that the system for pro se habeas applications did not fail the applicant in this case because he received effective assistance of counsel.

JUDGE ALCALA filed a dissenting opinion, in which JUDGE JOHNSON joined.

The dissent concluded that the Texas system for addressing claims of ineffective assistance of counsel is flawed. The dissent opposed the concurrence due to the dissent's view that an ineffective assistance of counsel claim brought by a pro se litigant does almost always fail because pro se applicants are usually unaware of the legal standard for presenting his or her claim. The dissent explained that Irving Magana Garcia's claim of ineffective counsel made this failure clear because he alleged that his counsel was ineffective, yet "his pro se pleadings [were] inadequate to raise any colorable ineffective-assistance claim." Therefore, the applicant's "nonsensical" application in this case "reflect[ed] a fundamental misunderstanding of the nature of habeas corpus as a vehicle for raising claims pertaining to the ineffective assistance of trial counsel." The dissent believes that Irving Magana

Garcia's claim should not have been denied, but rather the court should have granted leave to amend the application because evidence pointed to the possibility of a colorable claim.

In its reasoning, the dissent concluded that Texas's current system for raising ineffective-assistance of counsel claims fails to provide a meaningful opportunity for indigent defendants to raise this type of claim. The dissent reasoned that Texas's current system for raising ineffective-assistance of counsel claims is insufficient for pro se litigants by pointing out that the legal standard set out in *Strickland v. Washington* for claiming ineffective assistance of counsel is high and cannot be met by most pro se applicants, and by showing that this means many ineffective counsel claims are unaddressed, violating Sixth Amendment rights. The dissent suggested that the approaches taken by other jurisdictions in evaluating ineffective counsel claims highlight important considerations that Texas should consider, and that Texas should look to federal cases as guidance for ensuring no defendant loses his or her Sixth Amendment rights. Additionally, the dissent argued that federal courts now evaluate state ineffectiveness of counsel claims without any deference to the Texas criminal court's decisions about state court cases as a result of the Court of Criminal Appeals' inaction in the area of pro se ineffective assistance of trial claims.

***Ex Parte Justin Todd Valdez***

No. WR-82,807-01

Case Summary written by Logan Smith, Staff Member.

JUDGE NEWELL delivered the opinion of the Court, in which JUDGE KELLER, JUDGE MEYERS, JUDGE KEASLER, JUDGE HERVEY, JUDGE ALCALA, JUDGE RICHARDSON and JUDGE YEARY joined.

The State of Texas indicted the Applicant on charges of misdemeanor assault and placed Applicant on community supervision. Applicant appealed that conviction, and the court of appeals affirmed. This court granted Applicant two extensions of time to file a petition for discretionary review (PDR), but he failed to do so. Mandate was issued on January 15, 2015.

Applicant's Counsel filed an application for an original writ of habeas corpus in this court contending that the Applicant is entitled to an out-of-time PDR because Counsel mistakenly believed the PDR was

not due until a later date, thus failing to timely file. Counsel further contends an original writ of habeas corpus from this court is the appropriate mechanism for obtaining an out-of-time PDR because a “misdemeanor trial judge does not have authority to order the Court of Criminal Appeals to permit the filing of an out-of-time PDR.”

**Issue:** Whether an original writ of habeas corpus in this Court is the proper avenue for seeking an out-of-time petition for discretionary review from a judgment imposing community supervision?

The Court of Criminal Appeals abstained from exercising its original habeas jurisdiction and dismissed the application. Here, Applicant sought relief in this court by virtue of a “Constitutional writ” rather than invoking the Court’s appellate jurisdiction via PDR from a writ application filed with the trial court and taken through the usual appellate process. This is not the type of circumstance calling for this court’s exercise of its original habeas corpus jurisdiction.

As previously explained in *Ex parte Lambert*, the court will abstain from exercising its original habeas jurisdiction except in extraordinary circumstances. The court is of the opinion that this is a matter over which district judges are authorized to entertain jurisdiction and grant the writ of habeas corpus. Although this court does have the authority to exercise its power to grant an original writ of habeas corpus, it will not spend its time issuing and trying indiscriminately all cases of habeas corpus.

Under the rule in *Lambert*, this court will accept a “Constitutional writ” application as an original matter only in extraordinary circumstances. The applicant, like the Defendant in this case, must first seek appropriate relief at the proper trial-level court. The refusal of an appropriate trial-level court to issue a writ after presented with a colorable claim will generally constitute an extraordinary circumstance. Moreover, the court of conviction is ordinarily the appropriate court in which to first seek relief. If a trial-level court issues the writ, but denies relief, then the applicant’s remedy is an appeal from that determination, not an original writ with this court.

Furthermore, the court rejected Counsel’s argument that a misdemeanor trial judge lacks the authority to order the court to permit the filing of an out-of-time PDR. Rather, a trial court that otherwise had habeas authority, does have the power to grant an out-of-time PDR. The applicant will ordinarily have to introduce additional evidence, not

contained in the trial or appellate record of the case, explaining why an appeal a PDR was not timely filed, and the habeas court will have to pass on the credibility of such evidence. Here, for example, Defendant seeks an out-of-time PDR based on an affidavit claiming his attorney was mistaken about the filing deadline. The trial-level court is generally the most appropriate place to receive evidence and to resolve fact issues, such as in this case.

Moreover, what Counsel characterizes as a trial judge's authority "to order the Court of Criminal Appeals to permit the filing of an out-of-time PDR" does not actually order the court to do anything. Rather, it merely resets the applicable appellate timetable.

Before seeking relief on a "Constitutional writ" in this court, applicants must first seek relief at the trial level and avail themselves of any appellate remedy. Applicant did not do so in this case and as a result his application for habeas corpus relief is dismissed, so that Applicant may seek relief at the trial level.

JUDGE KELLER filed a concurring opinion in which JUDGE KEASLER, JUDGE HERVEY, and JUDGE YEARY joined.

The court is correct in its opinion, but Judge Keller writes separately to address whether Article 11.072 of the Texas Rules of Criminal Procedure is an available remedy for a claim seeking an out-of-time PDR from a judgment imposing community supervision. It is not. Article 11.072, § 2(b) excludes a request for an out-of-time PDR from Article 11.072 because such a request does not challenge the legal validity of the conviction, or order, which imposed community supervision. Therefore, Article 11.072 is not an available vehicle for requesting an out-of-time PDR in Applicant's case. Instead, the appropriate remedy for Applicant is to file a "Constitutional writ" application in the trial court. If the trial court grants relief, then the applicant gets to file his out-of-time PDR. If the trial court considers the application, but denies relief, then the applicant could appeal that denial to the court of appeals. Finally, if the trial court refuses to consider the application, and the applicant filed with the trial court that imposed his community supervision, then he could file a "Constitutional writ" with this court.

JUDGE RICHARDSON filed a concurring opinion.

The court was correct to dismiss the Applicant's original writ application because the Applicant should have filed his writ application with the trial court. The majority states "[w]hen an application does not fall within one of the provisions relating to a certain type of judgment, order, or proceeding, a habeas corpus remedy may nevertheless be available under the Texas Constitution and Article 11.05." However, the majority does not address whether Applicant's writ application is one that *does* fall within one of the statutory provisions. Applicant's claim for relief in the form of an out-of-time PDR falls under Article 11.072, not the general constitutional provisions under Article 11.05. Just as Article 11.07 is the proper vehicle to request an out-of-time appeal or PDR when the applicant was sentenced to confinement, Article 11.072 is the proper vehicle through which to seek an out-of-time appeal or PDR from a judgment or order imposing community supervision. The majority is correct that a trial-level judge has the authority to grant an out-of-time appeal or PDR.

JUDGE JOHNSON filed a dissenting opinion.

The court was correct to state Article V of the Texas Constitution "confers power on this Court to issue writs of habeas corpus '[s]ubject to such regulations as may be prescribed by law.'" It then cites to Article 11.05 of the Texas Code of Criminal Procedure as the source of the authority of various courts to issue the writ of habeas corpus as may be prescribed by law. However, it skips over Article 11.01, "What Writ Is." The writ described in 11.01 is no longer "returnable to any county in the State," and thus, after an indictment or information is filed, Articles 11.08 and 11.09 control which county a writ is returnable. Nowhere in the statutes is there an indication the legislature intended the trial courts, of any description, to have the authority to grant relief on a writ of habeas corpus seeking relief from administrative rules or regulations. In this case, Applicant seeks allowance to file an untimely PDR, even though the Rules of Appellate Procedure do not allow him to do so. The Rules applicable are not regulations, but are rules, which this court has written as a means to manage its docket. Trial courts may issue and grant writs of habeas corpus that are created and governed by statutes, but trial courts may not do so if the cause is created and governed by rule. The court's holding permits the trial court to interfere with the management of this court's docket.

***Ex parte Julius Jerome Murphy***

No. 97-F-462-102

Case Summary written by Jennifer Wallace, Staff Member.

PER CURIAM.

In August 1998, a jury found Julius Jerome Murphy guilty of capital murder and subsequently sentenced him to death. On direct appeal, the Court of Criminal Appeals affirmed his conviction and sentence in May 2000. In April 2002, the Court of Criminal Appeals denied relief on Murphy's initial post-conviction application of a writ of habeas corpus. On January 17, 2006, Murphy filed in the trial court a subsequent application for a writ of habeas corpus, asserting that his intellectual disability exempted him from execution. The Court of Criminal Appeals remanded the issue to the trial court. The trial court denied relief, and the Court of Criminal Appeals agreed in November 2014.

On September 24, 2015, Murphy filed a second subsequent application in the trial court, asserting that

(1) the district attorney's office failed to disclose threats of prosecution and promises of leniency to the State's two main witnesses as required by *Brady v. Maryland*, 379 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972); (2) the State unknowingly presented false testimony through one of these witnesses in violation of *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009); and (3) evolving standards of decency dictate that the death penalty is no longer constitutional.

Issue: Did Murphy's above-referenced claims, if any, satisfy the requirements for Article 11.071 § 5?

The Court of Criminal Appeals stayed Murphy's execution on October 12, 2015, and upon review of Murphy's subsequent application for a writ of habeas corpus, the court held that Murphy's first and second claims satisfy the requirements for Article 11.071 § 5. The court remanded the first two claims to the trial court for resolution on June 15, 2016.

JUDGE ALCALA filed a concurring and dissenting opinion.

Judge Alcala concurred in the court's remand order, but dissented with respect to the scope of the matters to be addressed on remand. Judge Alcala argued she would not limit the scope of the remand hearing to the alleged *Brady* and due process violations, but rather she would authorize the trial court to address the remaining constitutional issues. Murphy asserted that society's prevailing standards of decency compel the conclusion that the death penalty is unconstitutional as it is so disproportionate as to be cruel and unusual punishment in violation of the Eighth Amendment. Murphy further argued against the constitutionality of the death penalty, asserting that: (1) the death penalty is arbitrarily imposed by race, so as to disproportionately affect minorities; and (2) the death penalty scheme is plagued by excessive delays, resulting in cruel and unusual punishment as offenders are placed in solitary confinement during the delay. Judge Alcala concluded that Murphy presented adequate specific facts to support these arguments as to warrant further factual development in the habeas court.

***Stevenson v. State***

No. PD-0122-15

Case Summary written by Emily Brown, Staff Member.

JUDGE KEASLER delivered the unanimous opinion of the Court.

The defendant, Eric Stevenson, was convicted by a jury of three counts of violating a sexually violent predator civil-commitment order. Stevenson argued on appeal that the trial court lacked jurisdiction over his case, that the judge erred in denying his motions to quash and for a directed verdict and in failing to admit certain evidence, and that double jeopardy barred his triple conviction. The Second Court of Appeals upheld all three of the convictions.

In Texas, once a person has been found by a civil trial to be a "sexually violent predator," a judge must impose a civil-commitment order and commit the person to outpatient treatment and supervision. This order is effective immediately and stays in effect until the person's behavior abnormalities change so significantly that the person is no longer likely to commit a predatory act of sexual violence. Certain requirements are followed to ensure the person's compliance with this



treatment and supervision. These are to be imposed by a judge, and failure to comply with the requirements under § 841.082 of the Texas Health and Safety Code constitutes a third-degree felony.

Eric Stevenson's convictions for burglary of a habitation with the intent to commit sexual assault and sexual assault of a child under 17 years of age are sexually violent offenses, and he was determined to be a sexually violent predator. The judge issued a final judgment and ordered civil commitment for treatment and supervision; Stevenson was required to live at a designated facility, participate in and comply with the provided treatment, submit to GPS tracking and monitoring and to not tamper with the device, obtain permission to leave his residence, and not have contact with family or friends unless approved by a case manager or treatment provider. Stevenson appealed this judgment, and violated the civil-commitment order while the appeal was pending. Stevenson went to his girlfriend's house without permission, removed the GPS device and left the facility without permission, and failed to make progress in the treatment program. The State subsequently charged him with three counts of violating the civil-commitment order. A jury found him guilty on all three counts, and assessed punishment at seventeen years confinement and a \$5,000 fine on each count. After this conviction, the court of appeals affirmed the trial court's judgment on the sexually violent predator determination and civil-commitment order.

#### Issues before the Court of Criminal Appeals of Texas:

1. Did the trial court lack jurisdiction over the civil-commitment order violation?
2. Was the evidence legally sufficient to support Stevenson's convictions?
3. Were the three convictions the same offense for the purposes of double jeopardy?
4. Did the trial judge err by denying Stevenson's motion to quash and by excluding evidence that the civil-commitment order was not final?

First, the court understood Stevenson's jurisdictional argument to ask the court to stay any enforcement of a civil-commitment order until the order is affirmed or reversed on appeal-this was not required by the court and it subsequently refused to do so. The court argued that the

statute does not require any specific pleadings to invoke the district court's jurisdiction because the statute classifies the offense as a third-degree felony, which automatically falls under its jurisdiction. The court held Rule 25.2(g) of the Rules of Appellate Procedure and the *Tamez v. State* case to be inapplicable to the instant case, both of which were relied on by the defendant.

Second, the court refused to extend the holding of *Jordan v. State* to the defendant's case, and also held that the legislature's intent directly contradicted his position that the evidence was legally insufficient to support his convictions. The court held that the State is not required to show a final adjudication; here, this would mean that a judge has ordered that a person be civilly committed. The State had already demonstrated that Stevenson had violated the terms of his order by leaving the facility without permission and tampering with the GPS device, and the court concluded that there was sufficient evidence for a rational jury to conclude that Stevenson had violated the civil-commitment order.

Third, the court addressed Stevenson's double jeopardy argument. Double jeopardy prohibits a second trial after the accused has already been convicted or acquitted of a crime and forbids multiple punishments for the same offense in a single prosecution. The court held that a civil-commitment order violation is a circumstances-surrounding-the-conduct crime, and that the forbidden act in question is a violation of the order. The very fact that the person has been adjudicated a sexually violent predator resulting in a civil-commitment order is what renders otherwise innocent conduct criminal. Therefore, the focus is on the circumstances that exist rather than the different acts that the defendant might commit under those circumstances. As such, Stevenson's additional judgments, the court concluded, should be vacated because the statute created a single offense for violating the order, not separate, punishable offenses for each alleged way that violations occurred. The court vacated counts one and three of Stevenson's convictions on the basis that they violated Stevenson's double jeopardy right against multiple punishments.

Fourth, the court concluded that Stevenson's failure to properly set out the issues raised from the court of appeals' decision in his briefs rendered his argument inefficient. The brief did not cite to any authority or facts to explain how the court of appeals' decision was

incorrectly made, and did not provide clear and concise arguments. Thus, the court dismissed his contention that the trial judge erred by denying his motion to quash and by excluding evidence.

The court concluded that the court of appeals' decision should be affirmed, with the exception of its holding on Stevenson's double jeopardy claim. The court vacated Stevenson's convictions on counts one and three as provided in the indictment.

### ***Ex Parte Golmon***

No. A-16,351-B

Case Summary written by Jessica Robertson, Staff Member.

The application for writ of habeas corpus is dismissed without written order. JUDGE ALCALA concurring, in which JUDGE JOHNSON joined.

The court correctly dismissed the applicant's claim of ineffective assistance of counsel for a failure to comply with the requirements of the Code of Criminal Procedure Article 11.07, Section 4. However, the court should amend the 11.07 habeas application form to expressly state that "any claims not raised in the initial habeas application will in all likelihood be statutorily barred in future habeas proceedings."

The bar of section four is so high that applicants may lose a claim, even if it would have entitled the applicant to relief, if the applicant fails to raise the claim in the initial habeas application. Further, most applicants at the time of the initial proceeding are *pro se*. This status affects most applicants in two ways. First, applicants are unable to prepare and present claims due to their lack of legal knowledge. Second, applicants are at risk for forfeiting potentially meritorious claims because they are usually unaware of the statutory bar on subsequent writs that are not presented in the initial habeas proceeding.

Habeas courts appointing counsel to appropriate indigent applicants may solve these types of issues. Because the applicant in this case was unrepresented at the initial hearing, the applicant states that he was not aware that the ineffective assistance of counsel claim could be raised at that time. The applicant's claim is dismissed under section four based on his failure to show that either the factual or legal basis for the claim was unavailable at the date of the initial application, or that, "but for a violation of the United States Constitution, no rational juror could have found him guilty beyond a reasonable doubt."

Accordingly, the court should add language at the end of current mandatory form for non-death habeas applications stating, “YOU ARE ADMONISHED THAT ALL OF YOUR CLAIMS MUST BE INCLUDED IN THIS APPLICATION BECAUSE, DUE TO STRICT PROCEDURAL REQUIREMENTS, SUBSEQUENT APPLICATIONS ARE RARELY CONSIDERED ON THEIR SUBSTANTIVE MERITS.” This language would reduce the procedural risks that applicants, as in the case at hand, face in presenting claims in subsequent writs.

***Ex parte Harvin***

No. WR-72,328-03

Case Summary written by Shelby Broaddus, Staff Member.

PRESIDING JUDGE KELLER delivered the opinion of the court, in which JUDGE KEASLER, JUDGE RICHARDSON, JUDGE YEARY, and JUDGE NEWELL joined.

Clifton Harvin (Harvin) was indicted for aggravated sexual assault of his daughter, A.H. After Harvin hired attorney Patrick Morris (Morris), Morris told the District Attorney that Harvin would agree to plea nolo contendere in exchange for ten years probation. The District Attorney accepted this plea, and placed Harvin on ten years of deferred adjudication. Harvin stated in the plea proceeding that he was satisfied with his counsel.

The State later filed motions to revoke Harvin’s deferred adjudication because he was found to be in possession of controlled substances. In this proceeding, Jack McGaughey (McGaughey) represented the State, and William Walsh (Walsh) represented Harvin. Harvin claimed that he attempted to obtain representation from the State’s attorney McGaughey eight years prior, when he was to take a polygraph test. Harvin maintained that he discussed the facts of the case and paid McGaughey to represent him, but McGaughey failed to enter an appearance on his behalf. McGaughey denied such promise and acceptance of payment to represent Harvin. It was concluded that Harvin’s complaint regarding McGaughey was untimely, and therefore had not been preserved. The trial court further determined that revocation of Harvin’s probation was appropriate. Harvin’s counsel, Walsh, asked the court for a continuance for Harvin’s punishment hearing because he did not have witnesses. Despite being granted the

continuance, Walsh failed to produce witnesses at the punishment hearing and instead attacked the original plea of nolo contendere. Harvin thereafter received a punishment of sixty years in prison.

At a habeas hearing in 2010, Harvin's daughter A.H. testified that her prior allegations of sexual assault were false, and it was her brother who had assaulted her. Also during the 2010 habeas hearing, Harvin maintained his innocence. Harvin claimed that his plea attorney, Morris, rendered ineffective assistance of counsel because Morris rarely spoke with him, never contacted witnesses, and threatened to quit if Harvin forced him to take the case to trial. Harvin also stated that Morris and the trial judge failed to tell him that a plea of nolo contendere has the same effect in criminal cases as guilty pleas.

Harvin also claimed that his adjudication attorney, Walsh, was ineffective for failing to complain that the opposing attorney, McGaughey, had a conflict of interest. Further, Harvin maintained that Walsh was ineffective for failing to file a motion to recuse Judge Towery at the adjudication and sentencing hearings.

Harvin further claimed prosecutorial misconduct by stating that the prosecutor failed to reveal recantations before his plea of nolo contendere. Additionally, he claimed that the prosecutor engaged in misconduct by failing to correct known false testimony in order to coerce an unwilling plea of nolo contendere. Harvin also claimed judge bias and law enforcement misconduct because the sherriff failed to take A.H. to the hospital following the allegation, and that the sheriff's report failed to mention facts pertinent to the case.

ISSUE: Did Harvin's claims, such as his innocence, ineffective assistance of counsel, prosecutorial and law enforcement misconduct, and trial judge bias, have merit?

The Court of Criminal Appeals held that none of Harvin's claims had merit. The court first determined that Harvin failed to demonstrate his claim of innocence. Harvin must have produced newly discovered or newly available evidence that unquestionably established his innocence. Further, Harvin was to demonstrate by clear and convincing evidence that no reasonable jury could have found him guilty in light of such evidence. The court found that the evidence presented by Harvin was not newly discovered. Additionally, the court determined that A.H.'s recantations were not credible. The court questioned the credibility of A.H.'s recantation on Harvin's personal

recorded tape because her statement was made in the presence of a priest who could have appeared to align with Harvin, and there was no other individual present that could have counteracted the pressure exerted by Harvin's presence during the recording. Medical evidence of A.H. also indicated sexual assault. The court additionally doubted A.H.'s claim that her brother, rather than father, molested her because she was still residing with her brother, and in her original recantation she said no one molested her.

The court next determined that Harvin's plea counsel, Morris, did not render ineffective assistance of counsel. In order to succeed on an ineffective assistance of counsel claim, a convicted person must have demonstrated that counsel's performance was deficient and that this deficient performance prejudiced the defense. The district attorney stated that he could not recall an occasion when Morris did not review the case files. Further, Morris's testimony about his habits and customs indicated that he investigated all witnesses and met with Harvin to discuss the case. Moreover, the court reasoned that Harvin testified in the plea proceeding that he was "very satisfied" with his counsel. The court also found that Morris's subsequent disbarment occurred years later, and did not indicate ineffective assistance in Harvin's case.

The court held that Harvin's adjudication counsel, Walsh, also did not render ineffective assistance of counsel. The court determined that because no client-attorney relationship existed between Harvin and McGaughey, there was no conflict of interest for Walsh to complain about. Additionally, the court said that because there was nothing in Judge Towery's conduct that revealed a high degree of favoritism or antagonism, Walsh was not ineffective for failing to ask the judge to recuse himself.

The court found that there was no prosecutorial misconduct because the other recantation evidence was at best impeachment evidence, which the State is not required to reveal prior to a plea. The court held that trial judge was not biased, and further held that there was no law enforcement misconduct because police officers are not required to unearth every fact or piece of evidence relevant to the case.

The court ultimately denied relief, holding that none of Harvin's claims were credible.

JUDGE ALCALA delivered a concurring opinion.

Judge Alcalá indicated that this case was a “close call.” Judge Alcalá determined that Harvin failed to show that he would not have pleaded to the offense had he known of A.H.’s recantation at that time. Further, Judge Alcalá held that Harvin’s claims of ineffective assistance of counsel failed because there was no showing that he was prejudiced by his representation because he received a favorable plea agreement. It was determined that Harvin’s claim of innocence lacked merit because the evidence presented was probative.

Judge Alcalá agreed with the majority that polygraph testing results are not admissible standing alone, but disagreed that these polygraph results may never be considered in any form of post-conviction habeas proceeding because case law and statutes indicate that polygraph evidence is considered reliable in the treatment of sex offenders.

**JUDGE MEYERS** filed a dissenting opinion.

Judge Meyers contended that the majority is preventing the “wheels of justice from legitimately turning.” Judge Meyers maintained that Harvin had almost no representation, and the errors made by the attorneys and the judge in this case plagued the entire process. Judge Meyers stated that neither the affidavit nor testimony of Morris supports a finding that he investigated all evidence and witnesses, allowed Harvin to decide his plea, and visited with Harvin about witnesses or evidence. Judge Meyers also reasoned that Morris’s habits and customs testimony should have been viewed with skepticism. Further, Judge Meyers stated that the record did not indicate that Morris explained the effect of a no contest plea.

Additionally, Judge Meyers indicated that the sheriff’s report stated that McGaughey was Harvin’s attorney; therefore, there was attorney client privilege. Judge Meyers held there was a reasonable probability that this conflict of interest was prejudicial to Harvin and adversely affected the outcome of his adjudication and punishment hearings. Moreover, Judge Meyers believed that the recantation tape of A.H. at a church was credible. Judge Meyers maintained there was no evidence on the record to indicate that Morris gave advice to Harvin on the ramifications of a plea of nolo contendere, but it was clear on the record that Harvin adamantly denied his guilt. Judge Meyers therefore determined that Morris rendered ineffective assistance.

Judge Meyers ultimately maintained that the majority failed to give Harvin the relief he deserved.

***Ex Parte Stanley Renard Tilley Sr.***

No. WR-95,129-02

Case Summary written by Emily Shanks, Staff Member.

**PER CURIAM.**

Defendant, was convicted of capital murder and was given a sentence of life without the chance of parole. The defendant applied for a writ of habeas corpus to this Court claiming that his trial counsel amounted to ineffective assistance of counsel because his trial counsel failed to provide forensic expert testimony that the eyewitness testimony in the case may have contradicted the physical evidence.

In a per curiam opinion, the court determined that the defendant alleged facts that would entitle him to relief if the facts were found to be sufficient. However, the court noted that additional facts were needed.

The court acknowledged that the trial court remains the correct forum for findings of fact and delegated the defendant's ineffective assistance of counsel claim to make findings of fact and conclusions of law as to whether the defendant's trial counsel prejudiced the defendant, equating to ineffective assistance of counsel. The court mandated that if the trial court elected to hold a hearing on the matter, then it should then determine whether the applicant was indigent and needed court appointed counsel for the hearing.

The court also delegated that the trial court was to order the defendant's trial counsel to respond to the defendant's claim of ineffective assistance of counsel.

**JUDGE ALCALA** filed a concurring and dissenting opinion, in which **JUDGE JOHNSON** joined.

Judges Alcala and Johnson concurred with the per curiam opinion that the claim for ineffective counsel should be remanded for further fact development and dissented with the per curiam opinion for its refusal to require the trial court to appoint counsel for the defendant who asserted his habeas application pro se, but rather only required the trial court to appoint counsel if it deemed it necessary for a hearing.



This opinion took the position that the court's refusal to consider appointment of counsel for an indigent pro se habeas applicant causes a significant problem. In particular, the indigent defendants who are sentenced to life in prison without parole and who have received ineffective assistance of counsel have no reasonable vehicle by which to present their ineffective assistance of counsel claims; thus, increasing the chances of violation of that defendant's Sixth Amendment rights.

The opinion suggested that the court could solve this problem by ordering the appointment of counsel in every case involving an indigent defendant who alleged ineffective assistance of counsel and who has been sentenced for life without parole. Further, this opinion suggests that this court should always hold that a habeas court abuses its discretion when it fails to appoint habeas counsel for the defendant.

***Aaron Jacob Moore v. State***

No. PD-1634-14

Case Summary Written by J. Ernesto Flores, Staff Member.

PER CURIAM. JUDGE KELLER, and JUDGE KEASLER, and JUDGE NEWELL, concurred.

Aaron Jacob Moore, Appellant (Moore), was charged with aggravated assault of a child, after his 12-year-old cousin reported to her mother that Moore had been sexually assaulting her for several years prior to the outcry. At the time of the offense, and the start of the investigation, Moore was 16-years-old. However, due to the heavy caseload of the investigating detective, it took the investigating detective almost two years to forward the case to the district attorney's office. Over a year after they received the report, the State filed a petition for discretionary transfer of the case from juvenile court to criminal district court. The juvenile court, found that in accordance with Family Code Section 54(j)(4)(A), it would waive its jurisdiction and transfer the case to criminal district court. The Juvenile court reasoned the State had shown that "for a reason beyond the control of the State it was not practicable to proceed in juvenile court before [Moore's] 18<sup>th</sup> birthday, waiving its jurisdiction and transferring the case. At age 19, Moore plead guilty to Aggravated Sexual Assault of a Child.

Moore appealed, arguing the juvenile court improperly transferred the case because the State did not meet its burden in showing for reasons beyond their control, it was not practicable to proceed in juvenile court. The appellate court agreed, determining that for purposes of Family Code Section 54(j)(4)(A) the phrase, “the State,” referred to both law enforcement and the prosecution. The court held that the State’s failure to meet the burden set in Section 54(j)(4)(A), deprived the juvenile court of jurisdiction to transfer the case and thus barring jurisdiction of criminal district court. Due to this lack of jurisdiction and the requirements of Section 54(j)(4)(A), the Court of Appeals dismissed the case with prejudice.

ISSUE: Under Family Code § 54(j)(4)(A) what is the scope of “the State,” and what is the constitutionality of the requirement for dismissal with prejudice

The Court of Criminal Appeals, focused its opinion on those two main issues: Determining the scope of “the State” for purposes of Section 54(j)(4)(A), and determining the constitutionality of the, because it encroaches on the Separation of Powers Clause, and the duties of the district attorney to prosecute a criminal case.

In defining the interpretation of the phrase “the State,” the court affirmed, and determined the phrase includes both law enforcement and the prosecution. The court adds that it has applied similar meanings in the context of Brady violations, and right to speedy trial.

In determining the constitutionality of the requirement for dismissal, the State argued previous attempts by the legislature require dismissal if prosecutorial action was delays, have been found to violate the Separation of Powers Clause in the Texas Constitution. In *Meshell v. State*, 739 S.W.2d 246 (Tex. Crim. App. 1987) the court found a statute that required the prosecutor to be ready for trial within 120 days violated the Separation of Powers Clause because it interfered with the prosecutor’s ability to prepared for trial. The court, however, distinguished the Legislature’s inadequate attempt to codify the constitutional right to a speedy trial, with Family Code Section 54(j)(4)(A). The court held that this statute does not impose an arbitrary deadline for prosecutorial action, rather it provides a juvenile court with limited authority to waive its jurisdiction and transfer a person who is 18 or older to a district court if certain criteria are met. The court reasoned that the statute was meant to limit the prosecution

of an adult for an act he committed as a juvenile, if his case could reasonably have been dealt with when he was still a juvenile.

Finally, the court concluded that the juvenile court improperly transferred the case to the criminal district court, because the state failed to meet their burden in showing that “for a reason beyond the State’s control, it was not practicable to proceed in juvenile court before [the defendant’s] 18<sup>th</sup> birthday.” Failure to meet this burden left the juvenile court no option other than to dismiss the case.

***Ex Parte David Ray Lea***

No. WR-82,867-01

Case Summary written by Gregory Cotton, Staff Member.

JUDGE HERVEY delivered the opinion of the Court, in which JUDGES KELLER, MEYERS, JOHNSON, KEASLER, ALCALA, RICHARDSON, and NEWELL joined. JUDGE YEARY filed a dissenting opinion.

In 2008, David Ray Lea pled guilty to three counts of possession of child pornography and was convicted and sentenced. In 2012, while Lea was out on probation, he pled guilty and was convicted for one count of improper visual photography or visual recording. Based upon this conviction, Lea’s probation was revoked, and he was sentenced to six years’ imprisonment.

In 2014, the Texas Court of Criminal Appeals found that the offense of improper photography was unconstitutional because it was overbroad and impermissibly infringed upon protected First Amendment speech. Based upon that holding, Lea filed two post-conviction writs of habeas corpus to vacate his conviction and to have his probation reinstated. The lower habeas court recommended that relief be granted to Lea because the statute has been voided.

Issue: Whether probation may be reinstated when the law that authorized a conviction is found to be void?

The Court noted that when a person is convicted under a statute that is later held to be unconstitutional on its face, then the conviction must be overturned and the person is entitled to relief. The unconstitutional statute must be treated as if it never existed, and so any harms that may occurred must thus be remedied.

The Court held that Lea was entitled to relief and that the order revoking his probation was to be set aside.

JUDGE YEARY, dissenting.

Judge Yeary dissented. He argued an applicant should be entitled to retroactive collateral relief based upon an overbroad statute, unless the applicant can show that his conduct was not within the legitimate sweep of the overbroad statute. Similarly, Judge Yeary argued an otherwise valid revocation should not be set aside simply because the conviction was based upon an overbroad statute.

***Love v. State***

No. AP-77,024

Case Summary written by Kate Foley, Staff Member.

JUSTICE YEARY delivered the opinion of the Court, in which CHIEF JUSTICE JOHNSON, JUSTICE KEASLER, JUSTICE ALCALA, JUSTICE RICHARDSON, and JUSTICE HERVEY joined.

A jury convicted Appellant Love of capital murder for two murders committed in 2011 and sentenced him to death. The Appellant filed a general pretrial motion to suppress records obtained in violation of the law, specifically to suppress all cell phone records because they were seized without a search warrant supported by probable cause and were therefore inadmissible. On appeal, the Appellant argued that the State's warrantless search and seizure and admittance of his text messages was in violation of federal and state constitutional prohibitions against unlawful searches and seizures. The State argued that the records were properly obtained through a court order.

Issue: Whether a court order was an appropriate vehicle for obtaining the Appellant's text messages, construed within the scope of Fourth Amendment protections.

To determine whether the Appellant's Fourth Amendment rights were violated, the Court examined whether the Appellant had an expectation of privacy in records of his cell phone use that were stored by his internet service provider, and whether society would regard that expectation as reasonable under the circumstances. While individuals do not keep a reasonable expectation of privacy after voluntarily providing information to third parties, personal content in private

conversations requires more protection. The Court held that text messages that had been transmitted from a cell phone to a service provider and remained stored in the provider's server did not equate to the sender voluntarily disclosing their personal content in the message to a third party, so that the sender no longer had a reasonable expectation of privacy in the content. The Court related text messages to the contents in an envelope in the mail or in an email and that turning them over to the United States mail or a service provider does not extinguish the reasonable expectation of privacy expected in these types of intermediary. Even though text messages are routinely recorded and stored by third party service providers, the Court held there is still a reasonable expectation of privacy in sent text messages that require a search warrant supported by probable cause. Relying on empirical data that over 90% of a recent survey supported that law enforcement should not have access, or at least must have probable cause to obtain access to texts and voicemails on cell phones, the Court reasoned that society would regard the expectation as reasonable under the circumstances.

The Appellant relied on the federal exclusionary rule as well as the statutory exclusionary rule embodied in Article 38.23. The statutory exclusionary rule specifies that no evidence obtained in violation of the United States Constitution shall be admitted in a criminal trial. There is a good faith exception to the statutory exclusionary rule that applies when law enforcement acts in good faith reliance upon an issued warrant; however, the Court held that the exception did not apply because there was no warrant nor a showing of probable cause. It applied the exclusionary remedy and held that the text messages were inadmissible against the Appellant because it was obtained in violation of the United States Constitution.

The Court conducted a harmless error analysis to determine if the error contributed to the Appellant's conviction or punishment, examining whether there was a reasonable probability that the wrongly admitted text messages contributed to the Appellant's conviction. The Court reviewed the record as a whole and held that it could not determine beyond a reasonable doubt that the text messages did not contribute to the guilty verdict, holding that the error was not harmless. The Court reversed the trial court's judgment and remanded for a new trial.

JUSTICE KELLER, joined by JUSTICE HERVEY, dissenting. JUSTICE MEYERS dissented.

Justice Keller dissented against the holding of the Court, contending that the Appellant did not sufficiently preserve error. Judge Keller reasoned that the Appellant's general pretrial motion to suppress, motion to suppress evidence obtained from the cell phone records, and the trial objection were not sufficiently specific to preserve error.

***Ex Parte Shay***

No. WR-84,007-01

Case Summary written by Garrett Foote, Staff Member.

JUDGE KEASLER delivered the opinion of the Court.

On an application for Writ of Habeas Corpus the applicant, Patrick Shay, sought relief from a conviction of improper photography or visual recording under Texas Penal Code § 21.15(b)(1). Shay pled guilty to the offense and the court sentenced him to two years confinement for the state felony. In seeking habeas relief, Shay relied on the Court of Criminal Appeal's opinion in *Thompson v. State*. In that case the court held that the portion of the improper photography or recording statute that Shay previously was convicted of was unconstitutional. Subsequently, due to being a felon from the improper photography conviction, Shay was later charged for being a felon in possession of a firearm.

To apply for a writ of habeas corpus, the applicant must show that they have suffered sufficient collateral consequences as a result of their conviction. In this case, although Shay was not physically confined for the unlawful photography charge at the time of applying for habeas relief, the court held they had jurisdiction to review his case because the improper photography conviction contributed to his felon in possession of a weapon charge. The court stated that it was not necessary for the applicant to show that by granting relief it would remove or alleviate the collateral consequence. The court ruled that no matter how favorable Shay's plea agreement appears to be, that did not bar him from making a collateral attack on his conviction. The court recognized previous case law that stated an unconstitutional statute was to be considered void retroactively from its creation. In that way, the law is to be considered as if it had never existed. Therefore, the court determined

that there is no legal basis for Shay's improper photography conviction. Ultimately, the court held that Shay was not barred from seeking relief and set aside Shay's conviction while remanding the cause to the trial court for dismissal of his indictment.

JUDGE KELLER, dissenting opinion.

Justice Keller disagreed with the court granting habeas relief to Shay because there was no collateral consequence for the improper photography conviction at the time of filing for relief, other than the fact he was in a county jail for a felon in possession of a firearm charge. Judge Keller did not believe that the fact that he was subsequently charged with felon in possession of a firearm was a sufficient collateral consequence to give the court subject matter jurisdiction. Judge Keller believed that discharging the conviction of improper photography would not release his felon in possession of a firearm charge. It was not an essential element of the crime that the felon be convicted pursuant to a constitutional statute. Shay was in fact a felon at the time of being charged for felon in possession of a firearm. Because Shay pled guilty to improper photography pursuant to a plea agreement, the state did not charge Shay with aggravated sexual assault and child pornography. On account of Shay accepting a favorable plea agreement, Judge Keller believed that Shay could apply for habeas relief because he likely would have been convicted for the two other felony charges.

***Ex Parte Albert Junior Dawson***

No. WR-85, 612-02

Case Summary written by Jennifer Wallace, Staff Member.

JUDGE KEASLER, joined by PRESIDING JUDGE KELLER and JUDGES HERVEY, RICHARDSON, YEARY, and NEWELL, filed a concurring opinion in the denial of the application for writ of habeas corpus. JUDGE ALCALA also filed a concurring opinion.

Following his conviction of forgery of a financial instrument and ten-year prison sentence, Albert Junior Dawson filed an instant application for writ of habeas corpus challenging that final felony conviction pursuant to Article 11.07 of the Texas Code of Criminal Procedure. The applicant contended that his ten-year sentence was illegal and claimed ineffective assistance of counsel. Although the

habeas court received an affidavit from the applicant's trial counsel, the court addressed the applicant's claims without findings of fact or conclusions of law. Subsequently, the habeas court forwarded the habeas record to the Court of Criminal Appeals so that the court could ultimately decide whether to grant habeas relief to the applicant. The Court of Criminal Appeals' internal procedures allow the court's staff to review Article 11.07 writ applications and extraordinary writ petitions. In order to decide these "non-conference" writ applications, the writ attorney's staff review the entire writ record, including any habeas judge's findings of fact and conclusions of law, and draft a memorandum analyzing the applicant's claims. The writ staff attorney makes a recommendation about whether relief should be denied or granted, and the case is sent to a single judge of the court for resolution. If the judge is in agreement with the recommendation that an application should be denied or dismissed, the judge may deny or dismiss the case without consulting the en banc court. If a writ staff attorney recommends that relief should be granted or an assigned judge disagrees with the staff's recommendation, an application will be reviewed en banc. The assigned judge may also request that the application be reviewed en banc.

In this case, the staff member recommended that the applicant's relief be denied, and the application was randomly assigned to Judge Alcalá. Although Judge Alcalá agreed that the application for writ of habeas corpus should be denied because it was meritless, she requested the formal votes from the entire court.

Issue(s): Do the court's internal procedures for deciding non-conference applications for writ of habeas corpus give a single judge a monopoly on an application's disposition in violation of the Texas Constitution and Texas Code of Criminal Procedure?

On November 23, 2016, the Texas Court of Criminal Appeals denied the applicant's application for writ of habeas corpus based on the merits without a written order. Judge Keasler, joined by Presiding Judge Keller and Judges Hervey, Richardson, Yeary, and Newell, filed a concurring opinion in the denial of the writ application. Judge Keasler defended the court's internal procedures for deciding non-conference applications for writs of habeas corpus. According to Judge Keasler, Texas Code of Criminal Procedure Article 11.07, § 5 empowers the court to decide an application's merits and grant or deny an applicant relief. Section 5 permits (1) the hearing judge to deny relief without docketing



the cause based on his or her findings and conclusions, or (2) the court may docket the cause and hear the application for writ of habeas corpus like an appeal. Pursuant to Article 11.07, § 5, Judge Keasler argued that the court's procedure allowing for a single judge to deny or dismiss a non-conference writ application is an example of the former, while the filing and setting an application for an opinion exemplifies the latter. Also, Texas Constitution Article V, § 4(b) requires that when the court considers a case en banc, "five Judges shall constitute a quorum and the concurrence of five Judges shall be necessary for a decision." According to Judge Keasler, § 4 does not limit how the court achieves the necessary concurrence, and the Texas Constitution fails to mention or prescribe how the court votes on the matter; however, the Constitution permits the court to establish rules for how the en banc court convenes. Judge Keasler argued that the court's procedures are in compliance with the requirements of the Texas Constitution because the procedures establish both how the court convenes on non-conference writ applications and how the court achieves a concurrence of at least five judges. A concurrence of at least five judges was required and garnered to adopt the court's procedures, and by allowing the assigned judge to dispose of specific writ applications, the remaining judges have authorized the assigned judge to decide an application on their behalf in those limited circumstances. Thus, the assigned judge disposes the writ application with the concurrence of at least five judges when he or she denies or dismisses a non-conference writ application. In other words, the denial or dismissal of a writ application is a *per curiam* order according to Judge Keasler. In response to Judge Alcala's claims that such procedures are in violation of the Texas Constitution and the Texas Code of Criminal Procedure, Judge Keasler argued that the court's internal procedures do not give a single judge a monopoly on the disposition of a writ application and concurred in the denial of the writ application.

**JUDGE ALCALA**, concurring.

Judge Alcala concurred in the court's denial for habeas relief, but argued that the court's procedures for disposing of non-conference writ applications violates the Texas Constitution and the Texas Code of Criminal Procedure. Judge Alcala argued that nothing in the Constitution authorizes one judge of the court to grant or deny relief on a habeas application without a quorum of the court, but rather the

Constitution requires that a three-judge panel or the en banc court decide non-capital cases. Further, Judge Alcala argued that in this case, Article 11.07 of the Texas Code of Criminal Procedure required the applicant's writ application to be decided by a quorum of the court because the decision of the habeas judge was not based on findings of fact or conclusions of law. As a result, Judge Alcala argued that by permitting individual judges of the court to resolve habeas applications without a quorum of judges or an en banc court decision, the court's procedures lack constitutional and statutory authority and deprive the remaining judges of their constitutional rights to meaningfully participate in writ application decisions.