HOT ISSUES IN PENDING PDRS IN THE COURT OF CRIMINAL APPEALS

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"Can an erroneously submitted alternate theory be harmful when the reviewing court finds the evidence sufficient to support the conviction under another submitted theory?"

Sanchez v. State, 221 S.W.3d 769 (Tex. App. -- Corpus Christi 2007, pet. granted).

This is a murder case. The indictment charged four different paragraphs, each with a different manner and means. One paragraph charged murder by choking. Another charged murder by using a stun gun. Two other paragraphs alleged murder by manner and means unknown to the grand jury. *See id.* at 772-73. During the trial, the medical examiner testified that in his opinion, death was caused by asphyxia by choking or stun gun. *See id* at 773. The State offered no evidence of what diligence the grand jury exercised to determine the cause of death. *See id.* at 776. Over the defendant's objection, the jury charge contained all four manners and means (including both "manners and means unknown" paragraphs).

After finding the evidence legally and factually sufficient, the Court of Appeals then turned to the jury charge. The court found that there was no evidence to support submitting the manners and means unknown paragraphs to the jury, quoting the rule from *Hicks v. State*, 860 S.W.2d 419, 424 (Tex.Crim.App.1993):

"When the indictment alleges the cause of death in this manner, the State bears the burden of proving the 'unknown' allegation. The State carries that burden in either of two ways: (1) if the trial testimony does not establish the cause of death, a *prima facie* showing is made that the cause of death was unknown to the grand jury; and (2) when the trial testimony does establish the cause of death, the State must prove that the grand jury used due diligence in attempting to ascertain the cause of death."

Id. at 778. The Court of Appeals found error because this rule was not satisfied and thus the State failed to carry its burden to prove the unknown allegation. The reason was that the medical examiner did testify to a cause of death - asphyxiation, thus the State was required to show that the grand jury used due diligence. The court then found "some harm" and reversed. The CCA granted the State's PDR.

The question presented quoted above is only one of four granted by the CCA in this case. It caught my attention, though because, if sustained, we could see a situation where any number of manners and means could be submitted to a jury without evidentiary support and there could never be harm so long as one of the other manners and means submitted was supported by sufficient evidence.

"Does the implied bias doctrine apply in a case, like Mr. Uranga's, where it is revealed during punishment that one of the jurors was the victim of the defendant's alleged extraneous conduct?"

Uranga v. State, 247 S.W.3d 375 (Tex. App. -- Texarkana 2008, pet. granted).

After Appellant was convicted for possession of methamphetamine, during the punishment phase of the trial, the State offered and published a video of Appellant engaged in a high speed chase from the police. In that video, you could see Appellant drive through a front yard. That front yard, it turned out, belonged to one of the jurors who, up to that point, had not known who had driven through his yard. Thus, the juror was a victim of Appellant's extraneous offense. *See id.* at 376. The juror disclosed his discovery.

The defense moved for a mistrial, but after repeated assurances from the juror that he could still be fair, the trial court denied it. The court of appeals affirmed.

Appellant argues that despite the juror's assurances, the "implied bias" doctrine should raise a presumption of bias. *See id.* at 377-78. The "implied bias doctrine" has not been established in Texas, but has been discussed at least twice by the United States Supreme Court. In *Smith v. Phillips*, 455 U.S. 209 (1982)(O'Connor, J., concurring), Justice O'Connor "opined that the implied bias doctrine should be applied in limited circumstances such as when the at- issue juror is revealed to be an employee of the prosecuting agency, a close relative of one of the participants in the trial or in the criminal transaction, or was a witness or somehow involved in the criminal transaction." *Id.* at 222. Later, in *Williams v. Taylor*, 529 U.S. 420 (2000), the Supreme Court considered a case where one of the jurors was (1) related to the State's key witness; and (2) had been represented by the prosecutor in a divorce case. In that case, according to the court of appeals, the Supreme Court "suggested" that prejudice would not be presumed and the appellant would have to show harm. *See id.* at 378.

The court of appeals refused to adopt the implied bias doctrine and instead searched the record for "actual bias." Finding none, the court of appeals affirmed.

Interestingly, the court of appeals placed quite a bit of weight not only on the assurances of the juror (whose credibility, of course, the trial court was in a

"better position to judge"), but that the damage to the juror's lawn would have made the criminal mischief offense a misdemeanor rather than a felony.

"The court of appeals erred in determining that the presence of an alternate juror in jury deliberations was reversible error as the requirement under both the Code of Criminal Procedure and the Texas Constitution for a twelve member jury was violated."

Adams v. State, 275 S.W.3d 61 (Tex. App. -- San Antonio 2008, pet. granted).
Trinidad v. State, 275 S.W.3d 52 (Tex. App. -- San Antonio 2008, pet. granted).

Both of these cases are out of the same district court. In both cases, an alternate juror was directed by the trial judge to participate in deliberations but not vote. In both cases, the court of appeals reversed and the State petitioned for discretionary review, claiming that this was not error and if it was, it was not preserved.

In both cases, the defense did not object to the arrangement at trial. The court of appeals, however, found that the right to a 12 (and no more than 12) person jury is a "waivable only" right under *Marin v. State*, 851 S.W.2d 275, 279 (Tex.Crim.App.1993), *overruled on other grounds, Cain v. State*, 947 S.W.2d 262 (Tex.Crim.App.1997) and since there had been no affirmative waiver, error was preserved. *See Trinidad*, 275 S.W.3d at 57-58; *Adams*, 275 S.W.3d at 64-65.

The court of appeals then examined each under a constitutional harm analysis for non-structural error and found harm in both cases due largely to the fact that the alternate jurors were directed to actually participate in deliberations. *See Trinidad*, 275 S.W.3d at 60-61; *Adams*, 275 S.W.3d at 67-68.

"1 - The First Court of Appeals erred in holding a jury of five was a mandatory alternative to mistrial when the United States Supreme Court has found a jury of five members unconstitutional.

2 - The Court of Appeals erred in finding the record suggests the State and Appellant were willing to proceed with five jurors."

Garza v. State, 276 S.W.3d 646 (Tex. App. -- Houston [1st Dist.] 2009, pet. granted).

In this DWI trial, a jury was selected and sworn and then sent home for the day. Over night, one of the jurors had a "cardiac event" and became incapacitated. There were also other juror time conflicts problems which were going to delay the trial. The State initially requested a mistrial, but then withdrew its motion. The court advised the parties of its intent to declare a mistrial for manifest necessity. The defense objected and also expressed a willingness to proceed with five jurors. The court declared a mistrial. Prior to the re-trial, Appellant filed a pre-trial writ of habeas corpus, claiming his retrial was jeopardy-barred.

The trial court denied the writ but the court of appeals reversed and held that re-trial was jeopardy barred. The court held that the trial court failed to consider less drastic alternatives, such as proceeding with five jurors. *See id.* at 652-53.

The State then filed a petition for discretionary review alleging for the first time that it is unconstitutional to proceed with fewer than six jurors, citing *Ballew v. Georgia*, 435 U.S. 223 (1978). The court of appeals issued a new opinion to address this additional point. *See id.* at 653. *Ballew* held that a Georgia statute providing that all misdemeanor juries would be comprised of five members violated Ballew's Sixth Amendment right to trial by jury. *See id.* (citing *Ballew*, 435 U.S. at 245). The court of appeals observed that Texas statutory and constitutional law requires misdemeanor juries to be comprised of six members and felony juries to be comprised of 12, but that has nothing to do with the parties' ability to waive that right.

"Did the Court of Appeals err in holding that the prosecution discharged its affirmative burden of establishing that the appellant's confession was not the product of his illegal arrest and detention and, therefore, was admissible against him, by concluding that the act of police interrogators in confronting the appellant with the inculpatory admissions of an alleged co-defendant prior to eliciting appellant's confession, constituted an adequate 'intervening event' which supposedly broke the causal chain between his illegal arrest and detention rendering his confession 'a product of free will,' notwithstanding the fact that the record irrefutably demonstrates that the appellant was arrested illegally, without the benefit of a warrant issued by a neutral and detached magistrate, in violation of Chapter 14 of the Code of Criminal Procedure, was thereafter interrogated while illegally detained and was, at all times during his 22 hours at the homicide division, in the presence and under the control of the police, was never taken to a magistrate, never spoke with a lawyer and was mislead by the interrogators about what he was actually being charged with?"

Monge v. State, 276 S.W.3d 180 (Tex. App. -- Houston [14th Dist] 2009, pet. granted).

The facts are important here, so I have extracted them substantially verbatim from the case:

On July 12, 2005, Detective Mark Reynolds arrived at a murder scene in which the victim had been shot twice in the back. Reynolds later found, in the victim's back yard, a cell phone that had been issued to appellant. Reynolds obtained the phone records and learned that, on the day of the murder, the cell phone had been used to place calls to, and receive calls from, the victim. The phone records also listed calls between appellant, the victim, and a third individual, Margil Ochoa.

Reynolds drove to appellant's workplace on the morning of July 21, 2005, to question appellant about the cell phone. Appellant responded that his cell phone had been stolen, but he voluntarily accompanied Reynolds to the sheriff's department for further questioning. Upon arrival, appellant was placed in a small windowless room, where he was briefly questioned. Appellant denied any involvement in the murder. He voluntarily provided a DNA saliva sample, consented to a search of his vehicle and residence, and submitted to a polygraph examination that ended at approximately 6:00 p.m. Having been told he was free to leave, appellant instead fell asleep on the floor of the room where he had been interviewed. (Both parties agree that appellant was free to leave until at least midnight on July 22, six hours after the polygraph examination concluded.) There would be no further contact between appellant and the law-enforcement officers until the following morning.

Meanwhile, in a different interview room, the detectives were separately questioning Margil Ochoa, who appeared to be more forthcoming with information than appellant had been. At approximately midnight on July 22, Ochoa admitted his and appellant's involvement in the murder, specifically identifying appellant as the "shooter." After several more hours of questioning, Ochoa signed a written confession that again implicated him and appellant in the murder. At no time did the deputies procure an arrest warrant for appellant.

At approximately 7:00 a.m., the district attorney agreed to accept capital murder charges against appellant and Ochoa. Reynolds informed appellant he was under arrest, and placed him in handcuffs. While Reynolds was processing the paperwork, a second set of detectives decided to question appellant again. Appellant was given *Miranda* warnings. He was then advised that Ochoa was also under arrest, and that Ochoa had implicated appellant in the crime. Specifically, one of the detectives told appellant:

"I was here late last night too whenever all this was going on and I went and picked up Ochoa and he's trying to help hi[m]self. You know what I'm saying? ...

I'm going to tell you up front ... that *your fall partner has given you up.* He's given every detail about what took place from the time you guys left climbing over the fence, just about knocking him over, going down, sliding down the bayou, swimming in the bayou.... You know, they, they know everything at this point and all it is, to getting you convicted.... And you know here you have, uh one, one guy that's trying to help hi[m]self, he's concerned about his family, he doesn't wanna spend the rest of his life in jail, you know he's honestly trying to help hi[m]self. You know he's admitting that, you know, this just wasn't supposed to happen like this.... You know what I mean? We have his story.

But I can tell you ... everything that he's said is collaborated [sic] by the dead guy[']s girlfriend, so we know that he's telling the truth from that point on."

Id., 276 S.W.3d at 182-83 (emphasis in original).

After learning that Ochoa had implicated him, appellant confessed to shooting the victim twice. The interview, including appellant's confession, was recorded and videotaped. Appellant was indicted for capital murder. Before trial, appellant moved to suppress his confession, contending it was tainted by a warrantless, unlawful arrest. *Id.*

The court of appeals denied the motion, holding that the taint of the illegal warrantless arrest had been attenuated. *See id.* at 190. The analysis was pursuant to the factors set out in *Brown v. Illinois*, 422 U.S. 590 (1975): "(1) whether *Miranda* warnings were given; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct." *Id.*, 276 S.W.3d at 184 (citing *Brown*, 422 U.S. at 603-04).

The most interesting part of the analysis has to do with prong (3), the presence of intervening circumstances. Relying on a plethora of law from other states and distinguishing at least two Court of Criminal Appeals opinions apparently on point, the court of appeals held that the confession of the co-defendant was an intervening circumstance so strong that it basically outweighed the rest of the *Brown* factors. *See Monge*, 276 S.W.3d at 185-90.

"1. Can a defendant be convicted and punished for both manufacture and the subsequent delivery or possession with the intent to deliver of the same quantity of controlled substances, or does Texas Health and Safety Code § 481.112 allow more than one

'allowable unit of prosecution,' i.e. one for the manufacture and one for the delivery?

2. Did the court of appeals err in finding that the offenses of manufacturing a controlled substance and possession with intent to deliver a controlled substance are the same for double jeopardy purposes, even though the separate offenses are meant to punish separate dangers?"

Weinn v. State, 281 S.W.3d 633 (Tex. App. -- Amarillo 2009, pet. granted).

In this case the defendant pled guilty to manufacturing methamphetamine 200-400 and *nolo contendere* to possession with intent to deliver 200-400 and then went to a jury for punishment. The jury sentenced him to 30 years on each case and the trial court ordered they run concurrently.

On appeal, he claimed ineffective assistance of counsel and that he was subjected to double jeopardy because he was punished twice for the same offense. *See id*. at 635-36, 642. The court of appeals overruled his ineffective assistance point, but sustained on double jeopardy grounds, vacated the manufacturing count and reformed the judgment to reflect only one conviction and 30 year sentence on the possession with intent to deliver. Both parties petitioned for discretionary review. The State's was granted.

The court held that "[h]aving reviewed the statute, we agree that punishing appellant for the manufacture and possession with intent to distribute the same cache of drugs does violate appellant's protection from being punished twice for the same offense." *Id*. at 642-43. The court also noted that both the State and the defense agreed that there was only one offense. *See id.* at 642.

The reasoning of the court of appeals was:

"Texas Health and Safety Code section 481.112 identifies a continuum in the line of drug distribution. No matter where along this line the actor is apprehended, he may be prosecuted. However, even though the actor may progress along the continuum and, therefore, commit multiple prohibited acts under the statute, if each of those acts relates to one transaction, then the actor may only be prosecuted for the one single offense."

Id. at 643 n.7 (citing *Lopez v. State*, 108 S.W.3d 293, 297-302 (Tex. Crim. App. 2003). Thus, as the State observes in its PDR, one drug transaction is essentially one allowable unit of prosecution.

"1. The court of appeals erred in holding that a double-jeopardy violation occurred when Appellant was convicted and punished for each distinct material false or misleading statement he made in each loan application at issue because each such statement constituted an allowable unit of prosecution under Tex. Penal Code Ann. § 32.32 given that each statement related to separate matters and was sufficient standing alone to cause the granting of credit in an amount of more than $200,000."

Jones v. State, 285 S.W.3d 501 (Tex. App. -- Fort Worth 2009, pet. granted).

In this case the defendant was charged in two indictments with three counts each. Each indictment, however, covered only one loan application. The defendant was convicted on all counts and an identical sentence was passed on each count and ordered to run concurrently with all the others. On appeal, Appellant argued that an allowable unit of prosecution is the loan application and not each and every deceptive act. The State argued otherwise, relying on *Cheney v. State*, 755 S.W.2d 123 (Tex. Crim. App. 1988). The court of appeals summarized Cheney as follows:

"'[s]ection 32.32, by its own language, proscribes the making of written false or misleading statements to obtain property or credit. It is the act of making such statements that is the gravamen of the offense,' and also stated that '[t]he offense is complete once the written, deceptive statement relevant to obtaining property or credit is made, even if the perpetrator is not successful in obtaining the property or credit as a result of his written deception.'"

Id. at 503 (quoting *Cheney*, 755 S.W.2d at 129).

The court of appeals then went on to point out that at the time Cheney was decided, TEX. PENAL CODE ANN. § 32.32 was a misdemeanor, regardless of value. After the legislature amended the statute and attached it to the value ladder, the court of appeals held, TEX. PENAL CODE ANN. § 32.32 is analogous to theft, where the allowable unit of prosecution "is the object or objects stolen." *Id*. at 505. Thus, the court held,

"the gravamen, or allowable unit of prosecution, for the offense of making a false statement to obtain property or credit is the property or credit sought or obtained pursuant to the false or misleading statement or statements. We further hold that, here, each false statement in each case is an alternative manner and means of trying to obtain the single mortgage loan involved in each case. Therefore each indictment will support only a single conviction."

Id. The court of appeals reformed the judgment to reflect only two convictions with the same sentences to run concurrently.

"1. The Court of Criminal Appeals should reexamine and abandon the automatic application of the accomplice witness rule as applied to a witness who has been indicted for the same offense as the accused.

2. Does the mere fact that a witness was once indicted for the same crime as Appellee make that witness an accomplice as a matter of law absent an affirmative showing that there was a quid pro quo exchange of a dismissal of the indictment for testimony?

3. In reviewing whether the evidence is sufficient to corroborate an accomplice witness' testimony, should the appellate court look for 'alternative' explanations to 'explain away' inculpatory evidence or should the evidence be viewed in a light most favorable to the jury's implicit finding that the evidence 'tends to connect' Appellee to the offense?"

Smith v. State, 286 S.W.3d 412 (Tex. App. -- Corpus Christi 2008, pet. granted).

In this case there were two people indicted for this capital murder. The co-defendant testified against Appellant at her trial and she was convicted and given automatic life. At the time of trial, the testifying co-defendant was no longer under indictment. Over objection, the trial court instructed the jury that they were to determine whether the testifying co-defendant was an accomplice as a matter of fact (rather than instructing them that the testifying co-defendant was an accomplice as a matter of law). The jury convicted. The court of appeals reversed. The State sought discretionary review, which was granted.

This case will possibly determine two things - (1) when is a person an accomplice as a matter of law and when does he stop being an accomplice as a matter of law; and (2) how does the appellate court review evidence "tending to connect" the defendant to the offense (outside of the accomplice's testimony).

Here are some excerpts from the opinion that set out the issue nicely:

"The court of criminal appeals has held on numerous occasions that 'a person is an accomplice if he or she could be prosecuted for the same offense as the defendant, or a lesser included offense.'" *Smith*, 286 S.W.3d at 421 (quoting *Blake v. State*, 971 S.W.2d 451, 454-55 (Tex. Crim. App. 1998).

"Texas law is well-established [that] when a witness testifies and is under indictment for the same offense or a lesser included offense, the witness is an accomplice as a matter of law." *Id.* (citing *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007), among others).

"[It is also] well-established law, that when a witness has been charged with the same offense as the defendant, but the indictment is dismissed pursuant to a plea agreement under which the witness agrees to testify against the defendant, the witness remains an accomplice as a matter of law even though the indictment is no longer pending." *Id.* (citing *Blake*, 971 S.W.2d at 462 (Mansfield, J., dissenting), among others).

In this case the State argued that the co-defendant's case was dismissed for lack of evidence. *See id.* at 422. However, the court of appeals found,

"The record indicates that Boone testified pursuant to a plea agreement, and there is no support in the record before us that the charges against Boone were dropped for 'insufficient evidence.' Officer Martinez testified that before Boone gave his statement implicating Sherry, Boone asked whether he could get out of jail if he talked to the police. Officer Martinez denied making Boone any promises, but he admitted telling Boone that 'it depends on what you tell us.' As set forth above, Boone was also examined extensively about his plea bargain with the State. He candidly admitted that he was testifying 'under a plea agreement.' Moreover, when defense counsel asked if Boone 'sang like a canary' because he was 'fixing to go down,' Boone agreed.

The only evidence in the record that the State points to in support of its argument was testimony from Officer Martinez, but contrary to the State's argument, Officer Martinez did not testify that the State's case was dismissed for insufficient evidence."

Id. at 423.

Thus, the court of appeals found, the co-defendant (Boone) was an accomplice as a matter of law and the trial court should have so instructed.

This, however, does not end the inquiry and in fact the majority of the case is given to a lengthy analysis of the evidence and whether it sufficiently "tends to connect" Appellant to the crime. The court of appeals found the evidence lacking and rendered a verdict of acquittal because of this. *See id.* at 414, 414 n.2.

This is the standard of review the court of appeals used:

"'In conducting a sufficiency review under the accomplice-witness rule, a reviewing court must eliminate the accomplice testimony from consideration and then examine the remaining portions of the record to see if there is any evidence that tends to connect the accused with the commission of the crime.' *Solomon v. State,* 49 S.W.3d 356, 361 (Tex.Crim.App.2001) (citing *Cook v. State,* 858 S.W.2d 467, 470 (Tex.Crim.App.1993)). The inquiry is whether the evidence 'tends to connect' the defendant to the crime, not rational sufficiency to support a finding of guilt. *Id.* In other words, the corroborating evidence need not be sufficient by itself to establish guilt. *Id.* 'The non-accomplice evidence does not have to directly link appellant to the crime, nor does it alone have to establish appellant's guilt beyond a reasonable doubt; rather, the non-accomplice evidence merely has to tend to connect appellant to the offense.' *Burks v. State,* 876 S.W.2d 877, 888 (Tex.Crim.App.1994) (citing *Reed v. State,* 744 S.W.2d 112, 126 (Tex.Crim.App.1988)). If the evidence does not meet this standard, the conviction must be reversed and a judgment of acquittal must be rendered by the trial court. *Munoz v. State,* 853 S.W.2d 558, 564 (Tex.Crim.App.1993); *Ex parte Reynolds,* 588 S.W.2d 900, 902 (Tex.Crim.App.1979); *Sestric v. State,* 1 S.W.3d 921, 924 (Tex.App.-Beaumont 1999, no pet.)."

I*d.* at 423-24. After a lengthy analysis, the court of appeals held the evidence insufficient. The State's third point for review in the CCA, which the CCA granted, characterizes the court of appeals' analysis as "look[ing] for 'alternative' explanations to 'explain away' inculpatory evidence" rather than "view[ing] the evidence in a light most favorable to the jury's implicit finding that the evidence 'tends to connect' Appellee to the offense." State's PDR. This, of course, is basically a statement of opinion, as this construct does not appear in either the court of appeals' standard of review or in its analysis. Like the State, however, the dissenting justice in *Smith* also disagreed with the conclusion reached by the majority. *See id.* at 438-45.

It should be noted, though, that the court of appeals at least set out in its standard of review that "[t]he inquiry is whether the evidence 'tends to connect' the defendant to the crime, not rational sufficiency to support a finding of guilt." *Id.* at 424 (citing *Solomon v. State*, 49 S.W.3d at 361). Curiously, in it's point for review, the State seems to be asking the CCA to institute a standard of review that would appear to be higher than the one used by the court of appeals in this case. "Viewing the evidence in the light most favorable to the jury's implicit finding" sounds a lot like "rational sufficiency to support a finding," which the court of appeals here strongly implies is higher than the standard of review it actually used.

In the final analysis, the real interesting issue in this case is not the sufficiency analysis but how an accomplice witnesses as a matter of law will be determined going forward.

"1. A defendant is not 'actually innocent' of felony DWI when one of the prior DWI convictions alleged to elevate the primary offense to a felony is invalid.

2. An invalid prior conviction used to elevate the primary offense to a felony does not render the resulting sentence illegal.

3. A defendant who pleads guilty, pursuant to a plea bargain, to felony DWI and admits to the jurisdictional prior convictions is estopped from claiming that his sentence is illegal because the prior convictions are invalid."

Wilson v. State, 288 S.W.3d 13 (Tex. App. -- Houston [1st Dist.] 2008, pet. granted).

The defendant entered into a plea agreement to the offense of felony DWI and pled true to the two priors used to enhance the object offense to a felony. The trial court found the enhancements to be true and sentenced the defendant on the felony. He was placed on probation and later the State moved to revoke. Nineteen years later, the defendant was apprehended and then challenged his priors via writ of habeas corpus. As it turned out, both priors contained judgments stating "the finding of guilty herein shall not be final, that no judgment be rendered thereon, and that the defendant be, and is hereby placed on probation in this cause." *Id.* at 15. The trial court granted the writ and vacated Appellant's conviction.

One of the priors was from 1983 and he received a sentence of probation. The court of appeals observed, "The State used appellant's 1983 conviction to enhance appellant's DWI offense to a third-degree felony. However, the sentence for the 1983 conviction was probated. Under the law in effect at the time of appellant's DWI, a conviction that occurred before January 1, 1984 and for which the sentence was probated was not a final conviction. *See* TEX. REV. CIV. STAT. ANN., art. 6701*l*-1(g) (repealed 1994). Appellant's 1983 conviction could therefore not be used for enhancement purposes, and without two enhancement convictions, appellant's DWI was not a felony." *Id.* at 16.

In the more interesting part of the case, though, the State further argues that Appellant is estopped from challenging his priors because he stipulated to them. *See id.* at 17.

To this the court of appeals observed, "An applicant 'may undertake to prove on habeas corpus that in fact he is innocent of the offense ... even though he pleaded guilty, confessed, and stipulated to evidence.'" *Id.* (quoting *Ex parte Sparks*, 206 S.W.3d 680, 683 (Tex.Crim.App.2006)).

Nowhere in the opinion does the court hold that Appellant is "actually innocent" of felony DWI. The State does make the argument that a sufficiency of the evidence attack is not cognizable in a writ of habeas corpus, a proposition with which the court of appeals agrees. *See id.* (quoting *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004)). In this case, however, the court holds that Appellant was attacking the legality of his felony conviction. *See id.*

"1. Is the age-based defense located in Section 8.07(b) of the Texas Penal Code a 'defensive issue' (as opposed to 'law applicable to the case') for purposes of determining whether the trial judge must sua sponte submit a jury instruction on this defense?

2. Was Appellant harmed by any error resulting from the absence of an instruction on the age-based defense located in Section 8.07(b) of the Texas Penal Code when the victim testified that the worst abuse occurred after Appellant turned 17 years old?"

Taylor v. State, 288 S.W.3d 24 (Tex. App. -- Houston [1st Dist.] 2009, pet. granted).

The complainant in this case testified to a course of sexual abuse at the hands of Appellant that began before Appellant was 17 years old and continued thereafter. The jury heard all this evidence. The jury charge did not limit the jury's consideration, for purposes of conviction, to only the offenses which occurred after Appellant turned 17 and in fact only contained the general "on or about" instruction. There was no evidence that the juvenile court had waived jurisdiction. *See* TEX. PENAL CODE ANN. § 8.07(b).

Appellant did not request an instruction so limiting the jury's consideration and did not object to its absence. The court of appeals, finding error and egregious harm, reversed. The State sought PDR.

The court of appeals' reasoning is aptly quoted below:

"The State contends that the trial court did not err by failing to give a section 8.07(b) instruction because appellant's juvenile status was a defensive issue, and appellant neither requested the instruction nor objected to its omission. We disagree. The language of section 8.07(b) is not permissive; it is mandatory. It provides that, with a few exceptions, a person may not be prosecuted for or convicted of a criminal offense committed before he is 17 years old, unless the juvenile court has waived jurisdiction and certified the person for prosecution. TEX. PENAL CODE ANN. § 8.07(b) (Vernon Supp. 2008). It is a legislatively prescribed jurisdictional requirement applicable to all cases in which the culpable conduct was committed before the alleged perpetrator reached the age of 17. Section 8.07(b)'s application is neither dependent on a defendant's theory of the case, nor is it discretionary. Moreover, it is difficult to imagine - at least under the facts presented here - that a reasonably competent attorney would decide not to request a section 8.07(b) instruction for strategic or tactical reasons. In sum, section 8.07(b) was 'the law applicable' to this case. We conclude that the trial court erred by failing to instruct the jury that it could not consider appellant's acts before his seventeenth birthday as a basis for a guilty finding."

Id. at 28 (case citations omitted).

The State characterizes TEX. PENAL CODE ANN. § 8.07(b) as a "defensive issue." The court of appeals clearly considered it to be the "law applicable to the case" which must be charged *sua sponte*. That will be the issue for the CCA to decide. Clearly in this case the jury was instructed in such a way that it was perfectly free to convict on offenses that occurred prior to Appellant's 17th birthday.

The remainder of the opinion is an egregious harm analysis pursuant to *Alamnza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984) and its progeny. As stated earlier, the court of appeals found egregious harm.

Half of the incidents the complainant testified about occurred before Appellant was 17 years old. While the State's second point for review seems to say that the abuse was qualitatively worse after Appellant was 17 years old, the argument the State made in the court of appeals was that the post-17 abuse "was the 'worst' in terms of frequency." *Id.* at 29. The character of the abuse, in fact, appeared to be the same before and after Appellant was 17 years old. *See id.*

"1. Is a store receipt a 'commercial instrument' under the forgery statute when the receipt is used as proof of purchase for items that were not actually purchased?"

Shipp v. State, 292 S.W.3d 251 (Tex. App. -- Texarkana 2009, pet. granted).

Appellant was charged in three indictments with possession of a controlled substance, forgery of a

government instrument and forgery of a commercial instrument. He was tried in one consolidated trial and was convicted of all three charges and his sentences were ultimately stacked.

The issue in this case is whether a store receipt qualifies as a "commercial instrument" under TEX. PENAL CODE ANN. § 32.21(d). To determine this, the court of appeals engaged in a wide ranging analysis, ultimately deciding under *ejusdem generis* that it does not.

Appellant's wife had completely forged a Wal-Mart receipt for a computer and computer desk. Appellant showed that receipt in the parking lot when approached by a Wal-Mart employee after he left the store with a computer and desk.

Here is the disputed section under which he was charged:

"An offense under this section is a state jail felony if the writing is or purports to be a will, codicil, deed, deed of trust, mortgage, security instrument, security agreement, credit card, check, authorization to debit an account at a financial institution, or similar sight order for payment of money, contract, release, or other commercial instrument."

TEX. PENAL CODE ANN. § 32.21.

The court of appeals went through each specific item listed and concluded:

"We find that the enumerated examples in Section 32.21(d) all relate to legal rights or relationships: the right to take or cede possession of property or property rights or to hold another party to or release another party from contractually stated agreements. Checks and credit cards operate in lieu of cash to allow financial transactions. Each of the items listed in Section 32.21(d) before the catchall "other commercial instruments" either grants or cedes a valuable right. Therefore, we determine that such "other commercial instruments" are documents in writing which either grant or cede a present or future benefit or right in the same or similar fashion as those enumerated in Section 32.21(d).

In contrast, an ordinary receipt simply memorializes a transaction that has previously occurred, a fait accompli, which provides no future benefit. A receipt is a "written acknowledgment that something has been received." *Id.* at 1296. Al- though the testimony provided by the State showed many reasons why the fake receipt was faulty and demonstrated that such receipts can be cross-checked for veracity a number of ways, there was no testimony provided here to demonstrate that a receipt issued by this Wal-Mart store is anything more than the memorialization of a past transaction, as opposed to the other kinds of things granting or ceding future benefits or rights listed in Section 32.21(d). Although we can conceive of situations in which a receipt might be used by some in more ways than those contained in the classic definition of the term, there was no evidence of that adduced in such a regard here."

Id., 292 S.W.3d at 274-75.

The court of appeals did point out that "[t]here was no evidence presented at trial that such a receipt would be valuable for future use (i.e., it could be redeemed for money) if it was returned with the merchandise supposedly purchased for an exchange," thereby giving a nod to the possibility that it might be different if the person were trying to present the property with the fake receipt and get a refund. *Id.* at 273.

"1. Are subsections (a)(4) and (a)(7) of Tex. Penal Code Ann. § 42.07 (Texas' Harassment Statute) unconstitutionally vague?

6. Has the Court of Appeals improperly determined that because subsections (a)(4) and (a)(7) of Tex. Penal Code Ann. § 42.07 (Texas' Harassment Statute) allegedly implicate the First Amendment and might curtail protected speech those subsections are vague when the proper question should have been whether the subsections are overbroad?"

Scott v. State, 298 S.W.3d 264 (Tex. App. -- San Antonio 2009, pet. granted).

Appellant was charged in two separate cases with harassment under TEX. PENAL CODE ANN. § 42.07(a)(4) and (7), which provides as follows:

(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:
...
(4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another; ... or
(7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

He filed a motion to quash, claiming that the statute was unconstitutionally vague and overbroad. The trial court denied his motion and he entered a conditional plea and appealed. The court of appeals reversed and, finding that the statute implicated protected First Amendment conduct, reversed and acquitted. The State

sought PDR.

The court of appeals characterized its analysis as one for vagueness. *See id.* at 267-72. However, the analytical framework it established was:

"for a statute not to be unconstitutionally vague, it must be sufficiently clear in at least three respects: (1) a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited; (2) the law must establish determinate guidelines for law enforcement; and (3) if First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression."

Id. (citing *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996)(reviewing the Texas stalking statute)).

The court of appeals proceeded with an analysis aimed at the third prong of this framework - whether First Amended freedoms are implicated. This did indeed resemble an over-breadth analysis. However, thereafter the court of appeals did engage in a longer analysis aimed at vagueness. The court of appeals did a long comparison of this case to the facts in Long and held that, as the CCA had held in Long in reference to the stalking statute, subsections (a)(4) and (a)(7) of the harassment statute are unconstitutionally vague on their face. *See id.* at 272-73.

Whether this holding can be couched as a vagueness analysis or overbreadth analysis or some combination of the two, the end result was that the complained-of subsections of the statute were held to be unconstitutional, which is ultimately what the CCA will have to decide.

"Whether the court of appeals properly applied the Sixth Amendment, as interpreted by the United States Supreme Court, to the question of whether the trial court's refusal to permit the victim to be crossw-examined about a case for which he was on probation violated Appellant's constitutional right to confrontation."

Irby v. State, 2008 WL 2469275 (Tex. App. -- Dallas, June 20, 2008, pet. granted)(nfp).

In this sexual assault of a child trial, the complainant was on juvenile deferred adjudication at the time of trial for the offense of aggravated assault with a deadly weapon. The trial court refused to allow Appellant to cross-examine him on that deferred adjudication. He was convicted and appealed on this point, among other things. The court of appeals affirmed and Appellant sought PDR on this issue.

Here is the court of appeals' standard of review as applied to this issue:

"Evidence of a juvenile adjudication, outside the realm of a juvenile proceeding, is not admissible for impeachment unless required by the Texas or United States Constitutions. *See* TEX.R. EVID. 609(d). The confrontation clause of the United States Constitution gives the defendant the right to cross-examine a witness with juvenile records if the cross-examination is reasonably calculated to expose a motive, bias, or interest for the witness to testify. Evidence that a witness with a juvenile record might have been testifying due to pressure from the State and to shift suspicion away from himself is relevant to show bias and thus is admissible under the confrontation clause. The mere fact, however, that a witness might be on probation or have some otherwise "vulnerable relationship" with the State is not alone sufficient to establish bias or prejudice. There must be some causal connection or logical relationship between the witness's "vulnerable relationship" and his testimony at trial."

Id. at *7 (citations omitted).

Here is the analysis that then flowed from the court's dissertation of the law:

"In the present case, the record does not show a causal connection between W.P.'s record of deferred adjudication probation and his testimony at trial. According to defense counsel's assurances to the trial court, W.P. committed the aggravated assault with a deadly weapon on January 20, 2005, twelve days after the instant offense. He was subsequently placed on deferred adjudication probation. However, there is no indication that a motion to revoke W.P.'s probation was pending either when he made the allegations against appellant or at the time of trial. Thus, appellant has not shown that W.P.'s deferred adjudication status placed him in a "vulnerable relationship" with the State. The record also fails to show that W.P. had some bias or prejudice to testify favorably for the State because of his juvenile deferred adjudication status. Therefore, we cannot conclude that the trial court abused its discretion by refusing to allow appellant to cross-examine W.P. about his juvenile deferred adjudication status."

Id.

It remains to be seen whether the CCA will endorse the court of appeals' apparent belief that *Davis v. Alaska* and its progeny allow for the rather stiff requirement that the defendant must make a positive

showing of a "vulnerable relationship" beyond the probationary status itself.

"Supreme Court precedent allows the seizure of an item in plain view when it is immediately apparent the item is evidence without any further search of the object. But in* White v. State*, this Court held that an item in plain view may only be seized when its evidentiary nature is apparent without any further investigation. Should* White *be overruled because it is contrary to binding Fourth Amendment precedent of the Supreme Court?"

State v. Dobbs, 2009 WL 692681 (Tex. App. -- Dallas, March 18, 2009, pet. granted)(nfp).

Officers were executing a search warrant on Dobbs' house for drugs. While there, they saw Dobbs walk into his house with a set of new golf clubs and while in the house they saw those clubs and another set of brand new golf clubs as well as some country club shirts. Cops called country club and found out the merchandise had been stolen. Appellant was charged with the theft.

Appellant filed a motion to suppress, alleging that the stolen clubs and shirts were illegally seized because their stolen character was not "immediately apparent," such that the plain view exception would apply (the search warrant said nothing about golf clubs and shirts). Trial judge granted the motion, finding the stolen character of the property was not immediately apparent without further investigation to develop probable cause. *See id.* at *1.

The court of appeals affirmed and the State sought PDR.

The State claimed below and continues to claim in the CCA that *White v. State*, 729 S.W.2d 737 (Tex. Crim. App. 1987), the case the court of appeals relied upon for its analysis, was wrongly decided and should be overruled. White held basically that property cannot be "immediately apparent" as evidence of a crime if there has to be more investigation to develop probable cause. *See Dobbs*, 2009 WL 692681 at *4 (quoting *White*, 729 S.W.2d at 741). The State seeks to modify this rule to mean that further investigation is forbidden only when that investigation is direct manipulation of the object itself. Any other "investigation" by the officer to develop probable cause would be permissible.

"1. The court of appeals improperly required reasonable suspicion to justify a consensual encounter between Officer Barrett and Mr. Castleberry.

2. In assessing the totality of the circumstances for reasonable suspicion, the court of appeals employed an improper presumption that Mr. Castleberry's conduct in reaching for his waistband was innocent and improperly ignored key facts that the trial court found to be true."

State v. Castleberry, 2010 WL 175096 (Tex. App. -- Dallas, Jan. 20, 2010, pet. granted)(nfp).

At around 3:00am, an officer saw Appellant and a friend walking behind a restaurant in what the officer characterized as a high crime area and there had been a recent spate of burglaries. The area was lit. They had nothing in their hands and nothing about them were out of the ordinary.

The officer came up behind the men and stopped them, asked them for ID and asked them why they were there. Appellee "reached for his waistband" and the officer told him to put his hands up. The officer says he "commonly has them put their hands up until he can gain control of them and have them put their hands behind their back so that he can have control of their hands while he does a patdown." *Id.* at *1.

Appellee reached for his waistband two more times and on the second reach, he threw down some drugs.

Trial court granted Appellee's motion to suppress and State appealed. After failing in the court of appeals, the State sought PDR. Here is the analysis from the court of appeals:

"In its findings of fact, the trial court stated that '[a]t the time Officer Barrett approached the [appellee] and his companion, he did not have any reason to believe that a crime had occurred, was occurring, or was about to occur.' We agree. As the trial court noted, appellee had nothing in his hands which looked like a potential weapon or tool for committing a burglary and he and his companion had nothing in their hands which could be used to assist in taking stolen property away from a crime scene. The trial court further found that when the officer first observed appellee and his companion, 'they were doing nothing more than simply walking in a public area behind a closed business.'

In its findings of fact, the trial court also stated that '[a]t the time Officer Barrett approached the [appellee] and his companion he did not have any information which would lead him to believe that the [appellee] was a threat to the Officer or any other person.' We again agree with the trial court. Upon approaching appellee, the officer asked him his name and for him to

produce identification. In response, appellee reached for his waistband and the officer asked appellee to put his hands up, so he could 'gain control' of appellee and do a pat- down search. In light of the evidence, we agree with the trial court that the officer went 'too far.'"

Id., 2010 WL 175096 at **2-3 (quoting *Davis v. State*, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997). The court of appeals also cited *In re A.T.H.*, 106 S.W.3d 338, 347 (Tex.App.-Austin 2003, no pet.) for the proposition that a pat-down search conducted solely as a matter of routine or procedure are not justified. *See id.* at *3.

The court of appeals added in a footnote: "The trial court noted this [a waistband] was a common place to carry the requested identification." *Id.* at *3.

"The Court of Appeals erroneously concluded the witness Pinedo's memory loss rendered her 'absent' from Woodall's trial, even though Pinedo had been called to testify by Woodall and in fact appeared and testified at Woodall's trial. And because Pinedo was not 'absent' from Woodall's trial, the Court of Appeals further erred in holding that the admission of Pinedo's prior grand jury testimony implicated the Confrontation Clause and violated Woodall's right to confront the witnesses against her."

Woodall v. State, 2009 WL 2872837 (Tex. App. -- El Paso, Sept. 9, 2009, pet. granted)(nfp).

Appellant was prosecuted for engaging in criminal activity and aggravated promotion of prostitution. What is missing from the State's point of error on PDR is the fact that when Pinedo testified at trial, she testified that due to a subsequent car accident, she did not remember testifying before the grand jury or even working at the gentlemen's club/brothel that Appellant ran.

At the end of her trial testimony, Pinedo was not released as a witness, but failed to come back to court when called. At that point, the State proposed reading her grand jury testimony and written statement to the police to the jury. Defendant objected and the judge offered to attach Pinedo. The defense declined, stating that she didn't remember anything anyway, so it wouldn't do much good to attach her. The court then overruled Appellant's objection and the State was allowed to read her grand jury testimony and statement.

Using a straightforward *Crawford v. Washington* analysis, the court of appeals held this was error. The court of appeals held that Pindeo was absent because of the prior testimony that because of the car accident she didn't remember anything. The court of appeals also agreed that trying to attach and re-call her would have been pointless - unavailability was established when she testified to her complete memory loss.

"Her undisputed testimony about the car accident and resulting memory loss established that she was unavailable as a witness regarding the relevant subject matter. Once Pinedo's unavailability was established, she remained unavailable at least so long as her memory was not restored.

Pinedo's memory loss satisfies the first prong of *Crawford.* As for the second prong, Appellant never had - and would not have had - an opportunity to cross-examine Pinedo regarding her grand jury testimony. Regardless of whether Pinedo was returned to court, she could not have been questioned about her prior testimonial statements. We thus conclude that admission of the grand jury testimony was constitutional error."

Woodall, 2009 WL 2872837 at *5. The court of appeals found no harm as to the guilt/innocence stage, but did find harm and reversed the penalty phase and remanded for a new sentencing hearing. *See id.*, 2009 WL 2872837 at **1-6.

The question could come down to whether Appellant waived her confrontation claim by declining the offer to have Pindeo attached.