

SIGNIFICANT DECISIONS
UNITED STATES SUPREME COURT AND THE COURT OF CRIMINAL APPEALS
FROM SEPTEMBER 2018 TO APRIL 2019

HON. DAVID C. NEWELL
JUDGE, PLACE 9
Court of Criminal Appeals

Paper prepared by
Ms. Megan Reed
Briefing Attorney

Court of Criminal Appeals
P.O. Box 12308
Austin, TX 78744
512-463-1570

Acknowledgement

I would like to acknowledge all the hard work and care that my briefing attorney, Megan Reed, put into this paper. There. I've acknowledged it. She's awesome. I did some too though. I leave it to you to determine who did what, except to say that I did the commentary. She can't be blamed for failing to stop me.

Table of Contents

| | | |
|------------|--|-----------|
| I | INTRODUCTION..... | 1 |
| II | MOTIONS TO SUPPRESS | 1 |
| A. | THERE IS NO LEGITIMATE EXPECTATION OF PRIVACY IN LESS THAN THREE HOURS OF REAL-TIME LOCATION INFORMATION RECORDS ACCESSED BY POLICE THOUGH PINGING A PERSON’S PHONE LESS THAN FIVE TIMES. | 1 |
| B. | BLOOD DRAWS..... | 2 |
| 1. | Possible IV treatment is insufficient to justify a warrantless blood draw if there is no evidence of current, ongoing medical treatment..... | 2 |
| 2. | Individuals have a reasonable expectation of privacy in their blood that is drawn at a hospital for medical purposes. | 2 |
| C. | POLICE OFFICERS HAD PROBABLE CAUSE TO ARREST BASED UPON PUBLIC INTOXICATION UNDER THE COLLECTIVE KNOWLEDGE DOCTRINE EVEN THOUGH ARRESTING OFFICER DID NOT TESTIFY ABOUT HIS OBSERVATIONS OF INTOXICATION. | 3 |
| III | TRIAL PROCEDURE..... | 4 |
| A. | DOUBLE JEOPARDY..... | 4 |
| 1. | SIGNIFICANT CASE - Collateral estoppel does not bar the State from prosecuting an offense after a trial judge found the offense “not true” at a probation revocation hearing for a separate, prior offense..... | 4 |
| 2. | A defendant does not implicitly consent to a mistrial by failing to object when a trial court declares a mistrial sua sponte..... | 5 |
| 3. | A jury note stating that the jury was unanimous against guilt on the charged offense but deadlocked on a lesser does not amount to a final verdict of acquittal that would prevent a subsequent trial on the charged offense. | 6 |
| B. | CHARGING INSTRUMENTS..... | 6 |
| 1. | A prior indictment does not toll the statute of limitations for a subsequent indictment when the indictments do not allege the same conduct, act, or transaction..... | 6 |
| 2. | An indictment sufficiently charges “a person” when the defendant’s name is included in the caption on the face of the indictment..... | 7 |
| C. | IN A SEXUAL-ASSAULT-OF-A-CHILD CASE, THE TRIAL COURT DID NOT UNCONSTITUTIONALLY RESTRICT A DEFENDANT’S VOIR DIRE QUESTIONS ABOUT A PRIOR “SEXUAL OFFENSE” WHEN THE DEFENDANT AGREED TO REPHRASE HIS QUESTIONS TO REFERENCE MERELY “ASSAULTIVE OFFENSES.” | 7 |
| D. | ABSENT CONSENT BY THE STATE, THE TRIAL COURT LACKS AUTHORITY TO DISMISS A JURY AND IMPOSE DEFERRED ADJUDICATION IN A MISDEMEANOR CASE AFTER A DEFENDANT PLEADS GUILTY TO THE JURY MID-TRIAL..... | 8 |
| E. | CLOSING ARGUMENT - PLAYING A VIDEO OF A LION TRYING TO EAT A BABY THROUGH PROTECTIVE GLASS—TO ARGUE FOR A HIGH PRISON SENTENCE IN A SIMPLE ROBBERY CASE—WAS AN IMPROPER USE OF A DEMONSTRATIVE AID..... | 9 |
| IV | EVIDENCE..... | 10 |
| A. | A DEFENDANT’S FACEBOOK PHOTOS DISPLAYING WHAT LOOKED LIKE GANG-RELATED HAND SIGNS MAY BE ADMISSIBLE AT PUNISHMENT TO SHOW A DEFENDANT IS “HOLDING HIMSELF OUT” AS A GANG MEMBER..... | 10 |
| B. | THE <i>NENNO</i> TEST FOR RELIABILITY OF “SOFT SCIENCES” APPLIES TO DETERMINATIONS OF RELIABILITY OF ACCIDENT-RECONSTRUCTION EXPERT TESTIMONY WHERE THE EXPERT DID NOT CONDUCT ANY SPEED AND ENERGY CALCULATIONS...11 | 11 |
| C. | THE TRIAL COURT ERRED IN PREVENTING A DEFENDANT FROM CROSS-EXAMINING THE VICTIM’S MOTHER ABOUT THE EXISTENCE OF AND HER INTEREST IN THE OUTCOME OF A CPS PROCEEDING TO SHOW BIAS. | 12 |
| V | OFFENSES | 13 |
| A. | CAPITAL MURDER - TESTIMONY THAT A DEFENDANT MAY HAVE HAD A CERTAIN GUN, COMBINED WITH EVIDENCE OF MOTIVE, OPPORTUNITY, AND MEANS, AND EVIDENCE OF SUSPICIOUS BEHAVIOR, ARE COLLECTIVELY SUFFICIENT TO SUPPORT A CAPITAL-MURDER CONVICTION..... | 13 |
| B. | INDECENCY WITH A CHILD - A VICTIM’S TESTIMONY THAT THE DEFENDANT CONTACTED HER “CHEST,” COMBINED WITH OTHER STATEMENTS, IS SUFFICIENT FOR A RATIONAL JURY TO CONCLUDE THAT A DEFENDANT TOUCHED THE VICTIM’S “BREAST.” | 14 |
| C. | THEFT..... | 15 |

| | | |
|--------------|--|-----------|
| 1. | <i>Director of funeral home was guilty as a party to theft for accepting payments for cremations that were never performed even though it was his wife who endorsed the check for cremation services and deposited it.....</i> | 15 |
| 2. | <i>Ordinary shoplifting by a defendant working alone does not constitute organized retail theft under Penal Code § 31.16(b).....</i> | 16 |
| D. | TEXAS OPEN MEETINGS ACT § 551.143 IS UNCONSTITUTIONALLY VAGUE ON ITS FACE BECAUSE IT LACKS LIMITING LANGUAGE AND A CLEAR SCOPE..... | 17 |
| E. | SELF-DEFENSE - A REVIEWING COURT WILL NOT REEVALUATE THE WEIGHT AND CREDIBILITY OF THE EVIDENCE ON A SELF-DEFENSE CLAIM WHEN THE JURY HEARD TWO CONFLICTING STORIES AND THE JURY'S INFERENCES WERE REASONABLE..... | 18 |
| VI. | PLEA AGREEMENTS | 19 |
| A. | A VOLUNTARY PLEA OF NO CONTEST IS NOT RENDERED INVOLUNTARY BASED ON LATER JUDICIAL DECISIONS UNDERMINING THE PROPRIETY OF THE UNDERLYING AND PREVIOUSLY UNCHALLENGED SEIZURE OF EVIDENCE..... | 19 |
| VII. | JURY INSTRUCTIONS..... | 20 |
| A. | LESSER-INCLUDED OFFENSES - A DEFENDANT CHARGED WITH MURDER IS NOT ENTITLED TO A MANSLAUGHTER INSTRUCTION SIMPLY BECAUSE ONE WITNESS MADE ONE STATEMENT THAT DESCRIBED THE DEFENDANT'S ACTION AS A "REFLEX."..... | 20 |
| B. | HARM - THE DEFENDANT IN THIS CASE DID NOT SUFFER "SOME HARM" BY THE LACK OF A JURY UNANIMITY INSTRUCTION ON WHICH OF THE VICTIM'S ORIFICES THE DEFENDANT PENETRATED..... | 20 |
| VIII. | SENTENCING | 21 |
| A. | READING ALOUD A JURY'S WRITTEN VERDICT THAT ASSESSES A FINE CONTROL OVER AN ORAL PRONOUNCEMENT THAT FAILS TO INCLUDE THAT FINE..... | 21 |
| B. | A DEFENDANT'S LIFE SENTENCE FOR ATTEMPTED CAPITAL MURDER IS NOT AN ILLEGAL SENTENCE SIMPLY BECAUSE THE INDICTMENT FAILED TO ALLEGE THE AGGRAVATING ELEMENT OF CAPITAL MURDER THAT THE INTENDED VICTIM WAS UNDER 10 YEARS OF AGE..... | 21 |
| C. | DEATH PENALTY..... | 22 |
| 1. | <i>Intellectual Disability.....</i> | 22 |
| a. | A federal circuit court's reliance on <i>Moore v. Texas</i> to evaluate claims of intellectual disability was improper because Moore had been decided after the state court had evaluated the claims under then-existing law. | 22 |
| b. | Even though the intellectual-disability hearing was held prior to <i>Moore v. Texas</i> , a case need not be remanded for further proceedings if the evidence relating to intellectual disability is already on the record. | 22 |
| c. | A jury does not have the proper framework to determine intellectual disability when an expert's testimony relies on the now-rejected <i>Briseno</i> factors. | 23 |
| d. | Bobby James Moore is intellectually disabled. | 23 |
| 2. | <i>The Eighth Amendment may (1) permit a defendant to be executed even if he can't remember his crime; and (2) prohibit a defendant from being executed even though he suffers from memory loss unrelated to delusions.....</i> | 24 |
| 3. | <i>An inmate with a rare medical condition was not entitled to an alternative method of execution (rather than lethal injection) because he failed to sufficiently identify a "feasible, readily implemented" alternative method that would "significantly reduce a substantial risk of severe pain.".....</i> | 25 |
| 4. | <i>A capital-murder defendant was not entitled to complain about the lack of an imam at his execution because he waited almost two months after his execution date was set to seek relief.....</i> | 27 |
| D. | CIVIL ASSET FORFEITURE -- THE FOURTEENTH AMENDMENT INCORPORATES THE EIGHTH AMENDMENT'S BAN ON EXCESSIVE FINES. | 27 |
| E. | ARMED CAREER CRIMINAL ACT..... | 28 |
| 1. | <i>The Armed Career Criminal Act's elements clause includes a robbery offense that requires the defendant to overcome the victim's resistance.....</i> | 28 |
| 2. | <i>"Burglary" in the Armed Career Criminal Act includes vehicles or structures adapted or customarily used for overnight accommodation.....</i> | 29 |
| IX. | APPEALS | 29 |

| | | |
|-------------|---|-----------|
| A. | JURISDICTION - A SEPARATE NOTICE OF APPEAL IS REQUIRED TO PERFECT AN APPEAL FROM AN ORDER GRANTING SHOCK PROBATION INDEPENDENT OF THE NOTICE OF APPEAL FOR THE CONVICTION AND SENTENCE..... | 29 |
| B. | WAIVER - THE STATE'S WAIVER OF A JURY TRIAL CAN PROVIDE CONSIDERATION FOR A DEFENDANT'S BLANKET WAIVER OF HIS RIGHT TO APPEAL. | 30 |
| C. | A DEFENDANT DOES NOT PRESERVE A CLAIM THAT EXCLUDING EVIDENCE VIOLATED HIS CONSTITUTIONAL RIGHTS IF HE DID NOT SEEK TO ADMIT THE EVIDENCE ON CONSTITUTIONAL GROUNDS. | 31 |
| D. | FOR AGGRAVATED ASSAULT WITH A DEADLY WEAPON, THE MANNER-AND-MEANS ALLEGATIONS ARE NOT INCLUDED IN THE HYPOTHEMICALLY-CORRECT JURY CHARGE AND SHOULD BE DISREGARDED IN A LEGAL-SUFFICIENCY ANALYSIS. | 31 |
| X. | INEFFECTIVE ASSISTANCE OF COUNSEL | 32 |
| A. | TRIAL COUNSEL VIOLATED A CAPITAL-MURDER DEFENDANT'S SIXTH AMENDMENT RIGHT TO SET OBJECTIVES OF HIS DEFENSE WHEN COUNSEL CONCEDED THE DEFENDANT'S GUILT AT TRIAL OVER THE DEFENDANT'S OBJECTIONS. | 32 |
| B. | TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE SHACKLING OF THE DEFENDANT WHEN THE DEFENDANT PREVIOUSLY ATTEMPTED TO ESCAPE, AND A BARRIER WAS PUT UP TO PREVENT THE JURORS FROM SEEING THE SHACKLES..... | 33 |
| C. | EVEN WHEN A DEFENDANT WAIVES APPEAL, PREJUDICE IS PRESUMED IF COUNSEL'S DEFICIENT PERFORMANCE COST THE DEFENDANT AN APPEAL. | 34 |
| XI. | HABEAS CORPUS | 34 |
| A. | ACTUAL INNOCENCE - THE DEFENDANT WAS ENTITLED TO ACTUAL INNOCENCE RELIEF WHEN THE STATE'S BITEMARK EVIDENCE, WHICH IT HEAVILY RELIED ON AT TRIAL, WAS PROVEN UNRELIABLE..... | 34 |
| B. | AN OFFICER'S FALSE TESTIMONY ABOUT HIS QUALIFICATIONS WAS NOT MATERIAL WHEN OTHER OFFICERS CORROBORATED THE OFFICER'S TESTIMONY ON THE ISSUE OF CONSENT | 37 |
| C. | DNA TESTING..... | 38 |
| 1. | <i>A defendant is not entitled to post-conviction DNA testing when the defendant admitted it was a stall tactic and it is unlikely the testing would point to a specific suspect.....</i> | 38 |
| 2. | <i>Post-conviction test results of touch DNA that excluded the defendant as a major contributor were not sufficiently exculpatory when proper deference was given to the trial court's non-favorable finding.....</i> | 39 |
| XII. | EXTRAORDINARY MATTERS | 40 |
| A. | A FEE SCHEDULE PROVIDING FOR THE PAYMENT OF APPOINTED PROSECUTORS MUST HAVE REASONABLE FIXED RATES OR MINIMUM AND MAXIMUM HOURLY RATES; PAYMENT OUTSIDE OF THOSE RATES PURSUANT TO AN "OPT-OUT" PROVISION VIOLATES THE CODE OF CRIMINAL PROCEDURE. | 40 |

SCOTUS/CCA Update

Significant Decisions from September 2018 to April 2019

I. INTRODUCTION

This paper covers the published opinions issued by the Court of Criminal Appeals between September 1, 2018 and April 12, 2019. It also includes the significant criminal cases from the United States Supreme Court that have broad applicability, issued during that same time frame. If you feel something is missing, please email me though Nichole Reedy at Nichole.Reedy@txcourts.gov and we'll do our best to either correct or explain ourselves. Additionally, I will continue to update the paper throughout the terms of the respective courts. If you'd like a copy of the updated paper, do not lose the email mentioned above.

II. MOTIONS TO SUPPRESS

A. There is no legitimate expectation of privacy in less than three hours of real-time location information records accessed by police though pinging a person's phone less than five times. In 2014, Annie Sims was found dead on the porch of her home. Annie's mother, Mary Tucker, told police that Christian Vernon Sims (Annie's grandson) and his girlfriend, Ashley Morrison, were possible suspects. Annie's Toyota Highlander, Annie's purse, and two guns were missing from the home. Annie's husband called to cancel her credit cards, and the credit card company told him that the cards had been used three times, including once at a Wal-Mart in McAlester, Oklahoma.

Officers from McAlester Police Department went to the Wal-Mart to investigate and discovered that a young man and woman used Annie's credit card and left in a Toyota Highlander. Christian's grandfather looked at pictures from the security footage and identified the two people as Christian and Morrison.

Deputy Chief Jeff Springer from the Lamar County Sheriff's Office thought there was probable cause to believe that Christian committed murder, burglary of a habitation, unauthorized use of a motor vehicle, and credit card abuse. Springer also believed

that Christian and Morrison were a danger to the public because they were likely armed. Instead of seeking a warrant to "ping" Christian's and Morrison's cell phones, Sergeant Steve Hill used an "EMERGENCY SITUATION DISCLOSURE" form provided by Verizon Wireless to request current location information. Using that information, police located Christian and Morrison at a motel and arrested them.

Pretrial, Christian filed a motion to suppress, alleging that accessing the real-time location records stored in his cell phone violated the Fourth Amendment, the Texas Constitution, the Stored Communications Act ("SCA"), and Article 18.21 of the Texas Code of Criminal Procedure. The trial court denied Christian's motion. Christian appealed, and the court of appeals affirmed.

The Court of Criminal Appeals unanimously affirmed the court of appeals. *Sims v. State*, 2019 WL 208631 (Tex. Crim. App. Jan. 16, 2019) (9:0). Writing for the Court, Judge Hervey first discussed whether suppression is a remedy for violation of the SCA or Article 18.21. Both statutes contain provisions stating that, absent a federal constitutional violation (the SCA) or a federal or state constitutional violation (Article 18.21), the only available judicial remedies are those provided for in the statutes. The Court then applied the "general versus specific" canon of statutory construction to determine whether those exclusivity provisions control over Article 38.23, which provides the remedy of suppression. The Court concluded that the exclusivity provisions controlled.

The Court then considered Christian's Fourth Amendment Claim. The Court reviewed precedent on physical movements and location and the third-party doctrine. The Court discussed *Carpenter v. United States*, 138 S. Ct. 2206 (2018), which held that the defendant had a reasonable expectation of privacy in seven days of historical cellphone location information. The Court here stated that, although *Carpenter* dealt with historical location information—not real-time location information—it believed that the Supreme Court's reasoning in *Carpenter* applies to both types of records.

Therefore, whether a particular government action constitutes a "search" or "seizure" does not turn on the

content of the location information. Instead, it turns on whether the government searched or seized “enough” information that it violated a legitimate expectation of privacy. The Court concluded that Christian did not have a legitimate expectation of privacy in his physical movements or location in the less than three hours of real-time location information records accessed by police though pinging his phone less than five times.

[**Commentary:** Note that the opinion relies heavily on the fact that the police only took a little bit of information for a discrete purpose. In this way, the Court hopes to distinguish this case from *Carpenter*. That said, it also may be attractive to the Texas Legislature. At the time of this writing, there are several bills that might impact the continued viability of the holding in this case. We’ll have to wait and see what, if anything, gets passed.]

B. Blood Draws

1. Possible IV treatment is insufficient to justify a warrantless blood draw if there is no evidence of current, ongoing medical treatment. Joel Garcia was involved in a car crash, which led to three peoples’ death, and he was taken to a hospital. Law-enforcement officers, suspecting that Garcia was intoxicated and concerned that he might receive an IV treatment soon, took a sample of Garcia’s blood without a warrant. An analysis of the sample showed that Wood had a blood-alcohol concentration of 0.268, and it detected the presence of “Benzoylcegonine,” a cocaine metabolite. Garcia was charged with three counts of intoxication manslaughter, and he filed a motion to suppress the warrantless blood draw.

After an extensive hearing on the motion, the trial court suppressed the blood evidence. The trial court found that the officers’ testimony that exigent circumstances existed was not credible. The State appealed, and the court of appeals reversed the trial court’s ruling.

The Court of Criminal Appeals reversed the court of appeals. *State v. Garcia*, 2018 WL 6521579 (Tex. Crim. App. Dec. 12, 2018) (6:2:1). Writing for the Court, Judge Keasler noted that the court of appeals gave three reasons for its conclusion that the trial judge

erred in suppressing the evidence. The Court addressed each reason in turn.

First, the court of appeals supported its conclusion by the fact that “Garcia’s accident resulted in three deaths, several cars afire, and the necessity of numerous officers on the scene.” But the Court stated that the seriousness of the offense itself does not create exigent circumstances justifying a warrantless search. And, insofar as the accident’s severity might have adversely affected the officers’ ability to apply for a warrant, under the trial judge’s findings, that was not a concern here.

Second, the court of appeals reasoned that the officers’ need for contemporaneous blood evidence was extraordinarily high because cocaine and other narcotics are eliminated at an unknown rate. The Court stated that it did not disagree with this reasoning in principle but noted that it must be supported by facts. And here it was not. Nothing in the record showed how or why the officers might reasonably have suspected Garcia was using cocaine.

Third, the court of appeals reasoned that potential IV treatment created exigent circumstances. But the Court noted that the trial court’s findings show that the officers were not faced with any such dilemma over whether to intervene due to possible IV treatment. When the officers ordered the phlebotomist to take a sample of Garcia’s blood, all medical treatment of Garcia had stopped. Thus, the Court, deferring to the trial court’s findings of fact, held that the trial court did not abuse its discretion in suppressing the blood evidence.

Judge Yearry dissented. Relying upon his prior dissenting opinions, Judge Yearry argued that the Court erroneously believes that exigent circumstances to justify a warrantless blood draw must be evaluated on a case-by-case basis. According to Judge Yearry, this case demonstrates why that case-by-case approach is problematic.

Presiding Judge Keller and Judge Keel concurred without written opinion.

2. Individuals have a reasonable expectation of privacy in their blood that is drawn at a hospital for medical purposes. Juan Martinez was involved in a

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Significant Decisions: United States Supreme Court and The Court of Criminal Appeals

Also available as part of the eCourse

[2019 Robert O. Dawson eConference on Criminal Appeals](#)

First appeared as part of the conference materials for the
2019 Robert O. Dawson Conference on Criminal Appeals session
"Significant Decisions of the Texas Court of Criminal Appeals"