**Top Ten Criminal Cases**

 This paper addresses the top ten criminal cases from April of 2014 thru early April of 2015, evenly divided between U.S. Supreme Court opinions and Court of Criminal Appeals’ opinions. Like beauty, the significance of judicial opinions is in the eye of the beholder.

**Supreme Court**

1. ***Fernandez v. California*, 134 S. Ct. 1126 (2014)**

 Police saw a robbery suspect run into an apartment, and shortly thereafter, heard sounds of screaming and fighting coming from the building. They knocked on the apartment door and an injured and crying Roxanne Rojas answered. When police asked permission to enter and perform a protective sweep, Appellant came to the door and refused to let them in. Based on Rojas’ injuries, police arrested Appellant on suspicion of assault and took him to jail. Police later returned and received consent from Rojas to search the apartment, where they found evidence linking Appellant to the robbery.

 Appellant argued that, because he was a co-tenant of the apartment, police were required to honor his objection to the search and could not remove his objection simply by arresting him and removing him from the premises.

 The Supreme Court reiterated that police may search jointly occupied premises if one of the occupants consents, *United States v. Matlock*, 94 S. Ct. 988 (1974), unless another tenant is present and objects. *Georgia v. Randolph*, 126 S. Ct. 1515 (2006). Here, although Appellant had previously objected to the search, he was no longer present when Rojas consented. The majority determined that physical presence was the deciding factor in *Randolph*; police need not honor the objection of a tenant who is no longer physically present.

The Court rejected Appellant’s claim that his absence should not be dispositive when police removed him from the residence and knew he had previously objected. First, the Court held that, regardless of the officer’s subjective intent in arresting Appellant, the arrest was objectively reasonable. Second, the Court refused to hold that an objection remains effective until it is withdrawn. In reaching this conclusion, the Court applied *Randolph*’s analysis, which was based on “widely shared social expectations,” not property law. It concluded that, while a hypothetical visitor would be unlikely to accept an invitation to enter someone’s home if a co-tenant was at the door objecting, he would be more likely to enter if the objector was absent and unlikely to return for the duration of his visit.

1. ***Navarette v. California*, 134 S. Ct. 1683 (2014)**

 California Highway Patrol officers received a tip from an anonymous 911 caller that identified the make, license plate, and location of a truck that had nearly run the caller off the road. An officer spotted the truck several miles from the reported location and conducted a stop.

 In deciding whether the stop was lawful, the Supreme Court inquired whether the anonymous caller’s report was sufficiently reliable to be credited and whether it created reasonable suspicion of an ongoing crime of drunk driving, as opposed to an “isolated episode of past recklessness.”

The Court noted that anonymous tips are normally insufficiently reliable because they tend to not include sufficient factual recitations and the veracity of the tipster is unknowable. However, it held that under the facts in this case, the report had sufficient indicia of reliability. First the Court held that the report was entitled to greater weight because it included a detailed description of the incident and the caller claimed to be an eyewitness. Second, the officers confirmed the truck’s location where they expected to find it, based on the report. Third, the report was made immediately after the incident, and contemporaneous reports of criminal activity made under the stress of excitement have been treated as “especially reliable.” Fourth, the Court held that the use of the 911 system provided further support of the caller’s veracity. Because the system has known identifying and tracing features, “a reasonable officer could conclude that a false tipster would think twice before using such a system.”

 The Court also determined that the report provided reasonable suspicion of drunk driving. The call reported more than a conclusory allegation of a simple act of reckless driving. It determined that a driver who nearly strikes another vehicle or runs another vehicle off the roadway is likely intoxicated as these are “significant indicator[s] of drunk driving.”

1. ***Heien v. North Carolina,* 135 S. Ct. 530 (2014)**

An officer stopped Appellant’s vehicle based on his mistaken belief that a North Carolina brake light statute required two working lights, when a court later determined that it required only one. The Supreme Court addressed the validity of a traffic stop based on the officer’s mistake of law. Even though the officer was wrong about the elements of the offense, because the statute in question was ambiguous, the Court determined that his mistake was objectively reasonable. And because his belief that an offense had been committed was reasonable, the traffic stop based on that belief was also reasonable, *i.e.* supported by reasonable suspicion. The Court reiterated that the Fourth Amendment forbids only those searches and seizures that are unreasonable. It noted that mistakes of fact by police have long been accepted if they are reasonable mistakes, and it saw no reason not to also allow reasonable mistakes of law.

 The Court found support for its holding in *Michigan v. DeFillippo*, 443 U.S. 31 (1979), which upheld the validity of an arrest for a criminal offense that was later declared unconstitutional. That arrest led to the discovery of drugs. The *Defillippo* Court held that the drugs need not be suppressed. At the time of the arrest, the conduct police observed violated a presumptively valid ordinance, which provided probable cause for the arrest. The Court made clear that *Defillippo*’s holding was that no Fourth Amendment violation occurred—not that a violation occurred, but the exclusionary rule did not apply due to the good faith of the officers.

 However, the Court also noted that an officer cannot be reasonably mistaken about the requirements of the Fourth Amendment. “An officer’s mistaken view that the conduct at issue [(a search or seizure)] did not give rise to such a violation—no matter how reasonable—could not change that ultimate conclusion.”

**NOTE**: This opinion should be applied with caution. It was not as clear as it could have been on the distinction between reliance on a substantive criminal law and reliance on a statute purporting to authorize a search. In *Defillippo*, the Court stated: “We have held that the exclusionary rule required suppression of evidence obtained in searches carried out pursuant to statutes, not previously declared unconstitutional, which purported to authorize the searches in question without probable cause or a warrant.” In those circumstances, the search-authorizing statutes did not comport with the Fourth Amendment. In contrast, substantive criminal law offenses do not directly authorize a search and seizure; they are relevant only to the facts and circumstances that constitute probable cause or reasonable suspicion supporting an arrest. Or, as the Court explained, “The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest. We have made clear that the kinds and degree of proof and the procedural requirements necessary for a conviction are not prerequisites to a valid arrest.”

1. ***Riley v. California***, ***United States v. Wurie*, 134 S. Ct. 2473 (2014)**

 Riley and Wurie were arrested and their cell phones seized incident to arrest. In both cases, police, without a warrant, searched the phones by looking at pictures, videos, call logs, or text messages. The information obtained led to other evidence that resulted in convictions.

 The Supreme Court acknowledged that a warrantless search incident to lawful arrest has long been recognized, but it noted that the purpose of such an arrest was to search for weapons and/or prevent the defendant from destroying personal property that is: 1) evidence of the crime for which he was arrested, and 2) on his person or in the area within his immediate control. To determine whether a particular type of search should be exempt from the warrant requirement, the search’s intrusiveness on individual privacy must be balanced against its necessity for the promotion of legitimate governmental interests.

 The Court concluded that cell phones are exempt from the search incident to arrest exception to the warrant requirement. It reasoned that digital data on a cell phone is categorically different from physical evidence, which can potentially harm the officer or be easily destroyed. It held that data cannot harm an officer and, once the cell phone is seized, the suspect can no longer delete incriminating data from it. The Court rejected the argument that data could be destroyed by digital wiping or encryption by a third party. The justification for a search incident to arrest has always focused on the suspect, not a third party’s ability to destroy the evidence. And there was no evidence that digital wiping or encryption is a prevalent issue for police. The Court noted that police can take simple precautions like turning off the phone to prevent remote wiping and protecting the phone from radio waves to avoid encryption. And in those instances where police fear an imminent threat of either, exigent circumstances might justify foregoing a warrant.

 The Court refused to treat a cell phone like any other physical object that is subject to a search incident to arrest. It reasoned that the amount of private information on a cell phone is qualitatively and quantitatively different. It observed, “The sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet.” It also made note of the pervasiveness of cell phone use, citing a study that almost 75% of smart phone users are within five feet of their phones most of the time, and 12% admit using their phones in the shower. In addition, GPS data, browsing history, and apps on a cell phone can reveal a persons’ religion, budget, political preferences, and drug or alcohol use. The Court reasoned that a cell phone could theoretically store more information about a person than his own home. But it also pointed out a phone is not just a container, because some items retrievable from the phone are stored in the cloud.

1. ***Grady v. North Carolina*, 2015 U.S. Lexis 2124 (2015)**

 After Grady served his sentence for a sex offense, he was subjected to lifetime satellite based monitoring as a recidivist sex offender. This required him to wear tracking devices. The lower court refused to find that the monitoring constituted a search under the Fourth Amendment.

 The Supreme Court reversed, relying on *United States v. Jones*, 132 S. Ct. 945 (2012), which held that the placement of a GPS tracking device on a car and its subsequent monitoring constituted a Fourth Amendment search. It noted that *Jones* and *Florida v. Jardines*, 133 S. Ct. 1409 (2013), held that a search occurs when the government obtains information or evidence “by physically intruding on a constitutionally protected area.” Here, the intrusion was on the defendant’s body. The Supreme Court held that the monitoring program in this case was not immune from Fourth Amendment protections even though it was civil in nature. Concluding that the monitoring was a search, it remanded for a determination of whether it was reasonable under the Fourth Amendment.

**Court of Criminal Appeals**

1. ***Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014)**

 Appellant challenged the constitutionality of Tex. Penal Code § 21.15 (b)(1), which makes it a crime to photograph or electronically record an image of a person (not in a bathroom or private dressing room) if the photograph or recording is made: 1) without the person’s consent, and 2) with the intent to arouse or gratify the sexual desire of any person.

 At the outset, the Court of Criminal Appeals held that photography is sufficiently expressive to trigger First Amendment review without proof of an intent to convey a particularized message that would be understood by those who viewed it, a necessary hurdle for less inherently expressive conduct, such as flag burning. It also observed that there is no distinction for First Amendment purposes between the taking of the photograph and its publication or distribution. The Court compared a photographer’s camera to an artist’s paintbrush and held, “[T]he purposeful creation of photographs and visual recordings are entitled to the same First Amendment protection as the photographs and visual recordings themselves.”

 The Court concluded that the “intent to arouse and gratify” element does not remove otherwise expressive conduct from First Amendment protections, because the intent to do something that is lawful is protected. *See also Ex parte Lo,* 424 S.W.3d 10 (Tex. Crim. App. 2013) (addressing the constitutionality of the online solicitation of a minor statute). It distinguished the intent to arouse and gratify, which is lawful, from an unlawful one, such as the intent to threaten or intimidate another. “Banning otherwise protected expression on the basis that it produces sexual arousal or gratification is the regulation of protected thought, and such a regulation is outside the government’s power.”

 The Court also rejected the State’s attempt to narrow the statute’s application to certain cases by restricting the definition of consent. Under the State’s theory, by appearing in public, a person consents to being photographed, and only those photographs of persons in non-public places, or “upskirt photos” would be subject to prosecution. The Court refused to so narrowly construe consent because it is defined in the penal code.

 The Court distinguished *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), which upheld the harassment statute, on the basis that the telephone is a non-public means of communication, which allows greater government regulation, and because it requires proof that the defendant intended to inflict emotional harm.

 The Court noted that strict scrutiny applies to a statute that is not content-neutral. Here, the statute was not content neutral because it did not criminalize all photography without the subject’s consent—only those photographs or recordings made with intent to arouse and gratify. Under a strict scrutiny analysis, the statute must use the least restrictive means to achieve a compelling government interest. Here, the statute did not do so because it was not limited to privacy- protecting measures like criminalizing only “upskirt” shots or photographs of a person in a non-public place. The Court assumed that those examples would be legitimate applications of the statute. But it held the statute was overbroad because, in addition to its “plainly legitimate sweep,” it prohibited a substantial amount of protected expression, *i.e.,* photographs of people in public places, like beaches, concerts, festivals, and sporting events.

**NOTE**: The Court of Criminal Appeals has determined that a habeas applicant is entitled to have a conviction set aside when it is later determined to be unconstitutional, although the Judges were not able to agree on the theory of relief. *Ex parte Chance*, 439 S.W.3d 918 (Tex. Crim. App. 2014).

1. ***Ex parte Heilman,* \_\_S.W.3d \_\_, No. PD-1591-13 (Tex. Crim. App. Mar. 18, 2015)**

 Pursuant to a plea bargain, Applicant pled guilty to a misdemeanor tampering with a governmental record charge for which the statute of limitations had run, in exchange for the State’s agreement not to pursue a felony tampering charge. In a post-conviction writ of habeas corpus, he challenged the trial court’s jurisdiction over the time-barred charge.

 The Court of Criminal Appeals held that Applicant forfeited that challenge by failing to raise it at trial. In so holding, it overruled its previous opinion in *Phillips v. State*, 362 S.W.3d 606 (Tex. Crim. App. 2011), which held that a “pure law” limitations claim, one that was clear from the face of the charging instrument, could be raised for the first time on appeal. In *Phillips*, the Court distinguished a pure law limitations defense from a factual limitations defense, *i.e.,* one that requires the development of facts. But *Phillips* was based on the principle that a statute that retroactively extends the statute of limitations is an *ex post facto* law. Here, the Court held, when no *ex post facto* violation is present, there is no reason to treat pure law and factual limitations issues differently.

 In justifying its departure from *Phillips*, the Court noted that statutes of limitations have been characterized as legislative “acts of grace,” a much less weighty concern than constitutional rights that can be forfeited by inaction. It also noted that a defendant should be permitted to plea bargain away a limitations defense, when, as in this case, it is beneficial to him.

1. ***Ex parte Smith***, **444 S.W.3d 661 (Tex. Crim. App 2014)**

 Applicant waited over ten years after his conviction to file a post-conviction writ of habeas corpus raising ineffective assistance of appellate counsel. Counsel filed an affidavit stating he had no recollection of the case, and his file did not indicate that he had filed notice of appeal. The trial court recommended that relief be granted. On its own motion, the Court of Criminal Appeals raised the issue of whether the State is required to plead laches before a court is entitled to rely on that doctrine.

 The Court noted that habeas corpus is an equitable remedy based on notions of fairness. It pointed out that under the common law doctrine of laches, which the Court had previously adopted in lieu of the more rigid federal approach, the State need not make a particularized showing of prejudice. It can show prejudice from undue delay not only in its ability to respond to the allegations in the habeas application, but also prejudice in its ability to retry the defendant in the event a new trial granted on habeas.  *Ex parte Perez*, 398 S.W.3d 206 (Tex. Crim. App. 2013). Furthermore, a court must consider not only the length of delay, but also whether the delay was justifiable and whether the Applicant is entitled to relief for other compelling reasons, such as actual innocence.

 In light of these equitable considerations, the Court deemed it appropriate to consider, *inter alia*, society’s interest in the finality of convictions and administrative costs of addressing habeas claims. It held that the State’s failure to plead laches does not limit a court’s ability to take up the matter *sua sponte* and “balance equities beyond those that the parties advocate.” It cautioned, however, that trial courts should do so sparingly and only in cases involving “excessive delay.” Regardless of whether laches is raised by the State or the court, the Applicant must be given an opportunity to explain the reason for the delay in raising his claims.

1. ***Hanna v. State*, 426 S.W.3d 87 (Tex. Crim. App. 2014)**

 Appellant was arrested for DWI after officers came upon the scene of a one car/one utility pole accident. Upon conviction, the trial court ordered restitution to Lubbock Power and Light for damage to the utility pole.

The Court of Criminal Appeals held that restitution is permissible under Tex. Code Crim. Proc. art. 42.037, which allows restitution “to any victim of the offense,” even for an offense like DWI, which does not require proof of a victim, and even if a victim is not alleged in the charging instrument. The Court noted that restitution must be just, there must be a factual basis in the record to support it, and it can only be ordered for a victim of an offense for which the defendant is charged. “Victim” is not defined by statute and must be assigned its common, ordinary meaning. Its ordinary meaning does not require that the victim be an essential element of the offense, only that he be harmed because of the offense. Therefore, the fact that DWI is, elementally, a “victimless” offense does not mean that a person cannot factually be a victim of DWI. The Court concluded, “For purposes of the restitution statute, a ‘victim’ is any person who suffered loss as a direct result of the criminal offense.” Because the statute uses the expansive “any victim” instead of the more limiting “the victim,” restitution can be ordered for a victim not named in the charging instrument.

 The Court next held that the State must prove by a preponderance of the evidence that “the loss was a ‘but for’ result of the criminal offense and resulted ‘proximately,’ or foreseeably, from the criminal offense.” Under these facts, it determined that the State failed to carry its burden. It held that although the State proved Appellant caused the damage to the utility pole, it failed to prove that his intoxication caused the accident. No one saw the accident occur, Appellant claimed a water puddle caused him to lose control of the car, and the officer testified only that “[Appellant] driving that vehicle” caused the damage.

1. ***Kirk v. State*, \_\_ S.W.3d \_\_, No. PD-1197-13 (Tex. Crim. App. Jan. 28, 2015)**

 The trial judge adjudicated Appellant’s guilt and sentenced him to eight years. Appellant moved for a “time cut.” The judge timely granted a new trial on punishment, but on the seventy-sixth day after imposition of sentence, he rescinded the order granting a new trial.

 The Court of Criminal Appeals acknowledged that in *Awadelkariem v. State*, 974 S.W.2d 721 (Tex. Crim. App. 1998), it held that a trial judge lacked authority to rescind the grant of a new trial more than seventy-five days after the judgment. However, it held that in that case, the issue was the authority to rescind the order at all, not the deadline for doing so. And in *Awadelkariem,* the Court had followed Texas Supreme Court case law regarding the ability of the trial court to rescind such an order in a civil case. The Court pointed out that the Supreme Court has since abandoned the seventy-five-day window for the trial court to rescind such an order.

 The Court of Criminal Appeals noted that other jurisdictions have based the authority to withdraw a new trial order at any time before the judgment becomes final on the trial court’s plenary or inherent power. The Court also observed that our own rules of appellate procedure do not expressly prescribe a time limit for rescinding an order granting a new trial; Tex. R. App. P. 21.8 dictates only when a trial court must rule on a motion for new trial, not when it may change a timely order. Finally, the Court held that rescinding an order granting a new trial after seventy five days will not cut off a defendant’s right to appeal. In such cases, the rescinding order shall be treated as an appealable order under Tex. R. App. P. 26.2, and appellate time tables will be calculated from the date of that order.