APPENDIX A

Court of Criminal Appeals of Texas' Opinion

In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-18-00043-CR

ANTHONY CARTER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 137th District Court
Lubbock County, Texas
Trial Court No. 2017-413-558, Honorable John J. McClendon, III, Presiding

May 14, 2019

OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Anthony Carter (appellant) appeals his conviction for possessing a controlled substance with intent to deliver and his 90-year prison sentence. He operated several smoke shops from which he sold, among other products, an item called "Chilly Willy" which contained the compound fluoro-ADB. Though fluoro-ADB was not expressly named as a controlled substance by Texas statute, several components of it allegedly were within Penalty Group 2-A of § 481.1031(b) of the Texas Health and Safety Code. Four issues pend for our review. After considering each, we affirm.

Void Indictment

Though not the first issue mentioned by appellant, we address it first. He contends that the indictment was void because it did not allege an offense. It purportedly failed to allege an offense because, through it, the State accused "Anthony Carter" of "knowingly possess[ing], with intent to deliver, 'Chilly Willy; 2g Chronic Hypnotic' which contains a compound controlled in Penalty Group 2-A, Chapter 481.1031(b)(5) of the Texas Health and Safety Code, to wit: fluoro-ADB, by aggregate weight including adulterants and dilutants 400 grams or more." As previously mentioned, fluoro-ADB was not expressly named as a controlled substance in that statutory provision. Because it was not, appellant believed the indictment failed to vest the trial court with subject-matter jurisdiction, which rendered the conviction void. We overrule the issue.

The sufficiency of an indictment is a question of law. *State v. Zuniga*, 512 S.W.3d 902, 906 (Tex. Crim. App. 2017). Additionally, whether a charging instrument is sufficient and avers an offense depends on whether the statements therein "are clear enough that one can identify the offense alleged." *Teal v. State*, 230 S.W.3d 172, 180 (Tex. Crim. App. 2007). In other words, we must assess if "the trial court (and appellate courts who gives deference to the trial court's assessment) and the defendant [can] identify what penal code provision is alleged and [whether] that . . . provision [is] one that vests jurisdiction in the trial court." *Id.* If the answer is yes, then the indictment is sufficient to vest the trial court with subject-matter jurisdiction. *Id.* If not, then the conviction is void for want of jurisdiction.

Here, the indictment identified 1) the name of the accused and 2) the crime or offense of which he was accused. The former was "Anthony Carter," our appellant. The latter was "knowingly possess[ing]" 400 or more grams of a "compound controlled in

Penalty Group 2-A [of] Chapter 481.1031(b)(5) of the Texas Health and Safety Code." Furthermore, possessing a controlled substance within that penalty group in a quantity having an aggregate weight of 400 or more grams was and is a felony. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.1161(b)(3) (West 2017) (stating that the offense is a state jail felony if the amount is, by aggregate weight, including adulterants and dilutants, five pounds or less but more than four ounces).[1] Appellant being identified as the accused and being told of the criminal statute he violated satisfied the requirements of *Zuniga*. So, the indictment was sufficient to vest the district court with subject-matter jurisdiction over the proceeding. *See Kirkpatrick v. State*, 279 S.W.3d 324, 329 (Tex. Crim. App. 2009) (finding that the indictment sufficiently alleged an offense within the district court's jurisdiction because it was returned in a felony court and on its face disclosed the name of the offense and the penal code provision assigned it). And, that the indictment failed to mention the particular compound or chemical within the litany of compounds and chemicals itemized within § 481.1031(b)(5) does not alter our decision.

Penalty Group 2-A encompasses "materials, compounds, mixtures, or preparations" containing certain specified natural or synthetic chemical substances listed within § 481.1031(b). *See* TEX. HEALTH & SAFETY CODE ANN. § 481.1031(b)(1)–(8) (West Supp. 2018) (naming the natural or synthetic chemical substances comprising the materials, compounds, mixtures, or preparations). If appellant were confused about or questioned whether "fluoro-ADB" or the chemicals comprising it fell within the category of prohibited materials, compounds, mixtures, or preparations, he could and should have objected to the indictment before trial. *See Kirkpatrick*, 279 S.W.3d at 329 (stating that

[1] Funny that the statute defines the weight in terms of ounces and pounds (i.e., the American way of measuring weight) while the indictment refers to grams. That is inconsequential, though, given the ability to convert grams into ounces, and 400 or more grams equals 14 or more ounces.

"if [Kirkpatrick] had confusion about whether the State did, or intended to, charge her with a felony, she could have, and should have, objected to the defective indictment before the date of trial"). Because appellant did not do so, he waived his complaint. *See Herrera v. State*, No. 06-18-00111-CR, 2019 Tex. App. LEXIS 3018, at *2–3 (Tex. App.—Texarkana Apr. 15, 2019, no pet. h.) (mem. op., not designated for publication) (so holding when addressing a similar contention also involving fluoro-ADB).

Sufficiency of the Evidence

Next, appellant questions the sufficiency of the evidence underlying his conviction. His attack is directed at whether the State proved 1) he knowingly sold a controlled substance listed in § 481.1031(b)(5) and 2) the substance he was convicted of possessing fell within that provision. We overrule both issues.

The pertinent standard of review is explained in *Johnson v. State*, 560 S.W.3d 224, 226 (Tex. Crim. App. 2018). We refer the parties to that opinion and forgo reiterating the standard here.

Again, the controlled substance appellant allegedly possessed fell within § 481.1031(b)(5) of Penalty Group 2-A of the Texas Health and Safety Code. Per § 481.113 of the same Code, a person commits an offense if he "knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in . . . Penalty Group . . . 2-A." TEX. HEALTH & SAFETY CODE ANN. § 481.113(a) (West 2017). Therefore, securing a conviction under that statute obligated the State to prove not only that the substance in question was within § 481.1031(b)(5) but also that the accused (appellant) knew it was a substance within that provision. *See White v. State,* 509 S.W.3d 307, 309 (Tex. Crim. App. 2017) (involving a Penalty Group 1 controlled substance and stating that "[t]his is a nature-of-conduct offense, and the statute expressly assigns culpable mental

states to the nature of the conduct: A defendant must be aware that he is delivering a Penalty Group 1 substance to be guilty"); *Blackman v. State*, 350 S.W.3d 588, 594 (Tex. Crim. App. 2011) (stating that to prove "the unlawful-possession-of-a-controlled-substance element of the charged offense in this case, the State was required to prove that: 1) appellant exercised control, management, or care over the three kilograms of cocaine; and 2) appellant knew that this was cocaine"). We first address if the State proved that the item possessed by appellant was a controlled substance under § 481.1031(b)(5).

Proof Chilly Willy Was a Controlled Substance

Penalty Group 2-A described in § 481.1031 encapsulates materials, compounds, mixtures, and the like containing any quantity of natural or synthetic chemical substances "listed by name in this subsection or contained within one of the structural classes defined in this subsection." TEX. HEALTH & SAFETY CODE ANN. § 481.1031(b). Subparagraph (5) of (b) describes one such "structural class" as "any compound containing a core component substituted at the 1-position to any extent, and substituted at the 3-position with a link component attached to a group A component."[2] *Id.* § 481.1031(b). While neither "Chilly Willy" nor "fluoro-ADB" were alluded to in § 481.1031(b)(5), the State's expert nonetheless described fluoro-ADB as having various ingredients within its category of core, link, and group A components. That is, the core component found in "fluoro-ADB" was "indazole," according to the forensic chemist, while its link and group A components

[2] The terms "core component," "group A component," and "link component" were and are defined through a litany of various chemicals. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.1031(a)(1)–(3) (specifying the respective chemicals within each component).

were "carboxamide" and "methoxy dimethyl oxobutane," respectively.[3] These chemicals were found per "gas chromatography mass spectrometry," he continued. The prosecutor asked the forensic chemist, "So if we put all of those together . . . . We see the portions of fluoro-ADB that are relevant to this; is that correct?" The chemist answered, "Correct. . . . [B]ased off of those three combinations, that's why it is able to be controlled under the structural class with how the law is currently written." Sadly, the chemist was not asked to clarify the latter statement. This is of import because § 481.1031(b)(5) speaks in terms of certain chemicals having a specific placement within the molecular structure of an illegal compound.

That is, criminal statutes outside the Penal Code must be strictly construed. *State v.* Cortez, 543 S.W.3d 198, 206 (Tex. Crim. App. 2018). Being within the Health and Safety Code, § 481.1031(b)(5) is one such statute outside the Penal Code necessitating strict construction. Per its terms, a compound within its scope is one "containing a core component, [i.e., indazole], substituted ***at the 1-position*** to any extent, and substituted ***at the 3-position*** with a link component [i.e., carboxamide] ***attached to*** a group A component [i.e., methoxy dimethyl oxobutane]." (Emphasis added). If one is to heed the actual wording of (b)(5), it is not enough that the chemicals are found in a compound. That is, guilt requires more than merely utilizing a bygone means of ordering from a Chinese menu, *i.e.*, one item from column A and two from column B.[4] Simply pulling "indazole" from the core component column, "methoxy dimethyl oxobutane" from the

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[3] "Indazole" is named within the statutory category of "core component," *id.* § 481.1031(a)(1), while "carboxamide" is listed as a "link component," *id.* § 481.1031(a)(3), and "methoxy dimethyl oxobutane" as a "group A component." *Id.* § 481.1031(a)(2).

[4] Barry Popik, *"One from column A, one from column B" (Chinese menu ordering)*, THE BIG APPLE (Dec. 20, 2007) https://www.barrypopik.com/index.php/new_york_city/entry/one_from_column_a_one_from_column_b_chinese_menu_ordering (discussing the origins of what became known as the "Chinese menu" system).

group A column, and "carboxamide" from the link column gets the State nowhere. Instead, each item must be located on the plate in a certain way for the ultimate "meal" to be 非法 (i.e., illegal). To conclude otherwise would be to ignore the legislature's wording, and that we cannot do. So, construing the statute strictly leads us to hold that the State must prove the respective components or chemicals were located or attached as expressed in the statute.

Neither the forensic chemist nor any other witness expressly said that the pivotal compounds in "fluoro-ADB" were in the "positions" or "attached" as directed by § 481.1031(b)(5). Instead, the expert opined that "based off of those three combinations, that's why [fluoro-ADB] is able to be controlled under the structural class with how the law is currently written." Whether this was his way of confirming that the chemicals indazole, carboxamide, and methoxy dimethyl oxobutane had the requisite placement or attachments is a bit unclear. Nonetheless, the standard of review obligates us to look at all the evidence and construe it in the light most favorable to the verdict or prosecution. *See Johnson*, 560 S.W.3d at 226. In abiding by that standard, we encounter where, prior to voicing his opinion, the expert described how the legislature had recently changed the law in attempting to criminalize synthetic marijuana. While doing so, he uttered several informative statements. They were as follows: 1) "[O]ne of the recent additions to the law is instead of listing each substance by name, we now actually classify a synthetic compound ***by the structure***"; 2) "[T]here are a whole bunch of different ***combinations of structures***, and depending on what kinds of groups ***create that molecule***, it's classified by different subsections in the law"; 3) Fluoro-ADB fell within structural class § 481.1031(b)(5); 4) "From a chemist's perspective, really, and as a forensic chemist, we're looking at ***how the structure relates*** to the law"; 5) "[S]o we are looking at different

parts of the compound to see if it falls within that particular subsection" of the statute; 6) "[S]ince we are ***looking at the structural class***, now we are actually looking at the structure itself and seeing if that falls ***within a particular combination*** of groups"; 7) "I do know ***structurally*** [fluoro-ADB] is under the 2-A"; 8) The law "classifies three different parts ***of the molecule***"; 8) from "a forensic aspect, I can at least tell you that [fluoro-ADB is] the indazole ring group, and then also I have tried to make it easier on all of us by showing how the indazole actually ***fits in with the structure***"; and 9) "[B]ased off of those three combinations [of indazole, methoxy dimethyl oxobutane, and carboxamide], that's why it is able to be controlled under the structural class with how ***the law is currently written***." (Emphasis added). To that we add his answer of "Correct" when asked, "And that's what makes a compound, the place where ***the molecules are stuck***, correct?" and his statement that "but it's where the fluorine is actually attached to a particular carbon" when asked whether a different form of fluoro-ADB would be a controlled substance under § 481.1031(b)(5). (Emphasis added).

Finally, the tenor of the defense counsel's own argument and questions shed some light. During his cross-examination of the expert, he was attempting to point out that lay people would be unable to know if a compound he had was controlled under § 481.1031(b)(5). In doing so, he uttered, "Well, if I don't know that I'm charged with 5-fluoro ADB-PINACA, I can't go and look and see in the statute and go, 'Wait a minute, that NH2 component,' and I guess it's ***the first position***, or whatever . . . ." (Emphasis added). Admittedly, his comments were and are not competent evidence. Yet, they, along with the expert's testimony we cited, illustrate context. That context describes ongoing discussion about molecular structures of compounds within § 481.1031(b)(5) and the positioning of particular chemicals within that structure. In the expert so

describing about molecules, structural classes, structures, the structural class described in § 481.1031(b)(5), and the core, link, and group A components of fluoro-ADB, a rational fact-finder could reasonably interpret his ultimate opinion about why fluoro-ADB "is able to be controlled under the structural class with how the law is currently written" as meaning the core, link, and group A components at bar were in the positions and had the attachments required by § 481.1031(b)(5).

Simply put, we reached the end despite the length of the route taken and the fog covering its path. The State presented sufficient evidence to permit the jury to rationally conclude, beyond reasonable doubt, that fluoro-ADB was a controlled substance within the scope of § 481.103(b)(5).

Proof of Mens Rea

Next, we turn to the sufficiency of the evidence purporting to establish that appellant knowingly sold the substance controlled under § 481.1031(b)(5). In questioning the tenor of the State's proof here, appellant alludes to the United States Supreme Court opinion in *McFadden v. United States*, __ U.S.__, 135 S. Ct. 2298, 192 L. Ed. 2d 260 (2015), and its discussion of how to prove culpability under a comparable federal statute. The court observed that the "knowledge requirement" may be satisfied in either of two ways. *McFadden*, 135 S. Ct. at 2304. The prosecutor may show "the defendant" 1) knew "he possessed a substance listed on the schedules, even if he did not know which substance it was" or 2) knew "the identity of the substance he possessed." *Id.* An example of the former would include, according to the Court, "a defendant whose role in a larger drug organization is to distribute a white powder to customers. The defendant may know that the white powder is listed on the schedules even if he does not know precisely what substance it is." *Id.* We apply this mode here, at appellant's invitation.

The seizure culminating in appellant's prosecution occurred around May 1, 2017. About four months earlier, in January of 2017, law enforcement officers had executed a search warrant upon one of appellant's stores. Packets being sold there and having names such as "Chilly Willy," "Ripped," "Mary Jane," and "Brain Freeze" were confiscated. More importantly, an officer assisting in the search and seizure informed appellant at that time that "the synthetic that he was selling was illegal to sell." Yet, he continued to sell them over the ensuing months.

Additionally, on the face of some packets were images depicting what one could interpret as the potential effects of ingesting their contents. For instance, the "Chilly Willy" packet carried a person with long hair, sunglasses, and medallions sitting crossed-legged, with two fingers up in the form of a peace sign and smoking a self-rolled cigarette.[5] The

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words "chronic hypnotic" could be read next to the sitting gentleman. Much like a picture painting 1000 words, the visage could be viewed as suggesting that one who consumed the product would be "chilled-out" in a manner purportedly resulting from smoking marijuana.

Another packet, "Ripped," had an image of a banana with legs, hands, face, a wide-opened, smiling mouth, and bulging eyes.[6] Those eyes just happened to be bloodshot. So too were the banana's hands raised upward. Viewing the depiction as a whole evinces an object engaged in a highly animated state of being. And, of course, there was the packet labelled "Mary Jane." The Spanish translation for that name happened to be "Maria Juana" or, in its abbreviated version, "marijuana."[7]

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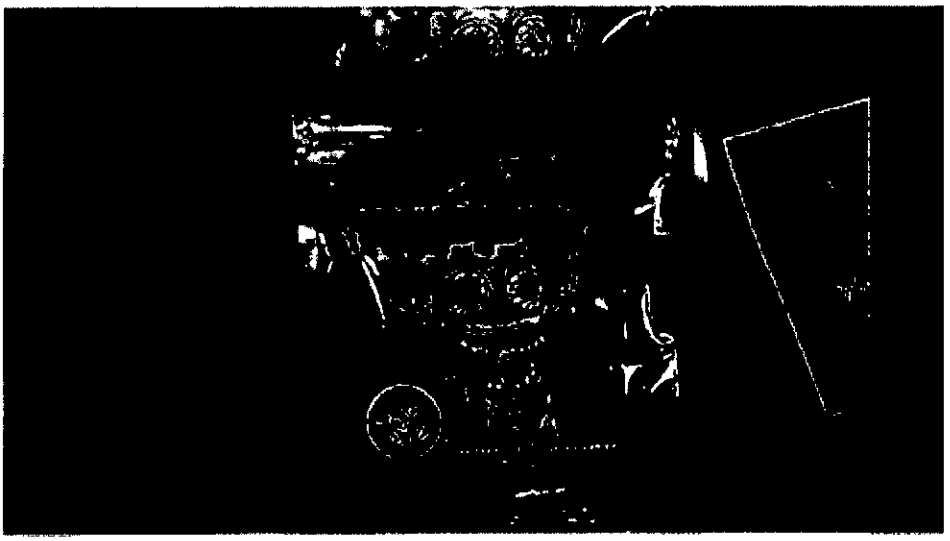

[7] Along with these packets, the officers also found actual marijuana.

In short, appellant was told of the illegal nature of the substances. Furthermore, those substances were packaged in a way that suggested their purposes and effects. That data was more than some evidence allowing a rational jury to conclude, beyond reasonable doubt, that appellant knew "Chilly Willy" was a synthetic substance the legislature intended to outlaw under Penalty Group 2-A. He may not have known the specific compounds it contained and which were within Penalty Group 2-A, but per *McFadden*, that knowledge is unnecessary. The evidence was enough to prove he possessed a substance listed on the schedules, even if he did not know which substance it was. We overrule appellant's issue.

Expert Witness

Next, we address appellant's issue regarding whether the trial court erred in allowing the State's forensic chemist to testify about the fluoro-ADB being a controlled substance. Allegedly, he "was not qualified to testify about synthetic substances" since he "had virtually no formal education, experience, or training on synthetic substances." So, allegedly, the "trial court abused its discretion when it certified him as an expert." We overrule the issue.

A trial court's decision concerning whether a witness is qualified to voice an expert opinion is reviewed under the standard of abused discretion. *Wolfe v. State*, 509 S.W.3d 325, 335 (Tex. Crim. App. 2017). That standard bars us from interfering with the decision if it falls within the zone of reasonable disagreement. *Id.*

Next, qualifying a witness as an expert normally implicates a two-step procedure. *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006). First, it must be shown that the witness has a sufficient background in a particular field, which background encompasses the matter on which the witness is to give an opinion. *Id.* (quoting *Broders*

v. Heise, 924 S.W.2d 148 (Tex. 1996)). The second step gauges the relationship between the subject matter at issue and the expert's familiarity with it; that is, it must be shown that the expert's background is "tailored to the specific area of expertise in which the expert desires to testify." *Id.* at 133.

Here, appellant attacked the expert's qualification due to a lack of "formal academic instruction, on-the-job training, or experience with synthetic substances" and the witness's unfamiliarity with how to "create" or make the fluoro-ADB or other synthetic controlled substances. Yet, the topic on which the chemist was asked to speak was not how those who engaged in the drug trade made their drugs. How synthetic drugs were made actually had little to do with the burden being addressed by the State. Indeed, the manner by which appellant attempts to attack the expert brings to mind a scene from "The Big Bang Theory."

Leonard's car is about to break down. He asks his highly educated scientist friends riding with him if "anybody [knew] anything about the internal combustion engine." Having doctorates in physics and astrophysics or master's in engineering, they responded with, "Of course," "Very basic," and "[It's] 19th-century technology." When asked whether "anybody [knew] how to *fix* an internal combustion engine," the replies were "No" and "No, not a clue."[8] The relevant topic there was how to fix a car engine, not the physics behind or design of an internal combustion engine.

Here, we do not deal with a car motor but, rather, § 481.1031(b)(5). To meet its requirements, the State was obligated to prove that the synthetic drug in question consisted of certain chemicals and those chemicals held certain molecular positions

[8] *The Big Bang Theory - Combustion Engine*, YOUTUBE, https://youtu.be/i9en6AcVkBo (last visited May 7, 2019).

within the compound they composed. In other words, the pertinent subject matter concerned the molecular structure of the synthetic, the chemicals comprising that structure, and their locations within the molecule in relation to each other. So, whether the witness knew how to make the drug in question was really unimportant. Instead, the witness had to be skilled or trained in the fields of identifying the chemical composition of substances and the molecular structures of the chemicals identified therein. The witness utilized by the State to do that had a bachelor's degree in forensic chemistry and criminalistics, a master's degree in forensic science, and four months of intensive training with the Department of Public Safety in "controlled substance analysis." In short, he was a forensic chemist who conducted controlled substance and blood alcohol analysis. As such, one of his primary duties was "tak[ing] unknown substances and figur[ing] out what they [were]," that is, identifying the chemical composition of substances. He apparently worked in that field with the Department of Public Safety for about four years and testified on the topics of blood and controlled substance analysis about 20 times. So too had he conducted "thousands of testing[s] for all sorts of different drugs." Whether the substances undergoing analysis were synthetically created mattered little because the manner in which they were tested differed little from the analysis of non-synthetic controlled substances. As he testified, "it's just like any other drug": "[W]hen it comes to detecting a drug, it's the same whether it's meth, cocaine, heroin, any other drug." More importantly, appellant has cited us to nothing that suggests the analysis is different.

Just as Leonard may have needed someone who knew how to take apart and fix a carburetor, the State needed someone who could take apart a drug and determine its chemical composition, irrespective of whether the drug was naturally occurring or cooked up by a human being. And, the foregoing evidence about the education, training, and

experience of the forensic chemist under attack illustrated that he had the requisite capability to undertake the job assigned him. At the very least, the trial court's determination that he had such training and skill in the relevant topic was not outside the zone of reasonable disagreement.

Excessive Sentence

Through his final issue, appellant asserts that "[s]entencing [him] to ninety years in prison for this offense [was] excessive, cruel, and unusual, in violation of the Eighth Amendment of the United States Constitution." As we recently reiterated in *Anderson v. State*, No. 07-17-00421-CR, 2019 Tex. App. LEXIS 2261, at *10 (Tex. App.—Amarillo Mar. 22, 2019, pet. filed) (mem. op., not designated for publication), a complaint about punishment being excessive or cruel and unusual must be preserved for review. That is normally done by a defendant complaining of the sentence when pronounced at trial or, if there was no opportunity to object, complaining through a motion for new trial. *Id.* at *10–11. The record before us discloses that appellant did neither. Consequently, whether his sentence was unconstitutionally excessive or cruel and unusual was not preserved for review, and the issue is overruled.

We affirm the trial court's judgment. So too do we deny, as moot, appellant's motion to strike from the appellate record a molecular diagram of fluoro-ADB used as demonstrative evidence at trial; whether it could or could not be considered in assessing the sufficiency of the evidence was a matter that we found irrelevant to the disposition of the appeal.

Brian Quinn
Chief Justice

Publish.

APPENDIX B

Seventh Court of Appeals' Memorandum Opinion

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0575-19

ANTHONY CARTER, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE SEVENTH COURT OF APPEALS LUBBOCK COUNTY

YEARY, J., delivered the unanimous opinion of the Court.

OPINION

In November of 2017, a jury found Anthony Carter, Appellant, guilty of possession of a Penalty Group 2-A controlled substance, with intent to deliver. He was subsequently sentenced to 90 years in prison and received a $100,000 fine. The Seventh Court of Appeals affirmed his conviction. *Carter v. State*, 575 S.W.3d 892 (Tex. App.—Amarillo 2019). We granted Appellant's petition for discretionary review to determine whether, in a legal sufficiency analysis, a reviewing court may uphold a conviction if expert testimony as to

certain technical elements of an offense is merely conclusory. Having concluded that the testimony in this case is not merely conclusory, we affirm.

THE STATUTE

Under Section 481.113 of the Texas Health and Safety Code, a person commits an offense if he "knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 2 or 2-A." TEX. HEALTH & SAFETY CODE § 481.113(a). That part of the statute is simple enough to understand. But Section 481.1031(b), the part of the Health and Safety Code describing Penalty Group 2-A gets a bit more scientifically esoteric. It was first promulgated in 2011 to address synthetic substances, and such substances were originally identified specifically by name. *See* Acts 2011, 82nd Leg., ch. 170, eff. Sept. 1, 2011 (enacting TEX. HEALTH & SAFETY CODE § 481.1031). But in 2015, the Legislature amended Section 481.1031, so that it now defines synthetic controlled substances by structural class. *See* TEX. HEALTH & SAFETY CODE § 481.1031(b). It appears that one of the reasons for the adoption of the amendment was that under the pre-amendment language, "a skilled chemist may [have] be[en] able to change the chemical makeup of a substance enough to circumvent the law and make the law difficult to enforce."[1] S. Comm. on Crim. Justice, Bill Analysis, Tex. S.B. 173, 84th Leg., R.S. (2015).

Accordingly, Penalty Group 2-A, as now defined in Section 481.1031(b), focuses on the positioning of certain molecular components to determine whether the synthetic

[1] The jury in Appellant's case heard testimony from the State's expert about the 2015 amendment and the different way in which the amended statute defined prohibited synthetic substances.

compound is prohibited. For example, Subparagraph (5) of Section 481.1031(b), which is at issue in this case, describes a "structural class" as "any compound containing a core component substituted at the 1-position to any extent, and substituted at the 3-position with a link component attached to a group A component, whether or not the core component or group A component are further substituted to any extent[.]" TEX. HEALTH & SAFETY CODE § 481.1031(b)(5).[2]

THE STANDARD

When reviewing the legal sufficiency of the evidence, an appellate court must view the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found each element of the offense beyond a reasonable doubt. *Johnson v. State*, 560 S.W.3d 224, 226 (Tex. Crim. App. 2018) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The appellate court must give deference to "the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to

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[2] The relevant portions of the statute are as follows:

> (b) Penalty Group 2-A consists of any material, compound, mixture, or preparation that contains any quantity of a natural or synthetic chemical substance, including its salts, isomers, and salts of isomers, listed by name in this subsection or contained within one of the structural classes defined in this subsection:
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> * * *
>
> (5) any compound containing a core component substituted at the 1-position to any extent, and substituted at the 3-position with a link component attached to a group A component, whether or not the core component or group A component are further substituted to any extent, including . . .

TEX. HEALTH & SAFETY CODE § 481.1031(b)(5).

draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. Circumstantial evidence and direct evidence are equally probative, and either one alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Juries are permitted to draw reasonable inferences from the evidence presented at trial "as long as each inference is supported by the evidence presented at trial." *Id.* at 15. Further, "criminal statutes outside the penal code must be construed strictly, with any doubt resolved in favor of the accused." *State v. Johnson*, 219 S.W.3d 386, 388 (Tex. Crim. App. 2007). Thus, for the court of appeals to have properly affirmed Appellant's conviction, there must have been sufficient evidence presented by the State that the molecular components within the compound were positioned as described in Section 481.1031(b)(5). The court of appeals concluded that there was, and we agree.

FACTS AND PROCEDURAL POSTURE

The facts are undisputed. Appellant operated a handful of smoke shops located in Lubbock county. He sold various products, including a leafy substance called "Chilly Willy." In 2014, Appellant received a letter from the Lubbock County District Attorney warning him against the continued sale of synthetic marijuana. After receiving the letter, Appellant sent samples of his products, including Chilly Willy, to a lab for testing. At that time, the Chilly Willy was not tested for fluoro-ADB. However, later testing by the State determined that Chilly Willy did, in fact, contain fluoro-ADB.

Some two years after the 2015 amendment to Section 481.1031(b), the Lubbock Police Department executed a search warrant (one of several executed between 2014 and 2017) at Appellant's residence. The police found multiple boxes containing individually

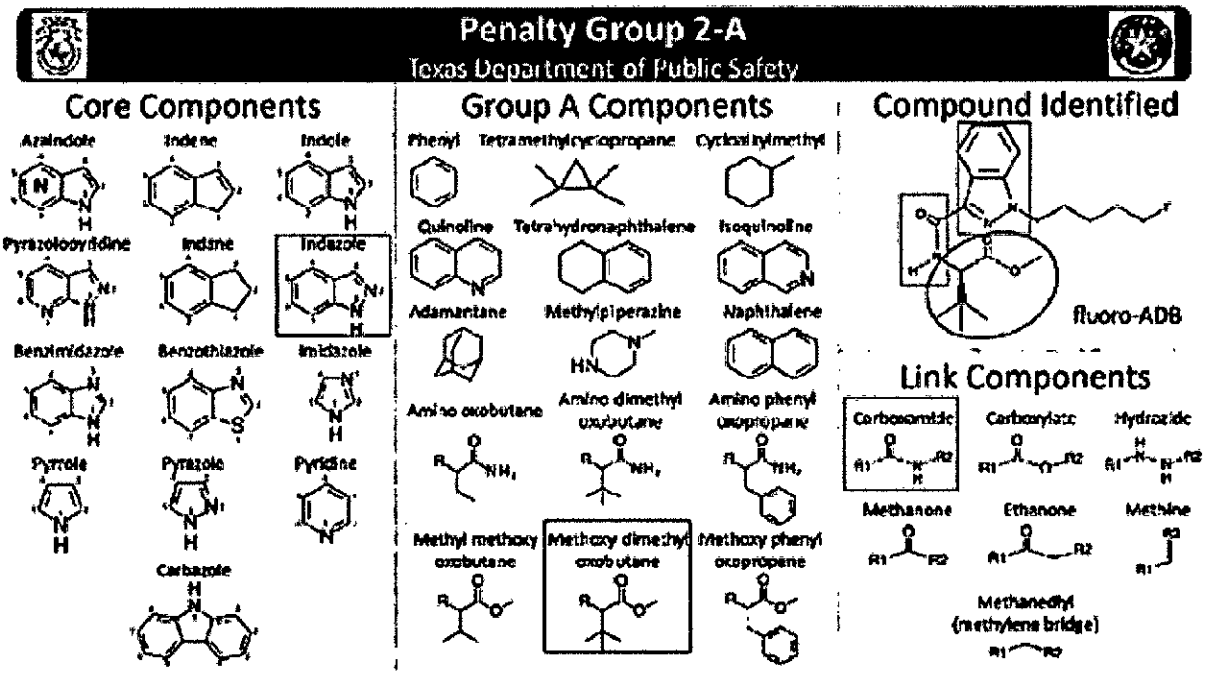
packaged bags of Chilly Willy. Appellant was charged by indictment with "knowingly possess[ing], with intent to deliver, 'Chilly Willy; 2g Chronic Hypnotic' which contains a compound controlled in Penalty Group 2-A, Chapter 481.1031(b)(5) of the Texas Health and Safety Code, to wit: fluoro-ADB, by aggregate weight including adulterants and dilutants 400 grams or more."

At trial, the State presented expert testimony from John Keinath, a controlled substance analyst with the Texas Department of Public Safety (DPS) Crime Laboratory in Lubbock. Keinath testified that he had been a forensic chemist in the DPS crime lab in Lubbock for four years. His expertise included controlled substance and blood analysis. He testified that he obtained a Bachelor of Science degree in Forensic Chemistry from Lake Superior State University in Michigan and a Master of Science degree in Forensic Science from the University of Illinois at Chicago. He testified that he has had an additional four months of "intensive" training in analysis of controlled substances through DPS and that he is a member of the American Academy of Forensic Sciences. He claimed to have testified about twenty times in court about controlled substance or blood analysis.

Keinath began his testimony with a discussion of Section 481.1031(b) before it was amended and the effect of the 2015 amendments. Specifically, Keinath told the jury: "[I]nstead of listing each substance by name, we now actually classify a synthetic compound by the structure. So there are a whole bunch of different combinations of structures, and depending on what kinds of groups create that molecule, it's classified by different subsections in the law." Keinath went on to testify about the lab's method of testing and how he tested the Chilly Willy substance. He went into painstaking detail about

the method of testing that he used, and in response to the prosecutor's question of what synthetic compound was contained in the Chilly Willy products, Keinath said, "So – again, based off of the 12 [samples] that I tested, the substance contained was fluoro-ADB."

Further, Keinath went on to describe the "three parts" needed to determine whether the substance falls within Penalty Group 2-A. To help illustrate his point, the State used a demonstrative exhibit that depicted fluoro-ADB. We have reproduced that exhibit here:



Keinath explained the following:

> So how the law is written, we're looking at what's called a core component, a group A component, and a link component. Up there on the screen, those are all the core components that could possibly create a particular substance; likewise, with a group A and link components. Now, with any synthetic compound, you can take any of those core components, group A components, and link components, and make quite a few different structures. But by doing so, it changes what the structure is called or what it is named.

He went on to explain that fluoro-ADB contains various prohibited components in the core component, group A component, and the link component.[3] Specifically, he testified that the core component of fluoro-ADB was indazole, the group A component contained methoxy dimethyl oxobutane, and the link component contained carboxamide. The prosecutor then asked Keinath, "So if we put all of those together, then that's what we see here. We see the portions of fluoro-ADB that are relevant to this; is that correct?" To which Keinath responded, "Correct. Based off of those three combinations, that's why [fluoro-ADB] is able to be controlled under the structural class with how the law is currently written."

Also, defense counsel's own line of questioning on cross-examination helped shed some light for the jury. Counsel for the defense asked Keinath: "[Y]'all spent a lot of time, [the prosecutor] and you, on how the chemical compounds work with the placement of the . . . molecules [and] where the molecules are. And that's what makes a compound, the place where the molecules are stuck, correct?" To which Keinath responded: "Correct." As cross-

---

[3] Section 481.1031(a), subsections (1) through (3), identify, by name, the components that are prohibited in the "Core component," "Group A component" and "Link component." As relevant in this case, they are:

> (a) In this section:
>
> (1) "Core component" is one of the following: . . ., indazole[.]
>
> (2) "Group A component" is one of the following: . . ., methoxy dimethyl oxobutane[.]
>
> (3) "Link component" is one of the following functional groups: carboxamide[.]

TEX. HEALTH & SAFETY CODE § 481.1031(a)(1)–(3).

examination continued, defense counsel asked Keinath whether fluoro-ADB is actually listed in the statute, and Keinath responded that it is not, but that it is a synthetic compound. Keinath went on to explain: "[B]ased off my knowledge, there might be different isomers, but as far as the core, the group A, and the link, fluoro-ADB is that particular part of it."

Finally, defense counsel spent some time discussing with Keinath types of chemicals that also have fluoro-ADB in the name of the chemical. During this colloquy, the following exchange occurred:

> Q: And what is 5 fluoro-ADB metabolite 7?
>
> A: Just based off of the name, all I can really say or infer is that it might have something to do with the toxicology of it, so after it's been processed through the system. But I personally don't know what the "ADB metabolite 7" is.
>
> Q: Do you know if that particular chemical structure is in the Penal Code?
>
> A: Based off of the structure provided on this particular product insert, it appears to be the same structure as the 5-fluoro-ADB.
>
> Q: Okay. What about 2-fluoro-ADB? Are you certain that's in the Penal Code?
>
> A: The 2-fluoro-ADB would be in the Penal Code, because again, based off of the Penal Code, we are looking at the core, the group A, and the link. It doesn't matter where the fluorine falls because the law broadly says that if it's a natural or synthetic compound, it includes any isomers, or stereoisomers, any of those. So under the broadness of the Penalty Group 2-A law, any sort of isomer would be covered.

During his testimony Keinath never explicitly described the specific *placement* of the components within the synthetic compound, fluoro-ADB, that Appellant was alleged to have possessed in the form of Chilly Willy. Nor did the State present any other evidence

specifically indicating that indazole (the core component) was substituted at the 1-position to any extent, and substituted at the 3-position with carboxamide (the link component) attached to methoxy dimethyl oxobutane (the group A component)—as Section 481.1031(b)(5) requires to establish the existence of a synthetic compound.

Appellant contended on direct appeal that, because the State produced no explicit testimony regarding the exact positioning of the components within fluoro-ABD, the court of appeals erred in finding that the evidence was legally sufficient. He argued that an ordinary jury could not have taken Keinath's testimony about the mere presence of the components of the compound fluoro-ABD and inferred from that testimony that fluoro-ADB satisfied the requisite structural requirements as set out in Section 481.1031(b)(5). Accordingly, he argued that the State failed to prove that: "1) he knowingly sold a controlled substance listed in [Section] 481.1031(b)(5)[,] and 2) the substance he was convicted of possessing fell within that provision." *Carter*, 575 S.W.3d at 896. The court of appeals disagreed and affirmed Appellant's conviction, concluding that "[t]he State presented sufficient evidence to permit the jury to rationally conclude, beyond reasonable doubt, that fluoro-ADB was a controlled substance within the scope of [Section] 481.103(b)(5)." *Id.* at 899.

ANALYSIS

We conclude that, when looking at *all* of Keinath's testimony, a rational trier of fact could reasonably infer that his analysis established that fluoro-ADB satisfied the criteria of Section 481.1031(b)(5): that indazole (the core component) was substituted at the 1-position to any extent, and substituted at the 3-position with carboxamide (the link

component) attached to methoxy dimethyl oxobutane (the group A component)—even though he did not explicitly say so.

At first glance, it seems irrational to expect an ordinary factfinder to make an inference regarding positioning of certain components in a synthetic compound. But, the mere fact that an ordinary factfinder, prior to any evidence being presented, could not make the required inferential step, does not mean that an informed factfinder could not reasonably make such an inference. That is all to say that an ordinary jury could still draw a reasonable inference from an expert's testimony about technical elements as long as each inference is supported by the evidence presented at trial. And the jury's inference here that the components were positioned according to the requirements of Section 481.1031(b)(5) is supported by the evidence.

The jury heard three categories of testimony from Keinath: (1) that the statute, as amended in 2015, defines prohibited synthetic compounds based on their structure; (2) that the Chilly Willy that Appellant possessed contained fluoro-ADB; and (3) that fluoro-ADB is prohibited under the statute based on the specific components it possesses and how it is structured. Keinath informed the jury about the amended statute and about the listed components that make the synthetic compound illegal. He also informed the jury that fluoro-ADB contained indazole, carboxamide, and methoxy dimethyl oxobutane. Keinath went on to give his ultimate opinion that, "[b]ased off of those three combinations, that's why [fluoro-ADB] is able to be controlled under the structural class with how the law is currently written."

From the totality of Keinath's testimony, the jury was adequately informed of the fact that fluoro-ADB contains components that are prohibited by Section 481.1031(b)(5). Defense counsel's cross-examination also helped give context to the jury when he asked Keinath: "And that's what makes a compound, the place where the molecules are stuck, correct?" When Keinath answered that question with, "Correct," he was essentially telling the jury that what makes a synthetic compound, under the statute, is the molecular positioning of those components. Moreover, the jury heard Keinath's expert conclusion that fluoro-ADB does satisfy the criteria for a synthetic controlled substance as defined by Section 481.1031(b)(5).

From these premises, a rational jury could reasonably deduce that Keinath had examined the molecular structure of the fluoro-ADB, and had determined it to be a Penalty Group 2-A compound precisely because he found that the indazole (the core component) was substituted at the 1- position to any extent, and that it was substituted at the 3- position with carboxamide (the link component) attached to methoxy dimethyl oxobutane (the Group A component). The jury was informed by Keinath during both his direct and cross-examination about what the statute prohibits. He also testified to his ultimate conclusion that fluoro-ADB constitutes a Penalty Group 2-A synthetic controlled substance under Section 481.1031(b)(5). A rational jury could therefore draw the reasonable inference that the various components that he identified as falling within fluoro-ADB are positioned according to the dictates of Section 481.1031(b)(5). Under these circumstances, we agree with the court of appeals that the jury could have rationally concluded that Keinath found

the core components of fluoro-ADB to be positioned according to the requirements of the statute.

CONCLUSION

We affirm the court of appeals' judgment that the evidence was legally sufficient because the State presented evidence from which the jury could rationally infer that fluoro-ADB was structured in such a way as to satisfy Section 481.103(b)(5).

DELIVERED: March 31, 2021
PUBLISH

APPENDIX C

Judgment of Conviction by Jury

CASE NO. 2017-413,558
INCIDENT NO./TRN: 9216143665

THE STATE OF TEXAS	§	IN THE 137TH DISTRICT
	§	
V.	§	COURT
	§	
ANTHONY CARTER	§	LUBBOCK COUNTY, TEXAS
	§	
STATE ID NO.: TX 4125637	§	

2017 NOV 22 AM 9:43
DISTRICT CLERK LUBBOCK CO.
BY

JUDGMENT OF CONVICTION BY JURY

Judge Presiding: HON. JOHN J. MCCLENDON III	Date Judgment Entered: NOVEMBER 17, 2017
Attorney for State: MANDI SAY, EDWARD WHARFF IV, GINNY SIMPSON	Attorney for Defendant: CHARLES S. CHAMBERS

Offense for which Defendant Convicted:
POSSESSION OF A CONTROLLED SUBSTANCE PG2/2A WITH INTENT TO DELIVER >400 GRAMS DFZ

Charging Instrument: INDICTMENT	Statute for Offense: § 481.113(D)
Date of Offense: MAY 3, 2017	
Degree of Offense: 1ST DEGREE FELONY	Plea to Offense: NOT GUILTY
Verdict of Jury: GUILTY	Findings on Deadly Weapon: AFFIRMATIVE
Plea to 1st Enhancement Paragraph: TRUE DFZ	Plea to 2nd Enhancement/Habitual Paragraph: N/A
Findings on 1st Enhancement Paragraph: TRUE DFZ	Findings on 2nd Enhancement/Habitual Paragraph: N/A
Punished Assessed by: JURY	Date Sentence Imposed/to Commence: NOVEMBER 17, 2017
Punishment and Place of Confinement: NINETY (90) YEARS / TDCJ-ID (ENHANCED)	

THIS SENTENCE SHALL RUN CONCURRENT

☐ Sentence OF CONFINEMENT Suspended, Defendant placed on community supervision for.

Fine:	Court Costs:	Restitution:	Restitution Payable to:
$100,000.00	$ 339.00	$0.00	☐ VICTIM (see below) ☒ AGENCY/AGENT (see below)

☒ Attachment A, Order to Withdraw Funds, is incorporated into this judgment and made a part thereof.

Sex Offender Registration Requirements ☐ Apply ☒ Does Not Apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62.

The age of the victim at the time of the offense was N/A. The requirements set out in this judgment in no way alter previous registration requirements for this Defendant, if any.

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited: From 5/8/17 to Present From____ to____ From____ to____
From____ to____ From____ to____ From____ to____

If Defendant is to serve sentence in jail or is given credit toward fine and costs, enter days credited below.

TOTAL DAYS: NOTES:

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in Lubbock County, Texas. The State appeared by her District Attorney.
Counsel / Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.

☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

It appeared to the Court that Defendant was mentally competent and had pleaded as shown above to the charging instrument. Both parties announced ready for trial. A jury was selected, impaneled, and sworn. The INDICTMENT was read to the jury, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence subm and argument of counsel. The Court charge jury as to its duty to determine the guilt or innocence of Defendant, and the jury retire onsider the evidence. Upon returning to op rt, the jury delivered its verdict in the presence of Defendant and defense counse , ny

The Court received the verdict and ORDERED it entered upon the minutes of the Court.

Punishment Assessed by Jury / Court / No election (select one)

☒ **Jury**. Defendant entered a plea and filed a written election to have the jury assess punishment. The jury heard evidence relative to the question of punishment. The Court charged the jury and it retired to consider the question of punishment. After due deliberation, the jury was brought into Court, and, in open court, it returned its verdict as indicated above.

☐ **Court**. Defendant elected to have the Court assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

☐ **No Election**. Defendant did not file a written election as to whether the judge or jury should assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

The Court FINDS Defendant committed the above offense and ORDERS, ADJUDGES AND DECREES that Defendant is GUILTY of the above offense. The Court FINDS the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 § 9.

The Court ORDERS Defendant punished as indicated above. The Court ORDERS Defendant to pay all fines, court costs, and restitution as indicated above.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court ORDERS the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the **TDCJ-ID.** The Court ORDERS Defendant to be confined for the period and in the manner indicated above. The Court ORDERS Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court ORDERS that upon release from confinement, Defendant proceed immediately to the Lubbock County Judicial Compliance Department. Once there, the Court ORDERS Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **County Jail—Confinement / Confinement in Lieu of Payment.** The Court ORDERS Defendant immediately committed to the custody of the Sheriff of **Lubbock** County, Texas on the date the sentence is to commence. Defendant shall be confined in the Lubbock County Jail for the period indicated above. The Court ORDERS that upon release from confinement, Defendant shall proceed immediately to the Lubbock County Judicial Compliance Department. Once there, the Court ORDERS Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **Fine Only Payment.** The punishment assessed against Defendant is for a FINE ONLY. The Court ORDERS Defendant to proceed immediately to the Lubbock County Judicial Compliance Department . Once there, the Court ORDERS Defendant to pay or make arrangements to pay all fines and court costs as ordered by the Court in this cause.

Execution / Suspension of Sentence (select one)

☒ The Court ORDERS Defendant's sentence EXECUTED

☐ The Court ORDERS Defendant's sentence of confinement SUSPENDED. The Court ORDERS Defendant placed on community supervision for the adjudged period (above) so long as Defendant abides by and does not violate the terms and conditions of community supervision. The order setting forth the terms and conditions of community supervision is incorporated into this judgment by reference.

The Court ORDERS that Defendant is given credit noted above on this sentence for the time spent incarcerated.

Furthermore, the following special findings or orders apply:

Court Costs $ 339.00 **VIS Included** **NO**

An additional fee of $25 is due if Court Costs not paid within 31 days of this judgment.

Dismissals: N/A

It is further presented in and to said Court that the defendant committed the above offense within 1,000 feet of the premises of a school, to-wit: Coronado High School;

It is further presented that the defendant used or exhibited a deadly weapon, namely, a firearm, during the commission

The Defendant shall submit a blood sample or other specimen, such as a Buccal swab, within one week of sentencing, to the Department of Public Safety under Subchapter G, Chapter 411, Government Code, for the purpose of creating a DNA record.

The Defendant waives any and all interest in any property seized in connection with this case, cash or property (real or personal, tangible or intangible) which is the subject of any civil forfeiture action. Cause No(s). 2017-525,575; 2017-525,603; 2017-525,604; 2017-525,781; 2017-525,619; 2017-525,615; 2017-525,620; 2017-525,621; 2017-525,777; 2017-525,623; 2017-525,629; 2017-525,630.

Signed and entered on this the 21st **day of** November, 2017

X

JOHN J. MCCLENDON III
JUDGE PRESIDING

FINGERPRINT SHEET

STATE OF TEXAS	**ANTHONY CARTER**
CAUSE NO.	**2017-413,558**
COURT:	**137TH**
OFFENSE:	**POSSESSION CONTROLLED SUBSTANCE PG2/2A WITH INTENT TO DELIVER >400 GRAMS DFZ**
OFFENSE DATE:	**MAY 3, 2017**