CASE LAW AND ATTORNEY GENERAL OPINION UPDATE

TMCEC Academic Year 2016

Ryan Kellus Turner
General Counsel and Director of Education
TMCEC

Regan Metteauer
Program Attorney
TMCEC

The following decisions and opinions were issued between the dates of October 1, 2014 and October 1, 2015.

Acknowledgment: Thank you Judge David Newell, Judge Laura Weiser, Professor Jennifer Laurin and John Messinger. Your insight and assistance helped us bring this paper to fruition.

I. Constitutional Issues

A. 4th Amendment

1. Facial Challenges

The city ordinance requiring hotel operators to retain records and specific information about their guests on the premises for a 90-day period and to make those records available to "any officer of the Los Angeles Police Department for inspection" on demand, is facially unconstitutional because it fails to provide the operators with an opportunity for pre-compliance review. Facial challenges to statutes may be brought under the 4th Amendment.

City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015)

In a 5-4 decision affirming the judgment of the court of appeals, Justice Sotomayor, writing for the majority, explained while facial challenges are the most difficult to mount they are not barred or disfavored by the Court and that any claim to the contrary reflects a misunderstanding of *Sibron v. New York*, 392 U.S. 40 (1968). While the City argued that the ordinance had been used for 150 years and that law enforcement access to the hotel registers served as a deterrent to crime, the majority rejected such claims because the registers were private property and that the ordinance in question allowed for immediate arrest (upon conviction, up to six months in jail and a $1,000 fine) and did not allow for judicial review of the reasonableness of law enforcement demands.

Justice Scalia, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, dissented, opining that historically guest lodging was a closely regulated industry and in light of the criminal conduct that occurs at motels, the ordinance is both reasonable and facially valid under the more relaxed standard applicable to the search of this category of businesses.

Justice Alito, joined by Justice Thomas, offered five examples of what he asserts are constitutional applications of the ordinance. The majority opinion has serious safety and federalism implications and inadequately addresses arguments that the 4th Amendment's application to warrantless searches and seizures is inherently at odds with facial challenges.

2. Blood Warrants

A nonconsensual search of blood of a DWI suspect, conducted pursuant to the mandatory blood draw and implied consent provisions in the Transportation Code, violates the 4th Amendment, when undertaken in the absence of a warrant.

State v. Villarreal, 2014 Tex. Crim. App. LEXIS 1898 (Tex. Crim. App. Nov. 26, 2014)

Judge Alcala, joined by Judge Price, Judge Womack, Judge Johnson, and Judge Cochran, opine that it is unconstitutional to perform a blood draw on a driver under the Transportation Code's mandatory blood draw and implied consent provisions when there is no warrant to draw the

blood and the driver has explicitly stated he does not consent to the draw. A blood draw is a search (not a seizure) and the applicable implied consent statutes do not create an irrevocable consent that would function as an exception to the warrant requirement of the 4th Amendment. The Court declined to extend the automobile exception, the special-needs exception, or the search incident to arrest exception to encompass warrantless blood draws.

There are two dissenting opinions in *Villarreal.* (Judge Keasler dissented without a written opinion.) Presiding Judge Keller, joined by Judge Hervey, dissented opining that, in light of the totality of the circumstances, recent U.S. Supreme Court decisions authorizing irrevocable consent in regards to probationers, and recent case law authorizing the warrantless taking of non-invasive DNA samples from arrestees, the warrantless blood draw of a person who has had two DWI convictions is not unreasonable. Judge Meyers dissented separately opining that Sections 724.012(b)(3)(B) should be upheld as an exception to the warrant requirement because the search is not an unreasonable one and because the statute provides individuals notice of the circumstances where they may be subject to a warrantless search.

Commentary: In *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), the U.S. Supreme Court held that natural metabolization of alcohol does not present a per se exception to the 4th Amendment's warrant requirement for nonconsensual blood testing. The November 2014 issue of *The Recorder* contains a chronology of *Missouri v. McNeely*-related case law in Texas. While *McNeely* did not expressly strike down state implied consent laws, a number of intermediate court of appeals decisions put a cloud of doubt over the constitutionality of Texas implied consent laws (Chapter 724, Transportation Code).

After the 2014 Case Law Update, two things appeared certain. One of which was that the Court of Criminal Appeals, and/or the Legislature, would have to reconcile "loose ends" in Texas law stemming from *McNeely*. That remains to be seen. For the time being, what all Texas magistrates need to know is that the holding in *Villarreal* excises Sections 724.011(a), 724.012(b), and 724.013 from the Transportation Code. The second was that municipal judges, in their roles as magistrates, should anticipate continued, concerted efforts by law enforcement to procure blood pursuant to a search warrant. This only seems all the more certain in light of *Villarreal*. There is more to come from *Villarreal*. The Court granted the State's motion for rehearing on February 25, 2015.

The defendant's 4th Amendment rights were not violated where the affidavit in support of a search warrant for a blood draw failed to identify that she had a medical condition (syncope) that the defendant argued rendered the blood draw unreasonable and accounted for her failed sobriety test.

Dromgoole v. State, 2015 Tex. App. LEXIS 7637 (Tex. App.—Houston [1st Dist.] July 23, 2015, no pet.)

The court could not conclude that inclusion of her diagnosis of syncope in the affidavit would have defeated a determination of probable cause for the warrant. Here, the record establishes that she had been drinking that night, nearly hit the officer while driving, drove through two stop lights, smelled of alcohol, had slurred speech, and failed all three of the field sobriety tests

conducted on her that night. The fact that there might be an innocent explanation for failing the field sobriety test does not disprove probable cause. Under the totality of the circumstances, her failure of the field sobriety test was consistent with the other facts to create a "fair probability" that blood tests would establish she was legally intoxicated.

The defendant also failed to show that simply stating that she had syncope in the context of a field sobriety test and exhibiting faintness or dizziness in the police car were sufficient to carry her burden of adequately disclosing to the officer or the person performing the blood draw that the blood draw would create an unreasonable risk of medical harm due to an existing medical condition.

In another issue, the defendant argued that Chapter 724 of the Transportation Code prohibits a nonconsensual blood draw for a person arrested for misdemeanor DWI in the absence of certain aggravating circumstances set forth in Section 724.012(b). According to the defendant, because she does not fit within any of the circumstances requiring the officer to obtain a blood sample, Chapter 724 rendered her refusal to submit to a blood test into a prohibition on drawing her blood regardless of the presence of a warrant. The court disagreed, citing *State v. Villarreal*, 2014 Tex. Crim. App. LEXIS 1898, n.15 (Tex. Crim. App. Nov. 26, 2014) (holding that, following *McNeely*, the holding in *Beeman* that an officer may obtain a search warrant even where implied consent statutes would authorize an involuntary blood draw, remains good law).

The magistrate had a substantial basis upon which to conclude probable cause existed for a blood search warrant. The good faith exception to the exclusionary rule allowed admission of the blood-test results even if the warrant contained a defect.

State v. Crawford, 463 S.W.3d 923 (Tex. App.—Fort Worth 2015, pet. ref'd)

The trial court granted a motion to suppress a search warrant for blood. On appeal, the State attacked the trial court's finding that the magistrate's statement in the warrant that the affidavit was "made before" her was untrue and rendered the warrant fatally defective because it was premised on a false statement. The affidavit was sworn to before another peace officer, not before the magistrate. The affidavit was subsequently faxed to the magistrate, a municipal judge for the City of Fort Worth.

In the findings and conclusions, the trial court failed to defer to the magistrate's probable-cause determination and impermissibly credited conflicting inferences to be drawn from the affidavit. Because the magistrate had a substantial basis to support her probable-cause determination, the trial court (and the court of appeals) was required to defer to that determination.

Comment: A notable concurring opinion written by Justice Dauphinot urged the Court of Criminal Appeals for clarification of the law stating that her understanding of the law led her to conclude once a search warrant issues, the only challenge that will lie is a *Franks* challenge (*Franks v. Delaware*, 438 U.S. 154 (1978)) and was incredulous that the only way defense lawyers can challenge the admissibility of evidence obtained pursuant to a defective warrant is by attacking the integrity of the officer who swore to the affidavit. Justice Dauphinot to the Court of Criminal Appeals: "Say it ain't so." *Crawford* at 932.

The defendant did not consent triggering the applicable provisions of Chapter 724 of the Transportation Code where he was "unresponsive due to the amount of alcohol in his system."

State v. Ruiz, 2015 Tex. App. LEXIS 8961 (Tex. App.—Corpus Christi-Edinburg August 27, 2015, no pet.)

The court believes the State to be relying upon Section 724.014(a) as "a key to unlock the recognized consent exception to the warrant requirement." Finding the State's view of the implied consent statutes as expansive, the court held that such reliance on those statutes is constitutionally infirm. According to the court, the State must prove consent was freely and voluntarily given. The State did not meet its burden to prove the warrantless blood draw was reasonable. The court also found no exigent circumstances.

The good faith exception to the exclusionary rule did not apply where the record showed that the peace officer relied on implied consent provisions in the Transportation Code and could have obtained a warrant but chose not to. The 4th Amendment required suppression of the defendant's blood test result because the state failed to establish a valid exception to the warrant requirement.

State v. Munoz, 2015 Tex. App. LEXIS 8109 (Tex. App.—El Paso July 31, 2015, no pet.)

Excerpt: "On the way to the station, Officer Jordan passed the Municipal Court building which houses a magistrate on duty from 9:00 p.m. to 8:00 a.m. every night. Officer Jordan stated that to get a warrant, she would have to go before the magistrate, 'get it signed and get the warrant.' She acknowledged she did not attempt to get a warrant nor was she prevented from getting one. Officer Jordan testified that she was aware that she could have obtained a warrant had she wanted. Officer Jordan explained to the court that she did not get a warrant because at that time the law allowed a mandatory blood draw if an individual had two prior convictions. She stated the only reason she failed to obtain the warrant was because she relied on the mandatory blood draw statute. After Munoz was placed in custody, it was determined he had *seven* prior convictions for DWI. Based on Munoz's prior convictions, he was immediately taken to the hospital for a mandatory blood draw." *Munoz* at 2-3 (Emphasis added).

Section 724.012(b) of the Transportation Code requiring a blood draw under certain circumstances does not authorize a police officer to take the specimen without a warrant.

State v. Anderson, 445 S.W.3d 895 (Tex. App.—Beaumont 2014, no pet.)

Commentary: In this case and other courts of appeals cases (See also, *Huff v. State*, 2015 Tex. App. LEXIS 3401 (Tex. App.—San Antonio April 8, 2015, no pet.); *Gore v. State*, 451 S.W.3d 182 (Tex. App.—Houston [1st Dist] 2014, no pet.)), there was testimony of the county's process for getting a warrant as well as availability of magistrates. In counties like Montgomery County with efficient processes in place, the State will have a difficult burden to prove exigent circumstances. In *Gore*, the court provides a detailed discussion of exigency cases since *McNeely*, including *Sutherland v. State*, 436 S.W.3d 28 (Tex. App.—Amarillo 2014, no pet.);

Weems v. State, 434 S.W.3d 655 (Tex. App.—San Antonio 2014, pet. granted); *Forsyth v. State*, 438 S.W.3d 216 (Tex. App.—Eastland, 2014, pet. ref'd); and *Douds v. State*, 434 S.W.3d 842 (Tex. App.—Houston [14th Dist.] 2014, pet. granted). See also, *Perez v. State*, 464 S.W.3d 34 (Tex. App.—Houston [1st Dist.] 2015, no pet.). Until the dust clears on cases involving offenses that occurred prior to *McNeely*, the pattern of arguments will likely continue to be reliance on implied consent and mandatory blood draw statutes, and in the alternative, exigent circumstances existed. Often, exigent circumstances are found not to exist because the facts show the officer thought he or she did not need a warrant.

The defendant's general motion to suppress and his attorney's general objection at the suppression hearing were sufficient to put the trial court on notice that he was complaining that his 4th Amendment rights against unreasonable search and seizure were violated by the warrantless taking of his blood sample.

Perez v. State, 464 S.W.3d 34 (Tex. App.—Houston [1st Dist.] 2015, no pet.)

The Court concluded that his objection that the statute relied upon by the State did not provide "authority for the officer to take the blood of my client without a warrant" and his objection based on "the Constitution of the United States as well as the statutory laws of the State of Texas on the search and seizure law" for obtaining evidence without a warrant preserved his complaint for its review.

3. Drug Dogs

Absent reasonable suspicion, officers may not extend the length of a traffic stop to conduct a dog sniff.

Rodriguez v. United States, 135 S. Ct. 1609 (2015)

Rodriguez was stopped after a peace officer observed him swerve out of his lane of traffic. When the officer approached the vehicle, he smelled an "overwhelming" scent of air-fresheners coming from the car. After questioning Rodriguez and a passenger, the officer placed a call for backup and conducted a records check on the passenger. Before backup arrived, the officer handed a warning citation to Rodriguez. The officer did not, however, consider Rodriguez free to leave. After Rodriguez refused to give the officer permission to walk a drug dog around his car, the officer ordered Rodriguez to turn off the ignition of the car, exit the vehicle and stand in front of the patrol car. The officer proceeded to walk his drug dog around the outside of Rodriguez's vehicle. When the dog indicated the presence of drugs, the officer searched the car and discovered methamphetamine inside the vehicle. The officer reported that approximately seven or eight minutes passed between the time he issued the warning to the time at which the dog indicated the presence of drugs.

Rodriguez was indicted in federal court for possession with intent to distribute methamphetamine. Rodriguez filed a motion to suppress evidence discovered by the drug dog, arguing that an officer may not extend an already completed traffic stop to conduct a dog sniff without reasonable suspicion or other lawful justification. The motion was denied. Rodriguez

appealed the denial of the suppression motion to the 8th Circuit Court of Appeals. The 8th Circuit held that a seven to eight minute detention was *de minimis* and reasonable in order to ensure officer safety. The U.S. Supreme Court granted certiorari to resolve division among lower courts on whether law enforcement may routinely extend an otherwise completed traffic stop, absent reasonable suspicion in order to conduct a dog sniff.

In a 6-3 decision, Justice Ginsburg, writing for the majority, opined that a traffic stop which exceeds the time needed to handle the matter for which the stop was made violates the Constitution's protections against unreasonable seizures. Consequently, a traffic stop becomes unlawful if when prolonged beyond the time reasonably required to make the ordinary inquiries incident to the stop and to determine whether to issue a citation for the violation. The purpose of the initial stop in this case was to investigate why Rodriguez swerved out of his lane of traffic. Therefore, the officer's authority to continue the stop ended once he completed his investigation of that infraction. Because the dog sniff was unrelated to the investigation of the original traffic violation, the officer should not have extended the stop absent independently supported reasonable suspicion for the dog sniff. Lacking the same connection to ordinary traffic safety inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission. The Court remanded the case to the 8th Circuit to determine whether the officer did, in fact, have an independent basis for conducting the dog sniff.

Justice Thomas dissented arguing that the brief extension to conduct a dog sniff was reasonable and that conducting a dog sniff does not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner. In this case, the dog sniff was independently justified by the officer's reasonable suspicion that Rodriguez and his passenger were engaged in criminal activity. The majority's reasoning imposes a one-way ratchet for constitutional protections that are over focused on characteristics of the officer (e.g., officer efficiency, officer with access to technology) which will result in arbitrary results. The majority opinion is at odds with *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding that the use of a drug dog sniff does not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner.) Justice Kennedy agreed with Justice Thomas' dissent, except his conclusion that the officer had reasonable suspicion, a determination which was not made by the court of appeals.

Justice Alito wrote a dissent in which he characterized the majority opinion as unnecessary, impractical, and arbitrary. The dog sniff was justified because the facts of the case met the standard for reasonable suspicion. The majority opinion ignores concerns of officer safety, and that the occupants of the car may have attacked the officer if he conducted the dog sniff before backup arrived.

An affidavit for a search warrant lacked probable cause where part of the basis for the warrant (a dog sniff) was excluded from the probable cause analysis due to subsequent case law and the residual part of the affidavit was the smell of marijuana from an ambiguously described location. Whether or not the officer could rely in good faith on binding precedent at the time of the warrant is the issue on remand to the court of appeals.

McClintock v. State, 444 S.W.3d 15 (Tex. Crim. App. 2014)

Officers seized contraband from a second-floor apartment over a business pursuant to a warrant based on the officer's smell of marijuana from outside of "this location" and a dog sniff on the open staircase accessible to the public. The trial court denied the motion to suppress, finding the staircase not to be part of the curtilage of the residence and finding the dog sniff not to be a search. While awaiting appeal, the U.S. Supreme Court decided *Florida v. Jardines*, 133 S. Ct. 1409 (2013), holding that a drug dog alert occurring on a front porch does not establish probable cause for a search warrant if at the time of the alert its presence exceeds the implied license to walk up to a front door and knock. Based on that case, the court of appeals discounted the dog sniff and concluded that the remaining information in the affidavit was insufficient to provide probable cause for the search warrant.

Generally, appropriate deference is given by the Court to the magistrate's determination of probable cause in doubtful or marginal cases "in vindication of the 4th Amendment's preference for warrants." But the general rule does not apply (deference to the magistrate is not called for) when "part of a warrant affidavit must be excluded from the calculus." Then, it is up to the reviewing courts to determine whether "the independently acquired and lawful information stated in the affidavit nevertheless clearly established probable cause." Here, the dog sniff must be excluded from the probable cause analysis because of the holding in *Jardines*. Because of the ambiguous use of the identifier, "the location," in the affidavit, the Court did not find *clearly established* probable cause in the remaining information in the affidavit.

Commentary: But that is not the end of the story. The Court vacated the judgment of the court of appeals and remanded for consideration whether either the state or federal exclusionary rule applies under these circumstances. The issue on remand is whether a good faith exception exists to the exclusionary rule where an officer's affidavit for a search warrant included (1) an unverified tip; (2) the defendant's activity coming and going before and after business hours of the business on the first floor; (3) smelling marijuana emanating from "this location," albeit ambiguous, and (4) a dog sniff, which must now be excluded from the probable cause analysis because of U.S. Supreme Court case law decided while this case's appeal was pending (*Florida v. Jardines*, 133 S. Ct. 1409 (2013)). The State asserts that the officer conducted the dog sniff in this case in good-faith reliance upon previously binding precedent that held that a canine drug sniff does not constitute a "search" for 4th Amendment purposes.

This is one to follow. The Court expects a "carefully wrought decision from the court of appeals" should it be necessary for the Court to resolve the issue. Neither party mentioned the good faith exception to the exclusionary rule in their briefs on appeal.

A search warrant affidavit clearly established probable cause where the dog sniff subsequently excluded from the affidavit was not integral to the justification of the search warrant and the human sniff (and visual observations) of two sergeants verified a citizen's firsthand description of atypical activity around a residence.

State v. Cuong Phu Le, 463 S.W.3d 872 (Tex. Crim. App. 2015)

After receiving a detailed citizen report of suspicious activity at a residence, Sergeant Clark, having extensive training and experience in the area of indoor cultivation of marijuana, conducted a three-week investigation, with the help of another sergeant, a narcotics supervisor. Their surveillance and observations along with an alert from a drug dog formed the basis of a search warrant, which resulted in the seizure of 358 marijuana plants and an indictment for felony possession of marijuana. Based on the intervening U.S. Supreme Court case *Florida v. Jardines*, 133 S. Ct. 1409 (2013), the trial court suppressed the marijuana plants, finding the affidavit lacking in probable cause without the drug dog alert. The court of appeals agreed. The Court of Criminal Appeals reversed.

Citing *McClintock*, the Court compares the affidavit in that case to the present case, finding this search warrant affidavit to present more information and less ambiguity. The Court found that the independent and lawfully acquired information in the affidavit *clearly established* probable cause, as is required when reviewing an affidavit part of which has been excluded (dog sniff/alert). The Court considered it notable that the citizen informant was accountable to Sergeant Clark and provided detailed and verifiable information and that Sergeant Clark verified the smell of raw marijuana at the front door and on the defendant's person and vehicle after leaving the residence (a legal human sniff).

Judge Alcala dissented, finding no probable cause without the dog-sniff evidence.

Commentary: Like the warrant in *McClintock v. State*, 444 S.W.3d 15 (Tex. Crim. App. 2014), this warrant was executed prior to the *Jardines* decision (holding that a drug dog alert occurring on a front porch does not establish probable cause for a search warrant if at the time of the alert its presence exceeds the implied license to walk up to a front door and knock). Unlike *McClintock*, this case was decided later and both parties assumed the dog sniff/alert should be excluded from the review. The *Jardines* decision occurred two months after the indictment and was the basis of the defendant's argument at the suppression hearing. The Court calls this case a useful bookend to *McClintock*.

4. Technology

North Carolina's Satellite-Based Monitoring (SBM) program constituted a search within the meaning of the 4th Amendment.

Grady v. North Carolina, 135 S. Ct. 1368 (2015)

In a per curiam opinion, the Court held that the nonconsensual attachment of a GPS device was a physical intrusion consistent with *U.S. v. Jones*, 132 S. Ct. 945 (2012). The government's purpose in collecting information does not control whether the method of collection constitutes a search. The Court rejected efforts to distinguish the post-release monitoring program of sex offenders on the grounds that it was civil in nature (citing *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 534 (1967) (holding that housing inspections are "administrative searches" that must comply with the 4th Amendment). The Court remanded the case for consideration of whether the search was "reasonable."

Contraband seized pursuant to an unconstitutional search via GPS tracking device was admissible where (1) the independent verification of the defendants speeding was an intervening circumstance that purged the primary taint of the search; (2) the defendant's detention and his consent to search, the discovery of the contraband, and his admission were sufficiently attenuated from the primary illegality; and (3) Article 18.21, Section 14(a) and (c) of the Code of Criminal Procedure permitted officers to install and use GPS upon sworn application to a district judge, so the search was not a flagrant disregard of the defendant's constitutional rights.

State v. Jackson, 464 S.W.3d 724 (Tex. Crim. App. 2015)

Law enforcement officers, suspecting drug trafficking, placed a global positioning system (GPS) tracking device on the defendant's car to ascertain when and where he was obtaining his supply. They monitored his movement as he traveled at speeds exceeding the posted speed limit. They independently verified that he was speeding by pacing his car in their own unmarked vehicles. Later, another officer who was aware of the investigation verified by radar that the defendant was speeding and pulled him over for that offense. Never issuing a speeding citation, the officers obtained his consent to search his car and discovered contraband in the trunk. A short time later he confessed that it was his. The trial court suppressed the contraband and the confession. The court of appeals rejected the State's argument that the independent verification of the vehicle's speed constituted an intervening circumstance attenuating the taint of the illegal search, which only became illegal through the subsequent decision in *U.S. v. Jones*, 132 S. Ct. 945 (2012). The majority of the Court disagreed with the court of appeals and reversed and remanded.

Commentary: This is another case involving an intervening U.S. Supreme Court decision. Like the dog sniff before *Jardines*, GPS monitoring did not constitute a search for 4th Amendment purposes prior to *Jones*. Here, the State Prosecuting Attorney (SPA) did not argue based on a good faith exception to either the federal or Texas statutory exclusionary rules (which will be the issue on remand in the *McClintock* case, *supra*), but instead argued attenuation of taint (using the factors in *Brown v. Illinois*, 422 U.S. 590 (1975)). Specifically, under *State v. Mazuca*, 375 S.W.3d 294 (Tex. Crim. App. 2012), the presence or absence of an intervening circumstance dictates which of the second and third *Brown* factors (temporal proximity or flagrancy of the police conduct) should carry greater significance. The SPA argues that the court of appeals erred in giving greater significance to temporal proximity instead of flagrancy. The Court agreed. Regardless, the majority of the Court found both the second and third *Brown* factors favor the dissipation of taint in this case and reversed and remanded. Meyers dissented, concluding the existence of unattenuated taint with a veiled comparison of the officers to Lance Armstrong.

A warrant to search a cell phone was required where (1) the defendant gave the officer his password for a limited purpose (no consent); (2) treating a cell phone as a "container" which may be searched as a part of the automobile exception is "a bit strained;" and (3) the phone was not searched incident to arrest when it was searched at DPS headquarters after the officer was called to another location to work an accident.

Yoon Chung v. State, 2014 Tex. App. LEXIS 11724 (Tex. App.—Waco October 23, 2014, pet. ref'd)

5. Probable Cause

Forged checks found in a vehicle after arrest for misdemeanor assault were inadmissible where the basis for the arrest was an uncorroborated anonymous report.

State v. Story, 445 S.W.3d 729 (Tex. Crim. App. 2014)

Police found forged checks in a vehicle as a result of a search incident to an arrest for misdemeanor assault. An anonymous report of a vehicle chasing and possibly attempting to run over a man in a field led officers to a man on a street near the field. Upon learning that the man was the subject of the report, officers transported him back to the vehicle in the field, occupied by the defendant. Both the man and defendant told officers they were just having an argument, which resulted in the defendant driving the vehicle near the man upon his exit. Officers arrested the defendant for misdemeanor assault and, during a subsequent search of the vehicle, recovered marijuana (in plain view prior to the arrest) and forged checks.

The trial court granted, and the court of appeals upheld, suppression of the checks due to a lack of probable cause for arrest of the defendant for misdemeanor assault. The Court of Criminal Appeals found no abuse of discretion and agreed that the checks were inadmissible. In support of its holding, the majority stated that without additional facts and circumstances indicating that the defendant had committed or was committing an offense, the anonymous call could not serve as the basis for the probable cause required for her arrest.

Presiding Judge Keller, in her dissent, argued that the presence in plain view of what appeared to be marijuana gave officers probable cause to enter the vehicle, and upon determining the substance was in fact marijuana, had probable cause to search the rest of the vehicle for more marijuana. In the course of that search, officers found the checks.

Commentary: Do not be alarmed. The Court of Criminal Appeals has not turned its back on the "open fields" doctrine (or the plain view doctrine). This is a burden of proof case. The majority acknowledges the possibility of the validity of the open fields doctrine, but faults the State for failing to raise it as part of its argument during the suppression hearing. The dissent points out, however, that the Court has previously held that a State appellant may raise, for the first time on appeal, an issue on which the defendant had the burden of proof at the suppression hearing, such as here, where the defendant had the burden to establish a privacy interest in the field. The State had other arguments not discussed here warranting further reading of the full case.

6. Reasonable Suspicion

Because the peace officer's mistake of law regarding the North Carolina "brake light" statute was reasonable, there was reasonable suspicion justifying the stop.

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

While watching for criminal indicators of drivers and passengers a peace officer observed a driver who appeared nervous. The officer began following the vehicle. The vehicle eventually

slowed when it approached a slower-moving vehicle, and the officer observed the car's right rear brake light hadn't turned on. Believing it was a violation of North Carolina traffic law to drive a vehicle with a broken brake light, the officer stopped the vehicle (observing that as he did so, the right brake light "flickered on"). The officer informed the driver and Heien (the owner of the vehicle, lying in the rear seat of the automobile) that he had stopped them for a broken brake light. During the stop, the officer began to suspect the vehicle might contain contraband. His suspicion increased when the driver and Heien claimed, in separate questioning, that they were traveling to different ultimate destinations. The officer asked the driver if he could search the vehicle. The driver agreed but said he should ask Heien, who consented. The officer found cocaine in a sandwich bag located in a duffle bag.

Heien pled guilty to drug trafficking while reserving his right to appeal the denial of his motion to suppress the cocaine. On appeal the Court of Appeals concluded that the statute in question required only *one* working "stop lamp." Heien's left brake light was functional, so his right brake light's dysfunction did not constitute a violation. It also concluded that separate statutory language requiring all "originally equipped rear lamps [be] in good working order" didn't apply to stop lamps. The Court of Appeals concluded that the stop violated the 4th Amendment, because an officer's mistaken belief that a defendant has committed a traffic violation is not an objectively reasonable justification for a traffic stop. The State appealed the decision to the North Carolina Supreme Court, challenging only the conclusion that a mistaken belief that a traffic violation had occurred provided no objectively reasonable justification for a traffic stop. (The State did not challenge the Court of Appeals' interpretation of the traffic statutes.) The North Carolina Supreme Court, reversing the court of appeals, concluded that the officer's mistake of law was objectively reasonable and that he had reasonable suspicion to stop Heien's vehicle. Chief Justice Roberts in an 8-1 decision affirming the North Carolina Supreme Court held that the officer's *objectively* reasonable mistake of law nonetheless provided the individualized suspicion required by the 4th Amendment to justify a traffic stop based upon that understanding.

Justice Kagan, joined by Justice Ginsburg, filed a concurring opinion to emphasize that an officer's *subjective* understanding (e.g., individual interpretation, awareness, and training) is legally irrelevant. A court tasked with deciding whether an officer's mistake of law can support a seizure is a straightforward question of statutory construction. If a statute is genuinely ambiguous, in that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. In her dissent, Justice Sotomayor argued that the reasonableness of a search or seizure should be determined by evaluating an officer's understanding of the facts against the actual state of the law. To determine otherwise erodes civil liberties and further expands law enforcement authority under the guise of reasonableness.

A traffic stop was not justified by reasonable suspicion where the officer's mistake of law that Section 545.104(b) of the Transportation Code applied to lane changes was not objectively reasonable.

U.S. v. Alvarado-Zarza, 782 F.3d 246 (5th Cir. 2015)

The officer who stopped the defendant claimed that a "turn" occurred when defendant moved into the left-turn lane from a through-lane. The court found Section 545.104(b), by its plain

terms, to not apply to lane changes. The Court of Criminal Appeals in *Mahaffey v. State*, 316 S.W.3d 633, 641 (Tex. Crim. App. 2010) addressed the distinction between a turn and a lane change where a policeman mistakenly concluded that a driver was "turning" by moving out of a lane that was ending. Because *Mahaffey* predated the stop of the defendant's vehicle, and because the statute facially gave no support to the officer's interpretation of the requirement that a driver signal for at least the last 100 feet of movement of the vehicle before a turn, the officer's mistake of law was not objectively reasonable.

The police officer had reasonable suspicion to conduct a traffic stop where the defendant passed a "left lane for passing only sign," and according to the video, she was clearly driving in the left lane without passing after driving past the sign in violation of Sections 544.004(a) and 541.304(1) of the Transportation Code.

Jaganathan v. State, 2015 Tex. Crim. App. LEXIS 920 (Tex. Crim. App. September 16, 2015)

Reasonable suspicion exists if the officer has "specific articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has engaged or is (or soon will be) engaging in criminal activity" (quoting *Abney v. State*, 394 S.W.3d 542, 548 (Tex. Crim. App. 2013). Before an officer can have reasonable suspicion to believe that a defendant committed the traffic offense of failing to obey a "Left Lane for Passing Only" sign, the officer must be aware of facts that support a reasonable inference that the defendant drove past the sign before being pulled over. *Abney*, 394 S.W.3d at 549. The Court finds that the record in the present case establishes that she did in fact pass such a sign. The lower court suggested potential justifications for the defendant's failure to move immediately out of the left lane. But the Court agreed with the State that the question in this case is not whether appellant was guilty of the traffic offense but whether the trooper had a reasonable suspicion that she was.

Judge Meyers dissented, expressing concern that the defendant's actions in this case, regardless of whether she was actually passing another vehicle, cannot constitute a crime at all. Judge Meyers finds it unclear how an individual can comply with the "Left Lane for Passing Only" sign and when his or her actions would become criminal activity, listing several unanswerable questions related to the statute.

Commentary: Compare this case to the *Abney* case where the Court found no evidence to support the officer's assumption that the defendant had passed a sign located 15-20 miles behind him and other testimony indicated that the sign was 27 miles from where the traffic stop was conducted. In that case, the Court said the facts supported that the defendant was driving in the left lane to make a left turn, which would be an appropriate action to take as it is clearly illegal to make a left turn from the right lane.

The officer had reasonable suspicion to conduct the traffic stop where the evidence showed that the defendant's driving was dangerous and violated Section 545.060 of the Transportation Code.

Zuniga-Hernandez v. State, 2015 Tex. App. LEXIS 8605 (Tex. App.—Houston [14th Dist.] August 18, 2015, no pet.)

By weaving in and out of traffic lanes, the defendant demonstrated that he was unable to safely operate a motor vehicle, and if the defendant continued to operate the vehicle, he was a danger to himself and other drivers in the area. The trial court, thus, did not abuse its discretion in denying his motion to suppress evidence. The defendant's argument that no other cars were around did not persuade the court, which responded that the officer's vehicle was obviously in the vicinity and regardless, traffic safety laws are designed to protect not only the safety of others, but also the safety of the driver in question.

Reasonable suspicion existed that the defendant was violating the law where the confidential informant had been used before and provided reliable information in the past; the informant called the defendant with the officer present and scheduled a time and place to meet; and after the meeting, the informant signaled that he had seen the money intended to purchase contraband.

Padilla v. State, 462 S.W.3d 117 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd)

7. Reasonable Expectation of Privacy

The defendant had a reasonable expectation of privacy in her dorm room and the entry into her dorm room by officers of the university and the police department implicated her 4th Amendment protections.

State v. Rodriguez, 2015 Tex. App. LEXIS 9972 (Tex. App.—Eastland September 24, 2015, no pet.)

Resident assistants of a dormitory discovered marijuana in a dorm room during a routine room check. They placed it in the middle of the room and called the university's Department of Public Safety. Officers subsequently accompanied the resident director into the dorm room.

The State argued that (1) the defendant no longer possessed a subjective expectation of privacy that society is willing to recognize as reasonable after the resident assistants found the contraband in her dorm room and (2) the contraband was admissible under the plain view doctrine. The court disagreed with both arguments, finding the first to be illogical and the second inapplicable.

First, the State's contention that the discovery of contraband by dorm personnel had the effect of reducing her subjective expectation of privacy is not logical because there is no evidence that she was aware that dorm personnel had searched her room or that they had discovered contraband. Second, the officers were not lawfully in the dorm room where they entered without the consent of either the defendant or her roommate, and dorm personnel did not have the authority to give police officers consent. The search of the defendant's dorm room, the seizure of the contraband, and the defendant's subsequent admission that the contraband belonged to her were obtained by exploitation of the warrantless search of her dorm room, warranting suppression.

The defendant had no reasonable expectation of privacy in his blood-test results performed for medical purposes and obtained by subpoena.

Rodriguez v. State, 2015 Tex. App. LEXIS 6507 (Tex. App.—Houston [1st Dist.] June 25, 2015, no pet.)

The defendant was arrested for suspicion of DWI and injured himself by pulling away from the officer's grip. While being treated at the hospital, the arresting officer requested a blood sample, and upon refusal, asked the nurse if he was going to take a blood sample in treating the defendant. He replied that he was. The District Attorney's Office issued a grand jury subpoena to the hospital's records custodian and obtained a copy of the defendant's medical records showing a BAC of .209. The defendant argued that Article 38.23(a) of the Code of Criminal Procedure required suppression of his test results because the State violated his rights under the 4th Amendment, HIPAA, and the Texas Medical Practices Act. According to the court, the State did not obtain the results in violation of the 4th Amendment, HIPAA, or the Texas Medical Practice Act, none of which provide a constitutional or statutory reasonable expectation of privacy.

The defendant failed to establish a legitimate expectation of privacy in an unmarked, unlocked flash drive left in a classroom and discovered by a university employee; the court properly denied the motion to suppress the photographs contained therein.

Kane v. State, 458 S.W.3d 180 (Tex. App.—San Antonio 2015, pet. ref'd)

8. Exceptions to the Warrant Requirement

In 2009, the "knock and talk" exception to the warrant requirement did not clearly establish that law enforcement may only approach the front door of a residence. The investigating peace officer did not violate clearly established federal law when he went to a sliding glass door that he believed was a customary entryway that was open to visitors.

Carroll v. Carman, 135 S. Ct. 348 (2014)

In a per curiam opinion, the Court reversed the 3rd Circuit Court of Appeals. It is not clearly established constitutional law that law enforcement must begin at a residence's front door to employ the "knock and talk" exception to the warrant requirement. The Third Circuit Court of Appeals erred in ruling that Carroll, a peace officer, was not entitled to qualified immunity, in a lawsuit alleging that Carroll entered Carman's property in violation of the 4th Amendment by going into Carman's backyard and onto Carman's deck without a search warrant. Carroll was entitled to qualified immunity because the constitutional rule was not "beyond debate." The Court did not address whether officers could use entrances besides the front door under the "knock and talk" exception.

The community caretaking exception to the warrant requirement did not apply where the officer observed a vehicle swerve within its own lane on a well-traveled road and subsequently observed traffic laws by stopping at a stop light.

Leming v. State, 454 S.W.3d 78 (Tex. App.—Texarkana 2014, pet. granted)

The court found no evidence to support either the trial court's ruling that a violation of Section 545.060 of the Transportation Code occurred (no evidence of an unsafe manner) justifying the traffic stop or that the officer had any reason to attribute credibility to the anonymous caller that said the vehicle was driving erratically. The court additionally found no justification for the stop under the community caretaking function. The officer's belief that the driver was in distress was not reasonable where the vehicle merely drifted or swerved within its own lane of traffic.

Suppression of a cup filled with alcohol in the defendant's vehicle was not required where the defendant was lawfully arrested for outstanding warrants, no one was available at the scene to drive the vehicle, the officer followed DPS inventory search procedures, and it was not reasonable to expect the officer to delay following said procedures in the event the defendant's mother did not show up to get the vehicle.

Jackson v. State, 2015 Tex. App. LEXIS 5360 (Tex. App.—Houston [14th Dist.] May 28, 2015, no pet.)

B. 5th Amendment

1. *Miranda* Warnings

Questions about the defendant's name and phone number asked in a custodial interview did not fall within the "booking" exception to the *Miranda* rule because (1) the questions were not asked during a booking procedure, and (2) the circumstances did not otherwise reveal that the questions were reasonably related to an administrative purpose.

State v. Cruz, 461 S.W.3d 531 (Tex. Crim. App. 2015)

Austin detectives traveled to Chicago to question a murder suspect whose real name was not known to law enforcement at the time. At the request of the Austin detectives, Chicago officers picked up the defendant on an outstanding Illinois DUI warrant, booked him, and made no mention of the Texas homicide investigation. After booking, during questioning, the Austin detectives did not say who they were or that they were investigating a Texas murder. They obtained his name, address, and cell phone number and subsequently read him the *Miranda* warnings. Detectives then went to the address, obtained permission from his girlfriend to search the residence, discovered his birth certificate, and obtained records for the cell phone showing the phone was in Austin on the date of the murder and that phone calls hit cell towers close to the crime scene.

The trial court suppressed the Chicago interview. The court of appeals reversed. The Court of Criminal Appeals reversed.

The *Miranda* rule generally prohibits the admission into evidence of statements made in response to custodial interrogation when the suspect has not been advised of certain warnings. In the *Miranda* context, "interrogation" means any words or actions on the part of the police that the police "should know" are reasonably likely to elicit an incriminating response. An exception to the "should know" general test exists for matters "normally attendant to arrest and custody" (a "booking" exception). A question that seeks to elicit biographical data may be deemed "not interrogation" under either of two theories: (1) because it does not meet the general test for interrogation (the "should know" test); or (2) because it was a routine administrative inquiry, falling under the "booking" exception.

The Court concluded that the questions asked by the Austin detectives satisfied the "should know" test for what constitutes interrogation. Here, the defendant's name and phone number had incriminating value in themselves. The detectives were not asking for the suspect's name for the first time, but were attempting to solicit the suspect's true name after what they suspected to be a false name had already been given. Also, the detectives were seeking to obtain his cell-phone number, which could link him, through cell tower data, to a location and time that was close to the murder.

The questions, according to the Court, did not reasonably relate to an administrative concern. Whether a question reasonably relates to an administrative concern must be ascertained by both the content of the question and the circumstances in which the question is asked. Guided by federal court and other state supreme court cases as well as the analogous area of the law, the inventory-search exception to the warrant requirement, the Court based its conclusion on the following facts: (1) the defendant had already been booked by Illinois authorities; (2) the Texas detectives did not inform the defendant they were from Texas or were connected with a Texas murder investigation; (3) the State of Texas had not exercised any form authority over the defendant; and (4) the detectives did not suggest any administrative need for the questions or point to a policy or procedure they were following.

The defendant did not clearly and unambiguously invoke his right to counsel (a reasonable officer in light of the circumstances would have understood only that he "might be invoking the right to counsel") or his right to remain silent where he made ambiguous statements and after receiving *Miranda* warnings in oral and written form, signed a waiver of his rights and continued talking to police.

Beham v. State, 2015 Tex. App. LEXIS 9786 (Tex. App.—Texarkana September 18, 2015, no pet.)

In a shoplifting case, the trial court erred in suppressing statements admitting theft made by the defendant to the Wal-Mart security guard because *Miranda* warnings were not required; the guard was not an agent of law enforcement and the defendant was not in custody when the guard encountered her.

State v. Petersen, 2015 Tex. App. LEXIS 7369 (Tex. App.—Eastland July 16, 2015, no pet.)

The court compared the facts in this case to those in *Elizondo v. State*, 382 S.W.3d 389 (Tex. Crim. App. 2012) (involving a loss prevention officer employed by Old Navy) and applied the factors in *Wilkerson v. State*, 173 S.W.3d 521 (Tex. Crim. App. 2005) for determining whether an agency relationship exists for required *Miranda* warnings. Here, there was no finding of a "calculated practice" between the Midland police and the security guard or any evidence in that regard. Though he contacted police before obtaining her confession, there was no evidence that the police instructed him to do that. Also, a reasonable person would not have believed that the guard was a law enforcement agent because he identified himself to the defendant and showed her his Wal-Mart badge. As for custody, the court found it significant that the guard questioned her near the exit doors, did not ask her to move to another location, and did not physically restrain her movement.

Officers did not violate the defendant's 5th Amendment right to counsel by discussing the details of the crime in the car on the way to the jail because that conversation did not rise to the level of interrogation where the officers turned up the radio in the car specifically to prevent appellant from hearing their conversation and could not be imputed with knowledge that their actions were reasonably likely to elicit an incriminating response.

Nelson v. State, 463 S.W.3d 123 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd)

***Miranda* and Article 38.22 of the Code of Criminal Procedure required suppression of a videotaped confession because it was obtained by an impermissible two-step interrogation technique.**

Vasquez v. State, 453 S.W.3d 555 (Tex. App.—Houston [14th Dist.] 2014, pet. granted)

A "question first, warn later" interrogation technique consists of officers interrogating a suspect and obtaining a confession without first providing *Miranda* warnings; then, after the inculpatory statements are made, officers provide *Miranda* warnings and obtain a waiver of the warnings. Officers then have the suspect repeat the inculpatory statements in an attempt to cure the lack of *Miranda* warnings. When a two-step interrogation technique is used in a deliberate, calculated way to undermine *Miranda* warnings, absent "curative measures," the post-warning statements must be excluded. Here, the record did not support the trial court's findings that curative measures were taken where the officer repeatedly referred to the previous unrecorded statement.

A dissenting opinion found that the State did not have the burden to prove the police did not deliberately employ this technique because the defendant arguably raised this issue for the first time during closing argument at the suppression hearing after the State had rested.

The Court of Criminal Appeals granted the State's petition for discretionary review on April 15, 2015.

2. Double Jeopardy

The State was not barred by double jeopardy from subsequently trying the defendant for a higher offense because at the time the defendant was tried for the lesser offense, one of the elements that comprised the higher offense had not taken place, and thus the State could not have brought the higher offense at the time the defendant was tried for the lesser one.

Ex Parte Hill, 464 S.W.3d 444 (Tex. App.—Dallas 2015, no pet.)

A longstanding exception to the double jeopardy bar exists allowing for a subsequent prosecution on a more serious charge when additional facts necessary to sustain that charge have not occurred. In this case, the defendant pled guilty to aggravated robbery. Months later, the victim died, allegedly from complications of the gunshot he received during the aggravated robbery. The State thereafter indicted the defendant for capital murder.

3. Privilege Against Self-Incrimination

The defendant's 5th Amendment rights were violated where he asserted his right not to incriminate himself during court-ordered treatment, found by the trial court to be a violation of a condition of deferral.

Dansby v. State, 2015 Tex. App. LEXIS 6012 (Tex. App.—Dallas June 15, 2015, no pet.)

The defendant pled guilty and the trial court deferred proceedings, one of the conditions of such deferral being successful completion of treatment. The defendant failed to successfully complete treatment by refusing to disclose information during therapy that he was warned might result in prosecution. The trial court found he violated the conditions of his deferral and proceeded to judgment. On a second remand, the court found that the defendant made a legitimate assertion of the 5th Amendment privilege against self-incrimination and that waiver of that privilege was not a condition of deferral.

C. 6th Amendment

1. Public Trial

The court violated the defendant's right to public trial by closing the courtroom during voir dire based on space limitations and safety concerns, which did not outweigh the right, especially with no specific findings as to security.

Cameron v. State, 2014 Tex. Crim. App. LEXIS 1536 (Tex. Crim. App. October 8, 2014)

The majority of the Court first found that the voir dire proceedings were closed because the record showed the trial judge's attempt to justify not being able to accommodate the defendant's friends and family by stating that "every single chair" was being used by a 65 member venire panel. Using the *Waller* test, the Court found the closure unjustified because (1) concerns over space and overcrowding, though legitimate, must not outweigh a defendant's 6th Amendment

rights, and can be mitigated by moving to a bigger courtroom or splitting the venire panel in half; (2) vague or general concerns of safety such as "fire code issues" and "police detention issues" are not sufficient overriding interests; and (3) the value of openness could be completely eroded if a trial judge could close a trial because open testimony might make some jurors uncomfortable.

Presiding Judge Keller, joined by Judge Hervey, dissented, finding the defendant failed to satisfy her burden of showing that the voir dire was not open to the public. Affidavits by bailiffs and the findings of the trial court showed that bailiffs cleared the courtroom in order to seat the venire panel, but never told spectators they were not allowed to watch or that they had to leave the courthouse. The trial court, in fact, gave the defense counsel the option to open the doors and have spectators stand where they could observe and hear.

Defendant forfeited the right to a public trial by failing to make a specific objection to the courtroom's closure.

Peyronel v. State, 465 S.W.3d 650 (Tex. Crim. App. 2015)

An unidentified woman associated with the defense approached a juror during the punishment phase of trial and asked, "How does it feel to convict an innocent man?" The trial court excused all punishment-phase witnesses from the courtroom on its own motion. The State also asked the trial court to exclude female members of the defendant's family from the courtroom so that jurors would not feel intimidated. Defense counsel responded that to exclude Peyronel's wife and daughter from the courtoom would "create the impression in the jury's mind that he has absolutely no support whatsoever here." The judge decided to exclude everyone in the gallery. On appeal, Peyronel argued that he preserved a complaint for review that his right to a public trial was violated. The court of appeals reversed the trial court's judgment as to punishment and remanded for a new punishment hearing.

The Court of Criminal Appeals reversed in a 7-1 decision. Writing for the majority, Judge Hervey stated that whether the right to a public trial is forfeitable is an issue of first impression for the Court. Courts in other jurisdictions have held that the right to a public trial may be forfeited by relying on *Levine v. United States*, 362 U.S. 610 (1960). In *Levine*, the U.S. Supreme Court held that the public trial protection does not extend to contempt proceedings. *Levine* has subsequently been cited for the proposition that the 6th Amendment public trial can be forfeited.

The Court held that the right to a public trial is subject to forfeiture. In this case, Peyronel did not preserve his public trial claim. Peyronel voiced concern about the perception of the jury if no one, specifically his wife and daughter, was present in the gallery to support him. He did not make a public trial claim. Peyronel had the burden to state the grounds for the ruling sought from the trial court with sufficient specificity to make the trial court aware of the complaint. He failed to do so.

Judge Johnson dissented, arguing that Peyronel made clear that he did not agree to the trial court's exclusion of his family. This constituted a proper objection. The trial court's ruling closed the proceedings to everyone and violated Peyronel's right to a public trial. Excluding the

female members of Peyronel's family was overly broad and exceeded the minimum required to accomplish the purpose of the initial exclusion: removing the unidentified female who improperly confronted a juror. Judge Alcala concurred without an opinion.

2. Impartial Jury

The trial court violated the defendant's 6th Amendment rights by arresting a juror for stating during voir dire that he would refuse to view certain evidence based on his religious beliefs because the arrest chilled the effect of the jury's ability to provide truthful responses to questions regarding their potential biases. The trial court further erred by commenting on the defendant's case and punishment, which likely influenced the jury's opinion about the case before it even began.

Drake v. State, 465 S.W.3d 759 (Tex. App.—Houston [14th Dist.] 2015, no pet.)

3. Speedy Trial

The defendant was not denied his right to a speedy trial because, although there was much too long of a delay in bringing the accusations to trial, which was attributable to the State, the defendant withheld invoking said right and chose to wait, and the little evidence of prejudice was offset by his acquiescence in the delay.

State v. Jolly, 446 S.W.3d 613 (Tex. App.—Amarillo 2014, no pet.)

D. 14th Amendment

Under the Due Process and Equal Protection Clauses of the 14th Amendment, same-sex couples have a fundamental right to marry, and thus certain state laws are invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples; there also being no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.

Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

In a 5-4 decision, Justice Kennedy, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan held that states are required by the 14th Amendment to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex lawfully licensed and performed out of state. The majority supports its holding with the history of marriage and precedent such as *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that laws making same-sex intimacy a crime "demean the lives of homosexual persons" and are invalid), *Turner v. Safley*, 482 U.S. 78 (1987) (holding the right to marry was abridged by regulations limiting the privilege of prison inmates to marry), *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying), and *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men"), which according to the

majority, compel the Court's conclusion that same-sex couples may exercise the right to marry. According to the majority, such a right is fundamental under the Constitution for four reasons: (1) the right to personal choice regarding marriage is inherent in the concept of individual autonomy; (2) the right to marry supports a two-person union unlike any other in its importance to the committed individuals; (3) it safeguards children and families from social stigma; and (4) marriage is a keystone of our social order. Because the Court held such a right is fundamental, the Court also held that the state laws challenged in this case (Michigan, Kentucky, Ohio, and Tennessee) are invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

Chief Justice Roberts, joined by Justices Scalia and Thomas dissented, finding that whether same-sex marriage is a good idea is of no concern to the Court, which is not a legislature. Judges have power to say what the law is, not what it should be. In response to the majority's approach, the dissent finds no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking. The cases relied upon by the majority, according to the dissent, do not hold that anyone who wants to get married has a constitutional right to do so, but instead require a state to justify barriers to marriage as that institution has always been understood. Further, none of the laws at issues in *Loving*, *Zablocki*, or *Turner* purported to change the core definition of marriage.

Justice Scalia wrote separately, joined by Justice Thomas to call attention to the opinion as a naked judicial claim to super-legislative power, finding the decision at odds with the Constitution and based on a misconception of liberty.

Justice Alito, joined by Justices Scalia and Thomas also dissented, finding that the Constitution leaves the decision whether a state should recognize same-sex marriage to the people of each state.

Commentary: Simply said, to the degree any provision of state law or a state constitution abridges the right of same-sex couples to marry, that provision is unconstitutional. Similarly, to the degree a state prohibits same-sex couples from entering into marriage under terms and conditions that are the same as opposite-sex couples, it too violates the 14th Amendment. In other words, there is no longer such a thing as "same-sex marriage." There is simply "marriage" and the government cannot discriminate between couples of same or differing sexes. Of course, it is not that simple because "the government" consists of people acting as public employees and government officials who each have their own personal beliefs.

Undoubtedly, *Obergefell* is a historic sea change in law. However, it is a change that public officials in Texas and elsewhere anticipated. Before *Obergefell* was handed down, Lt. Governor Patrick requested an attorney general opinion asking whether "a justice of the peace or a judge [could] refuse to conduct a same-sex wedding ceremony if doing so would violate their sincerely held religious beliefs on marriage." In *Tex. Atty. Gen. Op. KP-0025* (6/28/15), the Texas Attorney General Ken Paxton opined:

> County clerks and their employees retain religious freedoms that may provide accommodation of their religious objections to issuing same-sex marriage licenses. Justices of the peace and judges also may claim that the government forcing them to

> conduct same-sex wedding ceremonies over their religious objections, particularly when other authorized individuals have no objection to conducting such ceremonies, is not the least restrictive means of furthering any compelling governmental interest in ensuring that such ceremonies occur.

The language of *KP-0025* should be carefully parsed. The Attorney General qualifies his opinion by noting that the strength of any particular religious-accommodation claim depends on the particular facts of each case. This opinion does not address the ethical implications of judges refusing to conduct same-sex marriages, but actively performing marriage ceremonies for opposite-sex couples. The Attorney General does not offer to provide representation to judges who refuse to conduct same-sex marriages because it would violate their sincerely held religious beliefs on marriage. Nor does he claim that local governments are required to provide legal representation. In fact, a few weeks after issuing the opinion, the Attorney General issued *Tex. Atty. Gen. Op. KP-0027* (7/13/15) opining that a county is not required to provide representation to a county judge involved in a disciplinary proceeding before the State Commission on Judicial Conduct because the word "sued" does not encompass a disciplinary proceeding brought by the Commission.

While adhering to religious liberty is a fundamental right protected by the 1st Amendment, it should be emphasized that *KP-0025 does not* make any pretense of asserting that judges who take an oath to uphold the law can use their personal religious beliefs to avoid following the law regarding marriage. More importantly, the Attorney General leaves no doubt that *Obergefell* is the law of the land.

Notably absent from the Attorney General's opinion is a discussion of separation of church and state. The separation of church and state was, however, at the heart of legislation passed by the Texas Legislature in anticipation of the *Obergefell* decision. S.B. 2065 added Section 2.601 of the Family Code, which states that religious organizations, an individual employed by a religious organization while acting in the scope of that employment, or a clergy or minister *may not* be required to participate in any part of a marriage or celebration of a marriage if it would violate a sincerely held religious belief. Section 2.602 provides that a refusal to provide services, accommodations, facilities, goods, or privileges under Section 2.601 *is not* the basis for a civil or criminal cause of action or any other action by the state or a political subdivision. Let us emphasize, S.B. 2065 protects religious organizations and individuals acting in the scope of their employment with a religious organization; it provides no similar protection to judges, public officials, or public employees. This was not an accidental omission. It was an affirmation of the distinction between separation of church and state. The legislation protects religion (clergy and ministers); it does not protect the state (judges and other public officials) regardless of whether the latter have sincerely held religious beliefs.

This is not the first time that America has encountered major changes in the law of marriage. Neither is this the first time that some judges in Texas have potentially had to reconcile personal religious beliefs with the rule of law. Before and after the U.S. Supreme Court invalidated statutes that prohibited interracial marriage in *Loving v. Virginia* (1967), opposition to interracial marriage was based on religious grounds. In fact, Texas law did not expressly prohibit discriminating against interracial couples until 1997. Yet, despite this lag in statutory law, when

the Attorney General was asked in 1983 whether judges in Texas could refuse to marry an interracial couple, his opinion stated that it is clear that a judge, "when conducting a ceremony, 'is clothed with the State power,' and 'acts in the name and for the State.' As a result, the Equal Protection Clause is applicable to his performance of that ceremony." Accordingly, once a judge "undertakes to exercise the authority granted …by the Family Code," the judge may not refuse to exercise it on racial grounds. *Tex. Att'y Gen. Op. No. JM-1* (1983).

JM-1 was in response to a request made by the State Commission on Judicial Conduct. Like *KP-0025*, *JM-1* interprets the law, and that interpretation is neither binding on the courts nor the Commission. Conduct that is legal is not necessarily also ethical. In making decisions related to conducting marriages, judges must examine both statutory law and the Canons of Judicial Conduct in light of *Obergefell*. While overreliance on the rationale of an attorney general opinion is generally ill-advised, attorney general opinions can be instructive and advisory.

We think it is significant to note that in *KP-0025*, the Attorney General did not overrule *JM-1*. To the contrary, two of the opinions cited in *KP-0025* rely on *JM-1*. Strictly construed, *JM-1* seems to support the proposition that a judge who has never conducted a marriage ceremony and declines future invitations to perform all marriage ceremonies is safest from allegations of discrimination regardless of the sexual orientation of the couple requesting the judge to conduct the ceremony. (Notably, municipal judges were not authorized until 2009 to conduct marriage ceremonies. In AY 2011, 1,111 municipal judges were asked whether in their capacity as a municipal judge they had conducted a marriage ceremony; 67 percent reported having not performed a marriage ceremony.)

To be clear, in light of *Obergefell*, a Texas judge may not refuse to perform same-sex marriage ceremonies while continuing to perform opposite-sex marriage ceremonies. Can judges simply choose to no longer conduct any marriage ceremony? The simple answer is: Yes. Section 2.202(a)(4) of the Family Code *authorizes* judges to conduct marriage ceremonies but does not impose a *duty*. The complex answer is: It depends on the particular facts of each case. Two opinions, *Tex. Att'y Gen. Op. JM-22* (1983) and *Tex. Att'y Gen. Op. DM-397* (1996), have been cited for the proposition that under Texas law, individual judges are not required to exercise their authority to perform marriage ceremonies. Reliance on those opinions for that proposition, however, is incorrect. Both *JM-22* and *DM-397* pertain to the authority of justices of the peace to receive a fee for performing a marriage ceremony. Only *JM-1* pertains to judicial discrimination in performing marriage ceremonies. (*DM-397 cites JM-22* and *JM-22* cites *JM-1*.) Both *JM-22 and DM-397* state: "A judge is not, however, required to exercise that authority, *so long as a refusal to marry particular persons is not based upon constitutionally prohibited grounds.*" (Emphasis added).

II. Substantive Law

A. Penal Code

That the defendant was passed out behind the wheel with the engine running and the car in park sufficiently established he operated a motor vehicle for purposes of proving DWI.

Murray v. State, 457 S.W.3d 446 (Tex. Crim. App. 2015)

In an 8-1 decision, Judge Hervey, writing for the majority, explained that while the court of appeals had articulated the proper standard of review, it improperly used a divide-and-conquer analysis, which explained away individual facts that, when considered together, would support a reasonable inference that Murray had operated his vehicle while intoxicated. The pertinent inquiry in an evidentiary-sufficiency analysis remains the same: whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. When the evidence is viewed in the light most favorable to the State, a rational fact finder could have found that Murray operated his vehicle while intoxicated. The Court reversed the judgment of the court of appeals and remanded the case.

Judge Meyers, dissented, arguing that the jury could not make reasonable inferences based upon no evidence and that he believed that there would have to be some evidence that Murray turned the ignition while he was intoxicated.

Section 822.013 of the Health and Safety Code, providing legal justification to kill a dog under certain circumstances, is a defense to prosecution under Section 49.092 of the Penal Code (Cruelty to Nonlivestock Animals).

Chase v. State, 448 S.W.3d 6 (Tex. Crim. App. 2014)

After examining the text and history of Section 822.013 of the Health and Safety Code, the Court rejected the State's arguments, finding that (1) Section 1.03 of the Penal Code is not so broad as to bar all application of defenses outside the Penal Code to Penal Code offenses and (2) Section 822.013 was not solely a civil statute.

Judge Meyers dissented, finding that the goal of the statute was to protect farmers and ranchers against the loss of their livelihood by allowing them to protect their livestock from attacking dogs without fear of liability to the dog's owner, and was never intended to allow individuals in residential neighborhoods to murder a neighbor's dog after an attack with criminal impunity. Judge Meyers also found the provision to be too broad to be applied as a criminal defense.

Commentary: This decision includes a thorough statutory construction discussion for determining whether a statute is a defense to prosecution. The facts of this case are off-putting and the State made a valiant case, but neither persuaded the majority.

A contractor was criminally liable for theft in connection with a contract (Section 31.03, Penal Code) where he induced a customer to make a second installment payment based on the false representation that the desired signs were ready for shipment when he knew he would renege on his contract.

Taylor v. State, 450 S.W.3d 528 (Tex. Crim. App. 2014)

Though failing to perform on a contract (breach of contract) will not suffice to establish intent to renege on a contract, as other courts of appeals have recognized, a contractor may yet be found

guilty of theft, if, at some point after the formation of the contract, he or she formulates the requisite intent to deprive and appropriates additional property by deception. Here, there was a pattern of creating an appearance of intending to satisfy contractual obligations while knowing he would not.

Judge Johnson dissented, finding that the defendant proved himself to be "monumentally inept at business," but that is not a crime. According to the dissent, this is a contract dispute, and it should be left to the civil courts to resolve it.

Section 33.021(c) of the Penal Code (Online Solicitation of a Minor) is presumed valid because it prohibits conduct, not merely speech, and is thus subject to a rational basis review; the statute bears a rational relationship to the legitimate state interest in protecting minors.

Ex parte Wheeler, 2015 Tex. App. LEXIS 10117 (Tex. App.—Houston [1st Dist.] September 29, 2015, no pet.)

This court of appeals as well as the Beaumont Court of Appeals previously held that this provision is not unconstitutionally broad. The defendant's argument here is different than in those cases, i.e., that this statute prohibits an adult "ageplayer" from soliciting a consenting fellow "ageplayer" who is pretending to be a child as part of a fantasy. The court again found the statue not unconstitutionally overbroad because the legitimate reach of the statute dwarfed the threat of its arguably impermissible application to innocent "ageplayers" and whatever overbreadth existed should be cured by thorough and case-by-case analysis and judicious use of prosecutorial discretion. Additionally, the statute does not implicate the Dormant Commerce Clause because it regulates even-handedly between interstate and local commerce to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental in relation to the local benefit of the statute.

The theft statute applies to a theft when the appropriation is accomplished using a legal document, including an unlawful transfer by will.

McCay v. State, 2015 Tex. App. LEXIS 9543 (Tex. App.—Dallas September 9, 2015, no pet.) The defendant argued that the State is attempting to criminalize will contests and that the probate court is the proper arena for this type of contest. The court responded that a will contest determines the validity of a will whereas prosecution for theft determines whether a person has the specific criminal intent to deprive the owner of her property. Further, the only will contests that can be "criminalized" are those in which a will proponent knowingly submits a will for probate with the specific intention of stealing an estate from others with the legal right to inherit. The court concluded that the charging instrument stated a criminal offense (attempted theft) and sufficiently identified both the property at issue ("her property at her death") and the owners of that property ("any other person having a greater right to possession of the property than Defendant upon the death of Mary Ellen Bendtsen").

B. Transportation Code

There was insufficient evidence to support the jury's finding that a valid suspension period related to the suspension of the defendant's driver's license was in effect when he was cited for driving while license invalid (DWLI) because the State introduced neither any competent evidence of any relevant convictions nor evidence that DPS had automatically suspended his license.

White v. State, 458 S.W.3d 188 (Tex. App.—Texarkana 2015, no pet.)

The defendant was convicted by a jury of DWLI with a previous DWLI conviction, and he was sentenced to 90 days in jail with a $1,000 fine. On appeal, he complained that there was insufficient evidence for the jury to convict him because there was no evidence that a valid suspension period was in effect at the time he was operating his vehicle. The court agreed. In order to show that a suspension period was in effect at the time of the alleged violation, the State must show competent evidence that DPS provided notice of the suspension to the licensee as required by Section 521.295 of the Transportation Code. Here, the State's only evidence to show that the defendant's driver's license had been suspended was the testimony of the citing officer and the license return printed out from the officer's in-car computer.

III. Procedural Law

A. Code of Criminal Procedure

1. Bond

A person convicted of a misdemeanor involving moral turpitude, but who received judicial clemency under Article 42.12 of the Code of Criminal Procedure, if otherwise qualified, is eligible to act as a bail bond surety.

Tex. Atty. Gen. Op. GA-1087 (11/12/14)

2. Recusal

The defendant was not entitled to have an original plea agreement presented to a second judge after a first judge was recused.

Rodriguez v. State, 2015 Tex. Crim. App. LEXIS 991 (Tex. Crim. App. September 23, 2015)

Upon the voluntary recusal of the first judge, the case started over from the beginning, and it was as if no plea negotiations had occurred. The court of appeals erred by finding that the second judge was required to order the State to reoffer the 10-year plea bargain a second time. The Court concluded that the defendant received everything he requested in this case: the trial judge granted his motion for new trial, granted his motion to require the State to reoffer the most favorable plea deal, and then recused herself so that a new judge could hear the case. The new judge was not required to give him what the previous judge, whom he sought to recuse, had already given him.

3. Plea Bargaining/Plea of Guilty

The trial court did not violate the defendant's right to a neutral judge as the court did not interfere in plea negotiations by questioning defendant under Article 26.13(a)(2) of the Code of Criminal Procedure (Plea of Guilty) and clarifying for the record that he was aware of the specifics of the plea bargain.

Johnson v. State, 2015 Tex. App. LEXIS 8872 (Tex. App.—Houston [14th Dist.], no pet.) Though it is improper for a trial judge to participate or become otherwise involved in the process by which plea bargains are formed, here, the plea negotiations had ended and the defendant had rejected the plea bargain. The trial court did not suggest that he should reconsider his rejection and attempt to engage the State in further plea negotiations. Rather, the trial court simply clarified for the record that he was aware of the specifics of the plea bargain offered by the State and that he had turned it down.

Commentary: The court also addresses the defendant's assertion that Section 133.102 of the Local Government Code violates the Texas Constitution and that he was not required to preserve error regarding this constitutional challenge to the court costs assessed against him, relying on *Johnson v. State*, 423 S.W.3d 385 (Tex. Crim. App. 2014) and *Cardenas v. State*, 423 S.W.3d 396 (Tex. Crim. App. 2014). The court disagreed, finding that in neither of these cases does the high court hold that a defendant who had an opportunity to present a challenge to the constitutionality of a statute imposing court costs in the trial court may raise his constitutional challenge for the first time on appeal. Because neither *Johnson* nor *Cardenas* provides him with an exception to the requirement that he preserve his facial constitutional challenge in the trial court, the court concluded that appellant failed to preserve error for appellate review.

4. Statute of Limitations

***Phillips v. State* is overruled. Applicant forfeited his statute of limitations claim by agreeing to waive the defense in a misdemeanor plea bargain to avoid the filing of a felony charge.**

Ex parte Heilman, 456 S.W.3d 159 (Tex. Crim. App. 2015)

While under investigation for a felony, Tampering with a Governmental Record (Section 37.10, Penal Code), Heilman, a Beaumont police officer, pled guilty to a misdemeanor of the same offense in return for the State agreeing not to charge him on the felony offense and not oppose early termination of his one-year deferred-adjudication after six months. Because the statute of limitations for the misdemeanor offense had expired, Heilman signed a written waiver stating that he waived the statute of limitations. He similarly signed an order stating that the defense waived the statute of limitations. After six months, the trial court terminated Heilman's deferred adjudication and dismissed the information. Heilman subsequently filed an application for writ of habeas corpus, claiming a collateral consequence of inability to obtain a peace officer's license, and alleged an involuntary plea and ineffective assistance of counsel. He further sought findings of fact and conclusions of law that the original trial court lacked jurisdiction under *Phillips v. State*, 362 S.W.3d 606 (Tex. Crim. App. 2011), to accept his plea and sentence him

after the statute of limitations expired. The habeas judge vacated the trial court's proceedings against Heilman, concluding it lacked jurisdiction. The court of appeals affirmed.

In a 6-3 decision, the Court of Criminal Appeals reversed and remanded. Judge Keasler, writing for the majority, noted that the Court originally placed the statute-of-limitations defense within *Marin*'s third category of rights, namely as a right subject to forfeiture through inaction. In *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), the Court categorized the rights of litigants in criminal proceedings as: (1) absolute requirements and prohibitions (rights that must be observed, even without a request by a party and cannot lawfully be avoided, even with a party's consent); (2) rights which must be implemented by the system unless expressly waived (these rights can be waived, but a litigant is never deemed to have done so unless done so plainly, freely, and intelligently); and, (3) rights are to be implemented upon request (these rights can be forfeited by a litigant for failure to insist upon it by objection, request, or motion). Subsequently, in *Phillips v. State*, 362 S.W.3d 606 (Tex. Crim. App. 2011), the Court held that a factual limitations defense is a category-three *Marin* right, but a pure-law limitations defense is a category-one *Marin* right, as jurisdictional defects can be raised for the first time on appeal. In *Phillips*, the Court explained that a facially neutral law that revived a previously time-barred offense through retroactive judicial application violated the constitutional prohibition against the passage of *ex post facto* legislation.

Judge Keasler then explained that because the distinction between a factual limitation defense and a pure-law limitations defense is flawed, at least in circumstances lacking any explicitly *ex post facto* legislation, *Phillips* is overruled. Under *Phillips*, Heilman could not be prosecuted because he had agreed to waive that defense to forgo a felony charge. Under *Phillips*, a defendant could reap the benefits of an illegal, lighter sentence, and then turn around and attack the legality of that sentence. In this case, Heilman created the situation by accepting the misdemeanor plea bargain. In circumstances lacking any legislative *ex post facto* violation, especially in a good-faith, arm's length plea agreement, both types of limitations defenses are *Marin* category-three forfeitable rights. As there was no *ex post facto* violation, the trial court had jurisdiction to accept Heilman's plea and Heilman had the right to forfeit his limitations defense as part of the plea.

Judge Newell, joined by Presiding Judge Keller and Judge Hervey, noted that the Court was not holding that a defendant must object to preserve a claim that a facially retrospective statute violates the constitutional prohibitions against *ex post facto* legislation. A true *ex post facto* violation is fundamental error.

Judge Meyers dissented to argue that the statute of limitations should not be a defensive issue and the Court should overrule *Proctor v. State*, 967 S.W.2d 840 (Tex. Crim. App. 1998), which held that the limitations rule must be implemented only on the request of the defendant. The statute of limitations has nothing to do with guilt. The Court should make the statute of limitations an absolute requirement that is the State's burden to prove, not a defensive issue which burdens the accused. Judge Johnson, dissenting, agreed that Heilman was not entitled to relief, but disagreed with the majority's decision to overrule *Phillips* because it is distinguishable from the present case. Although Judge Alcala, agreed that the "pure law" discussion in *Phillips* should be overruled, she dissented because it is unnecessary to overrule *Phillips*. The holding in

Phillips is not properly presented for review in this case and it was improper for the majority to overrule it.

Commentary: In 2009, the Legislature clarified in Article 12.02 of the Code of Criminal Procedure what most assumed. Specifically, that a Class C misdemeanor is no different than other misdemeanors: a complaint must be filed within two years from the date of the commission of the offense and not afterward. Yet, despite case law, because of differences between procedures used in municipal courts and county courts, the debate over the law pertaining to complaints and the statute of limitations in Class C misdemeanors is poised to continue. Cathy Riedel, "Class C Misdemeanor and the Statute of Limitations: Case Closed?," *The Recorder* (July 2010) at 4.

Phillips was a nuanced decision that gave reason for lawyers and municipal courts to reconsider case law regarding statutes of limitations in Texas and to distinguish between special issues "based on facts" that are required to be stated in the charging instrument versus "pure law" where the charge simply was not formally filed in time. Cathy Riedel, "Statute of Limitations," *The Recorder* (August 2012) at 4. While *Heilman* makes the distinction moot, it also creates debate over the law pertaining to complaints and the statute of limitations in Class C misdemeanors seems as ripe as ever.

Ostensibly, *Heilman* simplifies the rules when considering statute of limitations claims and puts us back to where we after *Proctor*. No longer must we examine such claims to decide if they are "pure law" or factual claims. Rather, the same rule applies to each, and a defendant waives any statute of limitations argument if he does not raise it at the time of trial. While some may be inclined to broadly extrapolate the holding in *Heilman* to other issues in municipal and justice courts, we are less inclined. It does not pertain to the filing of citations or what occurs in the event that a formal charging instrument is not filed within the statute of limitations.

A motion to dismiss was properly granted where the State did not present the proper charging instrument within two years from the date of the commission of the offense.

State v. Drummond, 2015 Tex. App. LEXIS 8762 (Tex. App.—Houston [1st] August 20, 2015, no pet.)

Commentary: This case had to do with a Class A misdemeanor where a complaint had been sworn to but an information, the formal charging instrument, was not timely filed. It also has a good discussion of the uniqueness of municipal courts in that a prosecution is sufficient to support a conviction on a complaint alone.

5. Charging Instrument Issues

The trial court erred by granting the defendants' motion to dismiss on the ground that a computer hard drive seized by police was damaged beyond repair while in the State's custody because it was not shown in the trial court that the information on the hard drive was exculpatory and material rather than merely potentially useful.

State v. Fellows, 2015 Tex. App. LEXIS 7577 (Tex. App.—Corpus Christi-Edinburg July 23, 2015, no pet.)

In addition, the court was not persuaded that the defendants lacked reasonable access to comparable evidence as the State furnished them with 115,000 pages of discovery.

The amended charging instrument was not void because the defendant failed to object to the amendment.

Trevino v. State, 2015 Tex. App. LEXIS 7599 (Tex. App.—Houston [14th Dist.] July 23, 2015, no pet.)

The charging instrument in this case was an indictment, which the State amended on the day of trial before jury selection. The trial court errs by allowing the State to do so. However a defendant waives this error by failing to object to the amendment. If the right to object regarding the amendment of the indictment on the day of trial may be waived by failing to preserve error in the trial court, such an amendment is merely voidable—it is not void.

Commentary: Article 45.019(f) of the Code of Criminal Procedure provides that if a defendant does not object to a defect, error, or irregularity of form or substance in a complaint before the day trial commences, the defendant waives the right to object to the complaint. It is not clear whether a complaint can be amended, nor in what manner it can be done. A better method than amendment is dismissal and refiling of the complaint.

In a theft case, the defendant's claim of variance in the charging instrument failed where the State did not name the chief financial officer as a person acting on behalf of the corporation as the owner of the property, however, the State proved through her testimony that the entity named in the charging instrument was the owner of the property during its transport and that the defendant did not have the entity's consent to dispose of the property.

Lowrey v. State, 2015 Tex. App. LEXIS 7181 (Tex. App.—Texarkana July 2, 2015, no pet.)

The trial court properly denied the defendant's motion to quash the charging instrument because the State is not required to plead evidentiary facts, which are not essential to provide notice to the accused.

State v. Massingill, 460 S.W.3d 163 (Tex. App.—Beaumont 2015, no pet.)

The defendant argued that the State must plead the definition of a key term in the offense in order to provide him with adequate notice about what the State would prove. The court disagreed, finding that an indictment is generally legally sufficient if it tracks the language of the statute (which it did here); the charging instrument does not need to allege the definition of a term when it is defined in the statute. Here, the statute had two definitions, i.e., two ways the State could prove the offense. According to the court, the question of which definition the State might prove is a circumstance of the offense, so it is evidentiary. The defendant was sufficiently

informed of the crime he allegedly committed. Additionally, the court found the trial court lacked jurisdiction to reinstate the charging instrument after it quashed it.

6. Trial

A defendant who chooses to employ peremptory strikes outside of the "strike zone" may not complain about harm concerning a juror within the strike zone who could have been removed.

Comeaux v. State, 445 S.W.3d 745 (Tex. Crim. App. 2014)

In this case, the issue of first impression in Texas was whether a defendant, who while using all of his peremptory strikes, "wastes" one on a venireperson who is not in the group of potential jurors who could actually sit on the jury (the "strike zone"), has preserved his claim of an erroneous denial of a challenge for cause on appeal. The Court found that the defendant failed to show harm because he could have, but chose not to, strike the objectionable juror.

Judge Johnson's concurring opinion sets out the step-by-step framework when challenging a juror for preserving error.

The trial court properly allowed the application of the transferred intent doctrine and any error in the trial court's inclusion of the phrase "with criminal negligence" in the application paragraph of the transferred intent jury instruction did not result in actual harm.

Bravo v. State, 2015 Tex. App. LEXIS 7943 (Tex. App.—Houston [1st Dist.] July 30, 2015, no pet.)

The jury charge correctly and clearly set out the theories under which the defendant could be convicted and provided separate, correct instructions for finding him guilty of the lesser included offense. The court also observed that neither party repeated the complained-of language during closing argument, and the State properly explained the law during its closing argument. Further, nothing in the record indicates that the jury was confused about the difference between the intentional or knowing offense as charged and the lesser included offense involving criminal negligence as those issues were set out in the jury charge.

The defendant also argued that transferred intent could not be used when there was a single assault seriously injuring the target along with his children. The court disagreed, citing *Thompson v. State*, 236 S.W.3d 787 (Tex. Crim. App. 2007), which concluded that given the plain language and the history of the provisions at issue (the transferred intent statute and the offense the defendant was charged with), the transferred intent statute does indeed authorize the transfer of a culpable mental state between offenses contained in the same statute and also between greater and lesser included offenses. That authorization may be overridden by language defining a particular offense, as in the offense of capital murder, but no such impediment arises with respect to the injury-to-a-child offense (as in this case).

The trial court improperly commented on the weight of the evidence in violation of Article 38.05 of the Code of Criminal Procedure by asking questions and making remarks during witness testimony, including the court's interjection of facts based on its own experience, which conveyed its opinion to the jury regarding one of the main issues of the case.

Proenza v. State, 2015 Tex. App. LEXIS 7579 (Tex. App.—Corpus Christi-Edinburg July 23, 2015, no pet.)

The court concluded that the comments of the trial court, which tainted not only the defensive theory, but also the presumption of his innocence in front of the jury or vitiated the jury's impartiality, were fundamental error and required no objection. The trial court's comments showed lack of impartiality and bias so egregious as to deem the trial court biased on the matter of the defendant's guilt. The court could not say beyond a reasonable doubt that the trial court's error did not contribute to the defendant's conviction. One justice dissented believing the error in making the comments was not "structural" such that no harm analysis is required and finding the error harmless under the applicable standard.

In light of the unobjected-to portion of the testimony that the trial court read back to the jury indicating that the eyewitness saw the defendant, who was wearing a black shirt, run past her, the trial court's omission from the reading of testimony that a female and a man in a white shirt were also present at the victim's apartment did not affect the defendant's substantial rights.

Thomas v. State, 2015 Tex. App. LEXIS 6934 (Tex. App.—Houston [1st Dist.] July 7, 2015, no pet.)

During jury deliberations, the jury foreman requested the transcript for a witness whose statement was in dispute using a form provided by the judge. The judge called the jury back into the courtroom and read a portion of the witness' cross-examination by the State. The defense counsel objected and requested the inclusion of all testimony related to the disputed subject be read to the jury. That objection was overruled. On appeal, the defendant argued (1) that the form provided to the jury improperly limited the testimony that the jury could request, (2) that the trial court should have read testimony from the witness that was responsive to the jury's request, and (3) that the court improperly included testimony in the reading that was not responsive to the request.

The court concluded that the defendant's first and third bases for appeal did not comport with his trial objection, and thus, he did not preserve error. As to the second basis, the court held that that the trial court's failure to include the requested excerpt from the witness' cross-examination in the reading to the jury does not constitute harmful error.

Commentary: Though the court ultimately found the trial court's error not to be harmful and did not reach the issue of the form the trial court gave to the jury, this case should still serve as a warning to courts in how requests like this from the jury should be handled.

Subsection 61.003(a)(4) of the Government Code does not restrict the programs allowed to be considered by jurors for donation of jury reimbursements to only juror counseling programs.

Tex. Atty. Gen. Op. KP-0010 (3/9/15)

The Attorney General reaches this conclusion through statutory construction by applying the doctrine of the last antecedent and finding support in the use of the word "including" in the language of the statute. He also opines that a construction of the last phrase as the only program that could be approved for juror donation would render the first phrase meaningless.

Commentary: Section 61.001(c) of the Government Code excepts municipal court jurors from being entitled to reimbursement for jury service, but authorizes municipalities to provide such reimbursement. Some municipal courts share a jury pool with the county, and thus, provide jurors with the options for donation of their reimbursement in Section 61.003 of the Government Code.

7. Restitution

When an order of restitution is made in open court without a specific amount the case will be remanded for a restitution hearing.

Burt v. State, 445 S.W.3d 752 (Tex. Crim. App. 2014)

Due process requires that the defendant be given fair notice of all the terms of his sentence for the purpose of making objections and offering a defense. Here, the judge orally pronounced the "fact" of restitution at sentencing, but did not state the amount. This put the defendant on notice that restitution was part of his sentence, but did not give him the opportunity to challenge the sufficiency of the evidence or the specific amount of restitution. The remedy is a hearing, which would give the defendant the opportunity to challenge the amount, offer evidence to support his position, and exercise all his due process rights. No hearing is necessary, however, if the parties agree on a restitution amount through stipulation for a plea deal. In such cases, the agreement itself is a sufficient factual basis to support the restitution order.

The Court listed two scenarios where deletion of the restitution order is appropriate: (1) when a court has no authority to order restitution; and (2) when the judge is authorized to order restitution, but the evidence does not show a proximate cause between the defendant's criminal conduct and the victim's injury. Here, deletion of the restitution order was not required because the evidence was clear that a significant amount of restitution was a certainty for 18 victims.

Commentary: Challenges to the sufficiency of the evidence do not form the basis of an appeal from non-record municipal courts. However, such a sufficiency challenge could be the basis for appealing a restitution order from a municipal court of record. What is less clear, and outside the purview of this case, is whether the only way to challenge a restitution order in a non-record court is by appealing for a trial de novo in county-level court.

When restitution is made a condition of a probation order in a theft case, and a defendant is ordered to pay for stolen items that the defendant was not charged with stealing, the defendant must object to preserve error.

Gutierrez-Rodriguez v. State, 444 S.W.3d 21 (Tex. Crim. App. 2014)

Multiple items, worth a total value of $1,215, were stolen from two trucks. The items stolen from the trucks included an iPod and a GPS unit. Gutierrez-Rodriguez tried to pawn the two items and was charged with misdemeanor theft. The complainants testified at trial as to the value of those two items and testified as to the value of the items that were stolen but never recovered. As a condition of probation, the trial court ordered Gutierrez-Rodriguez to pay restitution for the GPS and the iPod she was convicted of stealing and for the other items that were not recovered. She did not object. The court of appeals held that the restitution requirement lacked any factual basis and deleted it from the judgment.

The Court of Criminal Appeals reversed the court of appeals. Writing for the majority, Presiding Judge Keller explained that while generally sufficiency of the evidence claims do not have to be preserved at trial, probation cases are unique in that they involve a contractual relationship with the trial court. Accordingly, unless the condition is intolerable or unconscionable, conditions of probation that are not objected to are accepted as a term. Requiring restitution for stolen items that the defendant was not charged with stealing, but that belonged to the complainants and was stolen during the same transaction as the charged items, is not the type of condition that the criminal justice system finds intolerable or unconscionable. Because Gutierrez-Rodriguez did not object and give the trial court an opportunity to consider the complaint, she forfeited the issue. Joined by Judges Meyers, Johnson, and Alcala, Judge Cochran wrote a concurring opinion to express concern that the majority's opinion was too broad and could confuse the bench and bar into thinking that all claims involving restitution as a condition of probation are waived unless the defendant objects at sentencing. Gutierrez-Rodriguez did not make a sufficiency-of-the-evidence claim on appeal, and there is ample testimony in the record to support the amount of restitution ordered. Gutierrez-Rodriguez claimed that ordering her to pay any restitution at all was unauthorized. That claim was clearly and explicitly forfeited by her failure to object in the trial court. Accordingly, Judge Cochran and the other members of the Court who joined the concurring opinion, unlike the majority, would not decide issues that are unnecessary to the disposition of this case or make artificial distinctions in preservation requirements for probationers and prisoners.

Restitution funds ordered in a criminal judgment and collected by the clerk pursuant to Article 42.037 of the Code of Criminal Procedure are not funds "belonging to the county," and thus are not required to be deposited with the county treasurer under Section 113.021 of the Local Government Code.

Tex. Atty. Gen. Op. KP-0019 (5/11/15)

B. Evidence

Text messages were properly authenticated under Rule 901 of the Texas Rules of Evidence where the victim testified that (1) the defendant had called her from that number on past occasions, (2) the content and context of the text messages convinced her the messages were from the defendant, and (3) the defendant called her from that same phone number during the course of the text message exchange.

Butler v. State, 459 S.W.3d 595 (Tex. Crim. App. 2015)

As with other types of evidence, text messages may be authenticated by "evidence sufficient to support a finding that the matter is what its proponent claims." Tex. R. Evid. 901(a). The Court compares a text message to a letter bearing the return address of a purported author, which combined with other circumstances including its appearance and contents, may be sufficient to authenticate a letter as having been sent by the person purported to be its author. According to the Court, "when considering the admissibility of text messages, just as when considering the admissibility of letters, emails, instant messages, and other similar written forms of communications, courts must be especially cognizant that such matters may sometimes be authenticated by distinctive characteristics found within the writings themselves and by comparative reference from those characteristics to other circumstances shown to exist by the evidence presented at trial."

C. Nunc Pro Tunc Judgment

The trial court erred by entering a nunc pro tunc judgment where the record did not conclusively establish that a finding was made at or before the time the written judgment was signed and this finding had to be an express determination in order to be effective.

Guthrie-Nail v. State, 2015 Tex. Crim. App. LEXIS 917 (Tex. Crim. App. September 16, 2015)

Here, the judge's oral pronouncement of judgment stated the defendant was guilty of the offense "as set forth in" the charging instrument. The original judgment said "N/A" under the section labeled with this finding (deadly weapon). The record, thus, more readily supports a lack of a finding rather than the existence of one. Additionally, the defendant had a right to notice and a hearing prior to the trial court issuing its unfavorable nunc pro tunc judgment. The Court remanded for a hearing on the nunc pro tunc. At a hearing, the parties might be able to shed light on exactly what the trial judge did or how the "N/A" notation came to be in the judgment, and they might be able to determine when and under what circumstances the docket-sheet entry was made.

Commentary: A judgment nunc pro tunc is a method for trial courts to correct the record when there is a discrepancy between the judgment pronounced in court and the judgment reflected in the record. *Blanton v. State*, 369 S.W. 3d 894, 897-898 (Tex. Crim. App. 2012). The correction made via nunc pro tunc must reflect the judgment actually rendered, but for whatever reason was not properly entered in the record (not what the court thinks should have happened). Such a correction is limited to clerical errors and not proper for errors involving judicial reasoning. *Blanton*, 369 S.W.3d at 898, citing *Ex parte Poe*, 751 S.W.2d 873, 876 (Tex. Crim. App. 1988). See, Regan Metteauer, "Five Latin Words that Shouldn't Faze You," *The Recorder* (May 2015).

D. Appellate Procedure

1. Jurisdiction

A mere quotation of a statute in a notice of interlocutory appeal by the State does not constitute a certification under Rule 44.01(a)(5) of the Texas Rules of Appellate Procedure, which is necessary to confer jurisdiction.

State v. Redus, 445 S.W.3d 151 (Tex. Crim. App. 2014)

In two consolidated cases, the elected district attorney signed notices of appeal regarding orders suppressing blood-alcohol evidence. The notices of appeal quoted Rule 25.2(a)(1) of the Texas Rules of Appellate Procedure and Article 44.01(a) of the Code of Criminal Procedure. The court of appeals held that the notice did not amount to a certification as required by Article 44.01(a)(5). The Court agreed, finding that by merely quoting the statutes, the district attorney did not vouch for any fact. Certification is a solemn personal assertion of facts, and in this instance, must actually vouch that the interlocutory appeal is not being taken for purposes of delay and that the evidence suppressed is of substantial importance to the case.

The municipal court defendant did not have a statutory right to appeal the county criminal court**'s judgments to the court of appeals when the county criminal court dismissed for lack of jurisdiction for failure to timely file an appeal bond per Chapter 30 of the Government Code. Intermediate courts of appeals only have jurisdiction of county-level courts when a judgment from a municipal court of record is affirmed, the fine is in excess of $100 or the sole issue is the statute or ordinance on which a conviction is based.**

Schatz v. State, 2015 Tex. App. LEXIS 8553 (Tex. App.—Fort Worth August 13, 2015)*; Flores v. State,* 462 S.W.3d 551 (Tex. App.—Houston [1st Dist.] 2015)

Commentary: The distinction between these cases is that in *Flores* the defendant failed to timely submit a bond (thus he never invoked the jurisdiction of the county criminal court), while in *Schatz* the county criminal court dismissed the cases on appeal because the judgments did not meet the requirements of Article 42.01 and 45.041 of the Code of Criminal Procedure. Having seen the judgments that were deemed defective, it is unfortunate that neither party asked the Fort Worth Court of Appeals to reconsider whether the judgments complied with Article 42.01 and 45.041 of the Code of Criminal Procedure.

2. Preservation of Error

A defendant's response of having no objection to the seating of the jury at the conclusion of jury selection did not constitute a waiver of any previously preserved claim of error during the voir dire proceedings.

Stairhime v. State, 463 S.W.3d 902 (Tex. Crim. App. 2015)

The Court delineates the "no-objection" waiver rule, noting that as recent as 2013, the Court revisited the rule and explained it should not be applied inflexibly, but instead when assessing the meaning of a statement of "no objection" in regard to a matter that may have been previously considered and ruled upon, courts should first ask whether the record as a whole plainly demonstrates that the "no objection" statement constitutes an abandonment of a claim of error earlier preserved for appeal. *Thomas v. State*, 408 S.W.3d 877 (Tex. Crim. App. 2013).

The Court held that the defendant's response to the trial court's inquiry here did not, in context, amount to a waiver where the inquiry made reference to no specific event that may have occurred previously during the course of the voir dire.

Because the Court had previously held that Section 33.021(b) of the Penal Code was facially unconstitutional, there was no valid law upon which to base the defendant's conviction.

Smith v. State, 463 S.W.3d 890 (Tex. Crim. App. 2015)

The Court concludes that one consequence of declaring a penal statute unconstitutional and void is to put a conviction pursuant to that statute into the *Marin* "category one"—an absolute right or legal requirement that is so fundamental that it cannot be forfeited or waived by those complaining thereafter. The Court went on to say that an unconstitutional statute is void from its inception, and when a statute is adjudged to be unconstitutional, it is as if it had never been, and such an unconstitutional statute is "stillborn;" an unconstitutional statute in the criminal area is to be considered no statute at all.

Presiding Judge Keller filed a concurring and dissenting opinion. In her dissent, she noted that the proper remedy for the defendant in this case was habeas corpus and not a petition for discretionary review because the court of appeals did not address the claim at issue (both the State and the defendant filed petitions for discretionary review).

Judge Yeary concurred and dissented, joined by Judge Keasler and Judge Hervey, finding a conflict between this opinion and previous opinions that eliminated any right-not-recognized exception to the contemporaneous objection rule, believing this should be resolved in a post-conviction habeas corpus proceeding.

Commentary: The State's grounds for its petition for review were (1) that the court of appeals erred in holding that the sufficiency of the evidence justifying the assessment of court costs should be based on the clerk's "bill of costs" rather than on the statutory predicate for the assessment of such costs; and (2) that the court of appeals erred in failing to reform the judgment to adjudge the correct assessment of court costs as mandated by the relevant statutes. Those issues will be reconsidered on remand in light of the all-too-familiar *Johnson* opinion (*Johnson v. State*, 423 S.W.3d 385 (Tex. Crim. App. 2014)).

A defendant preserved error where he posed a specific question he sought to ask the venire and the judge refused to allow the question, despite the fact that he failed to object to the judge's ruling and continued to rephrase the question.

Samaripas v. State, 454 S.W.3d 1 (Tex. Crim. App. 2014)

Appellate courts apply unique standards with respect to preservation of error during voir dire. If a party asks a proper question of the venire, the other party objects, and the court sustains the objection, then error is preserved. Further questioning or development of the subject at issue is neither required to preserve error nor does it cause error to be forfeited. There is no requirement to alert the trial court that the ruling improperly limited the scope of voir dire or impacted the ability to intelligently exercise peremptory strikes.

A defendant must appeal from initial order of deferred adjudication to challenge the imposition of attorney's fees if the defendant knew attorney's fees would be imposed but did not know the exact amount.

Riles v. State, 452 S.W.3d 333 (Tex. Crim. App. 2015)

More than a year after Riles pled guilty and was placed on probation, her probation was revoked and she was ordered to pay all of the court costs, including her court appointed attorney's fees. She appealed, arguing that the trial court erred in ordering her to pay the attorney's fees because there was no evidence of her ability to pay. The court of appeals held that this claim was forfeited because she did not raise it in an appeal from the original probation order. The Court of Criminal Appeals granted discretionary review to determine whether Riles forfeited her claim even though the amount and certainty of the attorney's fee was unknown to her at the time she was placed on probation.

In an 8-1 decision, Judge Meyers held that there was direct evidence Riles knew she would be required to pay court costs, including attorney's fees and, therefore, could have challenged the sufficiency of the evidence supporting payment of the fees in a direct appeal from the initial order for deferred adjudication. It did not matter that she did not know the exact amount owed in attorney's fees. Riles filed no appeal and failed to raise the issue in a direct appeal from the initial judgment resulting in procedural default.

Presiding Judge Keller, joined by Judge Hervey, issued a concurring opinion to contrast this case with *Mercer v. State*, 451 S.W.3d 846 (Tex. Crim. App. 2015). In this case, the attorney's fees were listed in the bill of costs. If they had not been, Riles would only be on notice that attorney's fees were a condition of probation, not an independent obligation under the judgment. Judge Alcala, in a separate concurring opinion, stated that, although the trial court did not provide Riles with the exact amount of attorney's fees she would be responsible for, it is reasonable to infer that she was aware of the amount. Alternatively, the record sufficiently showed that the trial court considered her ability to pay and that if she could not pay that she could seek relief on the additional costs through a petition for mandamus.

Judge Johnson dissented because once a defendant is declared indigent, the defendant is presumed indigent until a change in financial circumstances is shown. The record does not show that Riles' circumstances had changed. Accordingly, the trial court order was void and could be challenged at any time.

Commentary: Although this decision does not provide an answer, it does beg a question: Does the same rationale apply to an appeal from a municipal court of record in which a defendant had been placed on deferred disposition?

The right to be sentenced by a judge who considers the entire range of punishment is a waiver-only right, and not subject to procedural default.

Grado v. State, 445 S.W.3d 736 (Tex. Crim. App. 2014)

Based on the mistaken belief of the applicable law on the part of both the State and the defense, the judge incorrectly believed the minimum punishment in this case was 10 years' confinement, when it was in fact five. The defendant did not object. The court of appeals found the defendant's resulting assertion of error, despite a lack of objection, could be raised for the first time on appeal under *Marin v. State*. The majority of the Court, in its review of the lower court's *Marin* analysis, found the nature of the right at issue in this case should be classified as a *Marin* category-two right requiring a waiver. Thus, the court of appeals properly entertained the merits of the complaint.

Presiding Judge Keller dissented, finding that the defendant forfeited his complaint about punishment by failing to object at trial. Here, the punishment was within the "universe of punishments" applicable to his offense, and was neither illegal nor void. Further, Presiding Judge Keller did not see the justification for affording category-two status to this particular error when compared to the rights *Marin* itself denominated as category-two rights—assistance of counsel and the right to a jury trial, both rights guaranteed by the 6th Amendment. The defendant here has a remedy by way of an ineffective assistance of counsel claim.

The State may complain about an inaccurately amended certification for the first time on appeal because Rule 25.2(f) of the Texas Rules of Appellate Procedure contains no preservation requirement.

Marsh v. State, 444 S.W.3d 654 (Tex. Crim. App. 2014)

The plain language of the rule does not mandate that the State raise a complaint about an amended certification as a prerequisite to arguing such issue on appeal. The Court notes that the State often does not see the record before the defendant files an appellate brief, and thus, it would be unreasonable to compel the State to weigh in on the accuracy of a certification without first having the opportunity to examine the record.

Presiding Judge Keller filed a concurring opinion finding that the court of appeals addressed the substance of the State's claim, which was that the defendant waived his appeal, but did not go so far as to assert that the State was required by the rule to file a motion to strike the trial court's

entry of the amended certification. According to Presiding Judge Keller, the court of appeals disagreed with the State's argument for two reasons; the meaning of the first basis is unclear (the State's lack of objection) and the second basis (that the record showed no waiver of the right to appeal) was a mistake.

The defendant properly preserved his complaint that the trial court denied him the right to present a closing argument at a proceeding by requesting to make a final argument and getting the trial court's denial of that request.

Lake v. State, 2015 Tex. App. LEXIS 1660 (Tex. App.—Fort Worth February 19, 2015, no pet.)

E. Laches

An application for habeas corpus was barred by a 15-year delay in filing because the applicant knew about avenues for relief and could have inquired about the proper procedures to file an application.

Ex parte Perez, 445 S.W.3d 719 (Tex. Crim. App. 2014)

In denying relief, Judge Alcala, in an 8-1 decision, cited the Court's holding in its previous *Perez* opinion: The common-law doctrine of laches applies to the applications for writs of habeas corpus. Accordingly, laches applies when there is unreasonable delay by the opposing party, and prejudice resulting from the delay. The State is no longer required to demonstrate a particularized form of prejudice to its ability to respond to the application. Under this standard, courts can consider anything that places the State in a less favorable position.

Judge Meyers, dissenting, argues that defendants will unknowingly waive their rights simply by delaying. The Court should not try imposing time limits on habeas corpus because that is the Legislature's job and the approach supported by the majority creates an unfair advantage for the State.

Commentary: With habeas corpus becoming more common in the post-adjudication of fine-only misdemeanor matters, it is important that misdemeanor prosecutors understand the recent changes in case law as it pertains to laches. Laches bars applicants from untimely seeking habeas corpus. In addition to this case, the Court of Criminal Appeals issued two other notable laches-related decisions. The doctrine of laches applies to Article 11.072 of the Code of Criminal Procedure and the State is not required to raise laches in the trial court. *Ex parte Bowman*, 447 S.W.3d 887 (Tex. Crim. App. 2014). A trial court may *sua sponte* consider whether laches should bar an applicant's claim but the applicant must be given an opportunity to explain a delay in filing. *Ex parte Smith*, 444 S.W.3d 661 (Tex. Crim. App. 2014).

IV. Court Administration

A. Court Costs

In challenging the facial constitutionality of a statute requiring collection of court costs, the Appellant was not required to discuss severability or prove how a statute operates in practice.

Salinas v. State, 464 S.W.3d 363 (Tex. Crim. App. 2015)

In a unanimous decision, Judge Johnson explained that while the court of appeals did address the merits of Salinas' arguments, it did so utilizing an incorrect standard when it required him to also address severability principles and to establish what the funds designated in Section 133.102 of the Government Code actually do. Citing *Peraza v. State* (discussed below) the Court emphasized that demonstrating what the funds actually do is not the same as demonstrating what the governing statutes say about the intended use of the funds. The Court reversed the judgment of the court of appeals and remanded the case for consideration of whether Section 133.102, as written, is unconstitutional on its face.

Commentary: Is this this the last time the Court of Criminal Appeals will grant discretionary review in this case? A year ago it would have seemed likely that remanding *Salinas* would only be setting the stage for the Court to reconsider the constitutionality of Section 133.102 (a.k.a., the Consolidated Court Cost statute). The statute provides funds for: (1) abused children's counseling; (2) crime stoppers assistance; (3) breath alcohol testing; (4) Bill Blackwood Law Enforcement Management Institute; (5) law enforcement officers standards and education; (6) comprehensive rehabilitation; (7) operator's and chauffeur's licenses; (8) criminal justice planning; (9) an account in the state treasury to be used only for the establishment and operation of the Center for the Study and Prevention of Juvenile Crime and Delinquency at Prairie View A&M University; (10) compensation to victims of crime fund; (11) emergency radio infrastructure account; (12) judicial and court personnel training fund; (13) an account in the state treasury to be used for the establishment and operation of the Correctional Management Institute of Texas and Criminal Justice Center Account; and (14) fair defense account.

In what has become an ongoing saga of court cost related appeals, *Salinas* remains a case to carefully watch. TMCEC will report further developments. However, the likelihood of the Court again granting review may be less likely in light of *Peraza v. State* and the treatment of the Consolidated Court Costs statute by other intermediate appellate courts (See, *Davis v. State*, 2015 Tex. App. LEXIS 10254 (Tex. App.—Fort Worth Oct. 1, 2015, no pet.); *Penright v. State*, 2015 Tex. App. LEXIS 10108 (Tex. App.—Houston [1st Dist.] Sept. 29, 2015, no pet.); *Aviles-Barroso v. State*, 2015 Tex. App. LEXIS 9026 (Tex. App.—Houston [14th Dist.] Aug. 27, 2015, no pet.)).

The DNA Record Fee court cost is not an unconstitutional tax that violates separation of powers. The *Carson* "incidental and necessary" test is overruled.

Peraza v. State, 2015 Tex. Crim. App. LEXIS 764 (Tex. Crim. App. July 1, 2015)

Writing for the unanimous Court, Judge Richardson first looked to the case relied upon by the court of appeals, *Ex parte Carson*, 159 S.W.2d 126 (Tex. Crim. App 1942). In *Carson*, the Court held that the imposition of a $1 court cost to pay for law libraries in counties with more than

eight district courts and more than three county courts was unconstitutional because it treated defendants differently depending on the county in which they were convicted. In *Carson*, the Court also noted that the court cost was not a legitimate cost of litigation and was neither necessary nor incidental to the trial of a criminal case.

In assessing how other states have evaluated the legality of court costs, the Court considered *State v. Claborn*, 870 P.2d 169 (Okla. Crim. App. 1994), in which the Oklahoma Court of Criminal Appeals held that a court cost need not arise out of the defendant's particular prosecution in order to be legitimate. Furthermore, as long as the statutory assessment is reasonably related to the costs of administering the criminal justice system, it is not a tax in violation of separation of powers.

The Court concluded that the *Carson* "necessary or incidental" test is too narrow. Under the *Claborn* standard, adopted by the Court, if the statute under which court costs are assessed provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts as tax gatherers in violation of the separation of powers clause. What is a legitimate criminal justice purpose has to be considered on a case by case basis.

Sixty-five percent of the fund goes to the management of the statewide criminal DNA database. Thirty-five percent of the fund goes to the state highway fund, which goes toward collecting and managing DNA samples. These are both constitutional applications of the statute. Because Peraza did not demonstrate that every application of the statute would be unconstitutional, he did not meet his burden. The judgment of the court of appeals was reversed.

Commentary: In our AY 2015 analysis of the 14th Court of Appeals decision in *Salinas v. State*, 426 S.W.3d 318 (Tex. App.—Houston [14th Dist.] 2014, pet. granted), we posed the question of whether *Carson* was still good law. We observed that a lot has changed in Texas case law since 1942 and that *Carson* predated what we described as "the modern era of court costs in Texas." "Case Law and Attorney General Opinion Update," *The Recorder* (November 2014) at 35. Notably, when *Carson* was handed down, court costs were considered punitive. However, in *Weir v. State,* 278 S.W.3d 364 (Tex. Crim. App. 2009), the Court of Criminal Appeals declared that court costs were not punitive, but rather a recoupment of the costs of judicial resources. To this end, the Court's opinion in in *Peraza* is a logical extension of the subtle, yet significant, sea-change which began in *Weir*.

While it is too soon to say that *Peraza* marks the end of the trend in which court cost issues have regularly become "front and center" arguments in direct criminal appeals, it may very well be the beginning of the end. Court costs that are reasonably related to the costs of administering the criminal justice system have been provided new legal footing. The question now is what court costs, in Texas, if any, are not reasonably related to the costs of administering the criminal justice system?

B. Collections

Allowing third-party private attorneys or vendors contracted for collections services to make notations about the status of collections efforts on court documents likely falls within a court's broad discretion in managing the docket.

Tex. Atty. Gen. Op. GA-1093 (12/8/14)

To the extent a third-party collection attorney or vendor changes a "court record" without the court's knowledge or involvement, that activity is likely prohibited by Section 37.10 of the Penal Code (Tampering with a Government Record).

C. Attorney Conduct

Under Section 22.002(a) of the Government Code, the Texas Supreme Court only has the authority to issue a writ of mandamus **when a lower court's actions threaten to impair its appellate jurisdiction or nullify the effect of its judgments. The petition from a criminal law practitioner suspended from practicing before the Court of Criminal Appeals did not fall into either category, and the Court of Criminal Appeals is not a lower court. The Texas Supreme Court's authority to regulate the practice of law did not provide the Texas Supreme Court with the authority to issue the writ of mandamus. Similarly, a request for declaratory relief did not establish jurisdiction in the Texas Supreme Court. *In re Dow*, 2015 Tex. LEXIS 627 (Tex. June 26, 2015)**

Commentary: In this case, the Court of Criminal Appeals was not attempting to determine what lawyers may practice before it. Rather, the Court of Criminal Appeals imposed a sanction for the violation of a rule that provided for such a sanction. The Texas Supreme Court did not view this as a threat to its authority to regulate the Texas bar. David Dow was suspended from practicing before the Court of Criminal Appeals for one year for repeated violation of rules adopted by the Court. The rules were adopted to ensure that pleadings in a death penalty case were filed in time to be thoroughly considered by the courts. Granted, the Texas Supreme Court did not grant Dow the relief he sought. Nevertheless, the Texas Supreme Court does not endorse how this matter was handled by the Court of Criminal Appeals. To the contrary, in dicta, the Court stated that it did not agree that the Court of Criminal Appeals or *any other Texas court* is authorized to impose any such requirements on attorneys seeking to practice before them. *In re Dow*, 2015 Tex. LEXIS 627, at *14 (Tex. June 26, 2015).

V. Local Government

A provision in the San Antonio wrecker service ordinance setting the maximum fee a towing company could charge for the non-consent tow of an automobile, was not preempted by the Texas Towing and Boot Act because even though the plain language of the Act and the ordinance established that they were both attempting to regulate the same activity, the ordinance did not conflict with the Act.

State v. DeLoach, 458 S.W.3d 696 (Tex. App.—San Antonio 2015, pet. ref'd)

The defendant did not conclusively establish his affirmative defense of mistake of law and was not entitled to an acquittal on appeal because even though he claimed that he had reasonably relied on an attorney general's opinion, that opinion did not stand for the proposition that the municipal ordinance regulating non-consent tow fees that defendant was charged with violating was preempted by the Texas Towing and Boot Act.

Assuming a municipality may adopt an ordinance providing for the impoundment of a vehicle when the driver provides no evidence of financial responsibility, municipalities may not condition release of a vehicle so impounded upon presentation of such evidence to a vehicle storage facility.

Tex. Atty. Gen. Op. KP-0034 (8/14/15)

This opinion addresses the authority of municipalities to (1) seize a vehicle from an operator with no evidence of financial responsibility; (2) adopt an ordinance providing for such seizure; and (3) adopt ordinances conditioning release of such seized vehicles on providing proof of financial responsibility. In support of authority for seizure by local law enforcement, the opinion cites Texas intermediate courts of appeal and one federal district court, hinging the authorization on reasonableness. Regarding the ordinance, the opinion states that a home-rule municipality, and likely a general-law municipality, has authority to adopt an ordinance regarding the impoundment of vehicles for the offense of lack of financial responsibility provided that such an ordinance is not in conflict with any statute and also conforms to any constitutional constraints.

However, the opinion does not find authority for conditioning release of impounded vehicles on proof of financial responsibility for several reasons. First, Chapter 2303 of the Occupations Code governs vehicle storage facilities, and specifically, Section 2303.160 requires such facilities to release a vehicle to the owner or operator who pays any lawful charges and provides valid photo identification. The opinion finds this as evidence of legislative intent to limit the release of a vehicle based on proper identification rather than compliance of traffic laws. Second, the opinion points out that requiring facilities to verify proof of financial responsibility delegates the duty to enforce traffic laws to such facilities. Finally, while a municipal ordinance may impose more stringent standards than a state statute, one that serves to narrow or restrict a state statute could be construed as a conflict with state law.

A city is not authorized to appoint or contract with a private business to enforce the privileged parking provisions of Chapter 681 of the Transportation Code.

Tex. Atty. Gen. Op. KP-0033 (8/14/15)

Section 681.0101 of the Transportation Code authorizes a political subdivision to appoint a volunteer to "file a charge against a person who" violates the disabled parking provisions in Chapter 681 of the same code. The question addressed is whether Section 681.0101 authorizes a city to pay a private business to enforce disabled parking provisions. The opinion says no. According to this opinion, the term "person" in that statute does not include a legal entity because such an entity cannot possess such characteristics as citizenship and moral character or

subscribe to an oath of office as required by the statute. Further, a city's regulation and enforcement of parking is an exercise of the State's police power, which is a governmental function that a city cannot by contract or otherwise transfer to another entity absent specific constitutional authorization. The opinion hedges this prohibition with the ability of the city to delegate to others the right to perform acts and duties necessary to the transaction of the city's business—whether a particular contract falls within these parameters, according to the opinion, is a question of fact.