

TEXAS MUNICIPAL COURTS EDUCATION CENTER



COURSE MATERIAL Irving Prosecutors Seminar February 8-9, 2006

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Funded by a grant from the Texas Court of Criminal Appeals

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Irving February 8-9, 2006

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- A. CDL, DSC, and Deferred Disposition Update
- B. Extraterritorial Jurisdiction & Ordinance Enforcement
- C. What Jurors Want: The Psychology of Juries
- D. Case Law and Attorney General Opinion Update
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- F. Warrants for Code Inspection
- G. Establishing a Juvenile Case Manager Program
- H. Identifying & Managing Abusive Discovery
- I. Youthful Drivers
- J. The Role of the Prosecutor in Municipal Court

13th Annual Municipal Prosecutors Seminar Irving

Harvey Hotel DFW
4545 West John Carpenter Freeway
Irving, TX 75063
972.929.4500

Tentative Agenda

TUESDAY | FEBRUARY 7, 2006

MCLE # 000093363

- 2:00 – 5:00 p.m. **OPTIONAL PRE-CONFERENCE SESSION:**
Honorable Robin A. Ramsay, Presiding Municipal Judge, Denton
Asked & Answered: Legislative Update
- Cost & Administration/Juveniles
 - Magistrate Duties/Ordinance Issues
 - Procedural & Substantive Law/Transportation
- 3:00 – 5:00 p.m. **Registration**

WEDNESDAY | FEBRUARY 8, 2006

- 6:45 – 8:00 **Registration and Breakfast**
- 8:00 – 8:05 **Announcements**
- 8:05 – 9:20 **CDL, DSC, and Deferred Disposition Update (.25 ethics)**
Honorable Robin A. Ramsay, Presiding Municipal Judge, Denton
- 9:30 – 10:30 **Extraterritorial Jurisdiction & Ordinance Enforcement Issues**
(.25 ethics)
Lawrence Provins, Assistant City Attorney, Pearland
- 10:40 – 12:00 **What Jurors Want: The Psychology of Juries**
John Hawkins, Assistant District Attorney, Denton County
- 12:00 – 1:00 **Lunch**
- 1:00 – 2:15 **Case Law and Attorney General Opinion Update (.25 ethics)**
Ryan Kellus Turner, General Counsel, TMCEC

2:30 – 3:50 Small Group Discussions (.25 ethics)

4:00 – 5:30	Strategic Voir Dire W. Clay Abbott, DWI Resource Prosecutor, TDCAA	Warrants for Code Inspection Honorable Bonnie Goldstein, Attorney & Counselor-at-Law, Dallas	Establishing a Juvenile Case Manager Program Honorable Deanna Burnett, Presiding Judge, Carrollton and Susan Keller, Assistant City Attorney, Carrollton
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THURSDAY | FEBRUARY 9, 2006

6:45 – 8:00 Breakfast

8:00 – 9:15	Identifying & Managing Abusive Discovery (.50 ethics) Candace Chappell, Senior Prosecutor & City Attorney II, Irving	Youthful Drivers Ryan Kellus Turner, General Counsel, TMCEC
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9:30 – 10:45 Small Group Discussions (.25 ethics)

11:00 – 12:15 The Role of the Prosecutor in Municipal Court (1.25 ethics)
Honorable Arthur “Cappy” Eads, Municipal Judge, Village of Salado

ANNOUNCEMENTS

FOR

13th Annual Prosecutors' Seminar Attendees

I

Welcome to the Seminar

II

Notices to Attendees

The viewpoints of the instructors for this program do not necessarily express the opinions of the Texas Municipal Courts Education Center, its Board or Committees.

Federal and state statutes prohibit employment discrimination on the basis of disability, age, race, color, religion, sex, or national origin. Sexual harassment is included among the prohibitions. The TMCEC strongly disapproves of any form of discrimination or harassment at its seminars, meetings or within its work environment. Employees, participants, faculty and volunteers who have experienced or observed any acts that they believe may be prohibited by federal, state or common law, should report the incident to the TMCEC Executive Director immediately. All such alleged acts will be investigated and consideration given to the appropriate action, if any, to be taken.

The Texas Municipal Courts Education Center and the Texas Municipal Courts Association, as grantee, do not endorse, recommend or imply approval of any or all vendors represented in person or by materials/displays at or near TMCEC/TMCA sponsored meetings and seminars.

III

MCLE Credit

The Center's continuing education programs for judges and prosecutors are approved by the State Bar of Texas for the purpose of fulfilling mandatory Minimum Continuing Legal Education requirements.

A form can be located in the front pocket of your course materials notebook. Please fill out this form and return it to us at the end of the last session on the last day. The course number is **000093363** Course title is: TMCEC 13th Annual Prosecutors Skills Seminar. The Center must mail all forms to the State Bar office. Up to 16 hours attendance may be credited with up to 3 ethics hours

Attendance

The Texas Municipal Courts Association Board of Directors has adopted the following policy: **All judges and prosecutors at the TMCEC seminars must attend and fully participate during all hours as designated by the schedule.**

Your badge is proof of identification. Please wear it at all times during the seminar. The badge also serves as your ticket to enter the room where the breakfasts and lunches are served.

Concurrent Sessions

During the seminar, there may be concurrent sessions offered giving you a choice of presentations taught at the same time. If requested by TMCEC staff, please indicate your choice for each concurrent session on the selection sheet provided at the registration tables. An announcement will be made giving more details about these sessions at a later time.

Program Materials

Your binder is provided to you by the Center and consists of all necessary documents you will need throughout the seminar. You will be provided with a different binder for each seminar you attend every year.

You must fill in and sign the Certification Form in order to receive your certificate of completion. Without our receiving this form, we have no other proof of your attendance should you ever need it. You will receive this form at the end of the seminar.

There is also provided a faculty evaluation form which you are asked to fill in as the seminar progresses. Please write your comments fully and remember to add your thoughts for program improvement next year at the end of the form.

Breaks

You will be given several 10-minute breaks throughout the morning and afternoon sessions. This will allow you to smoke (outside) as there is no smoking permitted in the classrooms, dining rooms or areas adjoining the classrooms at any time. Refreshments will be provided in the designated area once each morning and afternoon.

Messages

There is a message board provided near the registration table. Please check it periodically. You should provide your office with the telephone number and extension.

Rooms

The Center pays for the sleeping rooms for participants and is direct billed for such. However, you must pay for all incidentals, including telephone charges, movies, room service and cleaning. By the provisions of the grant, the Center **CANNOT** pay for these expenses. Please do not put us in any precarious position regarding this matter.

Smoking

The Texas Municipal Courts Association Board of Directors has adopted the following policy: **No one shall smoke in any classroom, dining rooms or any area adjacent to the classrooms during the TMCEC seminars. Smoking will be permitted only outside the hotel or other common areas away from the meeting rooms and break areas.**

Meals

Once the sessions begin, catered breakfasts and lunches are provided by the Center. Because of budget restrictions, the dinner meal is not provided at TMCEC cost.

Shuttle

If a shuttle is provided by the hotel to the airport, please sign up for its use on the morning of departure prior to breakfast.

Check Out

The hotel has a set check out time of 12:30 p.m. Please insure that you do not go beyond this time. Extra-day charges imposed by the hotel will be your responsibility.

TEXAS MUNICIPAL COURTS EDUCATION CENTER

FACULTY ROSTER

Prosecutors and Bailiffs/Warrant Officers Seminars Harvey Hotel DFW – Irving

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ABOUT THE SPEAKERS

W. CLAY ABBOTT

Clay Abbott is DWI Resource Prosecutor for the TDCAA. He grew up in Boulder, Colorado and then attended Lubbock Christian University where he received a BA in History. He went on to receive his Doctor of Jurisprudence from the Texas Tech School of Law, *cum laude*. He was inducted into Order of the Coif in December 1986.

Mr. Abbott served as an Assistant District Attorney in Lubbock County before going into private practice for five years. In 1995 he returned to prosecution as the Chief Deputy for the Lubbock County District Attorney's office. He served TMCEC as General Counsel from 2000 to 2004. With Ryan Kellus Turner, he is the author of TMCEC's *Judges Book*.

Mr. Abbott served as an Adjunct Professor at the Texas Tech School of Law for nine years and is a frequent presenter for TMCEC, TDCAA, and others.

CHARLES AVERY

Detective Charles Avery has been with the Dallas Police Department since November 1985. Since becoming a police officer, Detective Avery has served as a patrol officer in the departments Central Patrol Division, the Traffic Sections/DWI Squad, Southwest Patrol as a Field Training Officer, Northeast Patrol as a Crime Prevention Specialist/Community Relations Officer and the Traffic Section as an Accident Investigator. Currently, Detective Avery is assigned to the Vice Section/Alcohol Enforcement Unit.

In 1988, Detective Avery attended and completed the *DWI Detection and Standardized Field Sobriety Testing (SFST)*-training program. Since the completion of this curriculum, Detective Avery has arrested thousands of individuals for Driving While Intoxicated and has been called by several Dallas County Courts to testify as an expert witness as to the effects of alcohol on the body.

In 1990, Detective Avery attended and became certified as a *Drug Recognition Expert (DRE)* through the National Highway Traffic Safety Administrations *Drug Evaluation and Classification Program (DECP)*. In 1991, he became an instructor in both SFST and the DEC Programs. Since becoming a DRE instructor, Detective Avery has trained, and certified, officers from across the State of Texas, Oklahoma, Louisiana, North Carolina, Florida, Iowa, Maryland, Wisconsin, as well as officers from the Washington, D.C. area. He has also been involved in training other certified DRE's in becoming certified as DRE Instructors.

Detective Avery helped to develop the Dallas Police Departments' Standard Operating Procedures that are used with the DECP and is currently working on other procedures so that the program can be expanded throughout the department. He has also helped to educate prosecutors from Dallas, Denton, Collin, and Lubbock Counties. In 1993, Detective Avery assisted Texas A&M University's Law Enforcement Extension with the production of a multi-media presentation that would aid prosecutors in the prosecution of drug-impaired drivers. In 1997, Detective Avery became the Northeast Texas Regional Coordinator for the DEC Program. In 1999, Det. Avery became an instructor in the *Drug Impairment Training for Educational Professionals (DITEP)* program and has

helped conduct training across the state of Texas as well as in the states of New Jersey, Iowa, Minnesota, Wisconsin, Idaho, Alaska, Hawaii and New Mexico. He has given presentations on DITEP at the *Lifesavers* Conferences in San Diego, CA, Charlotte, North Carolina and the *IACP DUI Summit* in Alexandria, VA. Detective Avery is currently the Region 1A coordinator for the DITEP program.

STEPHEN BERKLEY

Stephen Berkley is a Sergeant with the Texas Department of Public Safety. He has held his current position for almost 16 of the 27 years he's been with DPS. Sergeant Berkley has an Associates degree in Business. He is an AAMVA Fraudulent Document Recognition Instructor since February 2005.

DEANNA BURNETT

Deanna Burnett is currently Municipal Judge in Carrollton, a position she has held since 1988. Additionally, she has served as Municipal Judge in Farmers Branch, Plano, and Coppell, Texas. She received her Bachelor of Arts from the University of Texas at Dallas and Juris Doctorate from Texas Tech School of Law, Lubbock. Judge Burnett has been a member of the State Bar of Texas since 1982.

T.J. CARPENTER

T.J. Carpenter has been with the City of Marshal since October 1990, and has served as a Patrol/Warrant Officer since 1995. Prior to that, she was employed with the Tomball Police Department on CISD Patrol. Officer Carpenter graduated from the Harris County Sheriff's Department Academy and has an Advanced Law Enforcement Certification. She is a member of the Victims Advocate Member's Association and is a Region II Director for the Texas Marshals Association. She received the Presidential Patriotism Award in March 1997.

TOM CELLIO

Tom Cellio has been a Regional Faculty member of the American Heart Association for five years in the Dallas area. Mr. Cellio is also a state approved EMS education coordinator. He has been in EMS since 1990, starting in Denver, CO and moving to Texas in 1994.

CANDACE CHAPPELL

Candace Chappell grew up in Lubbock, Texas. She is a graduate of Texas Tech University where she earned her Bachelors Degree, Masters Degree and Juris Doctor. She worked in the Dallas Criminal District Attorney's Office, the El Paso County District Attorney's Office, and as an Assistant City Attorney for the City of El Paso.

In 1995, Ms. Chappell went to work for the City of Irving, the year the city became a court of record. She was presently employed in Irving as a Senior Prosecutor and City Attorney II where she performed both prosecutorial and supervisory duties.

ARTHUR C. (CAPPY) EADS

Cappy Eads is currently the Municipal Judge for the Village of Salado. Prior to that, Judge Eads was elected District Attorney for the 27th Judicial District of Texas from 1976-2000. From 1975-1976, he served as a County Attorney for Bell County, Texas, and from 1972-1975 as an Assistant District Attorney with the 27th Judicial District.

Among several honors awarded to Judge Eads are the Outstanding Texas Leader Award (1998), the Governor's Distinguished Service Award (1995), and the Advocate for Justice Award-State (1993). Judge Eads belongs to

the State Bar of Texas (having served as Chair of the Criminal Law Section in 1983-1984), American Bar Association, Texas District & County Attorneys Association (having served as President in 1987), National District Attorneys Association (having served as President in 1986), and the National College of District Attorneys.

Judge Eads received his B.B.A. in 1965 from Southern Methodist University and his law degree in 1970 from Baylor Law School. He served in the U.S. Marine Corp from 1959-1967.

ALLEN GILBERT

Judge Allen Gilbert has served as Municipal Judge for the City of San Angelo since 1975. Judge Gilbert began teaching judges in 1977 through Texas Tech School of Law and has taught municipal court judges ever since. Judge Gilbert currently sits on the Juvenile Committee for Tom Green County. He has served on the Board of the Texas Municipal Courts Association for six years, is a past Vice-President of the Texas Municipal Courts Association, and has served on that Association's Legislative Committee. Judge Gilbert has also served on the Supreme Court Education Committee. In 2005, the Texas Municipal Courts Association awarded Judge Gilbert with the Outstanding Judge Award.

BONNIE LEE GOLDSTEIN

In 1990, Bonnie Goldstein began her legal career and over the course of her 15 years has practiced in the areas of state and local government law, government contracts and construction litigation, among others. In 2003, she opened her law office practicing predominantly in the areas of state and local government law. Since 1994, Judge Goldstein has served as the Assistant City Attorney for the Town of Flower Mound, City of McKinney, Texas, among others. She is currently the City Attorney for the City of Princeton and City of Italy. She routinely represents and advises local governments including contracts, procurement, construction, employment, code enforcement, land use, planning and zoning issues, variances, and municipal court.

Judge Goldstein received her Bachelor of Arts degree at Hood College, Frederick Maryland in 1984, and her law degree in 1990 from George Washington University, the National Law Center, in Washington, D.C. She has authored and presented papers to various groups, including the Texas Municipal League, the North Central Texas Council of Governments and Police Training Academy and the Texas Municipal Courts Education Center. Judge Goldstein is fluent in Spanish and was named Legal Counselor to the Mexican Consulate in Houston on March 20, 1998. In February of 2003 she was appointed the Presiding Judge for the City of Cockrell Hill and August 2004, she was appointed as an Associate Judge for the City of Dallas.

ANDY KERSTENS

Andy Kerstens has been in law enforcement for fourteen years. He is presently employed with the Webster Municipal Court where he has been the warrant officer and bailiff for six years. Prior to that, Mr. Kerstens was employed for eight years with the Galveston County Sheriff's Office where he served in the Jail, Patrol, and Crime Scene Investigations Divisions.

Mr. Kerstens has been a TCLEOSE instructor since 1991. He has taught impact weapons, self-defense for office personnel, crime scene investigation, and special investigative topics. He is currently an active instructor for the Webster Citizens Police Academy, teaching crime scenes, fingerprinting and warrants.

Mr. Kerstens' hobbies include woodworking and motorcycle riding.

JIM LEHMAN

Jim Lehman is currently the Collections Specialist for the Research & Court Services Section of the Office of Court Administration. He joined OCA in January of 1998. Prior to OCA, Mr. Lehman was the Collections Manager for the Dallas County Criminal Courts and is largely responsible for successfully implementing that county's fine collection program. Mr. Lehman spent over 20 years in the private sector finance/collections industry prior to joining Dallas County.

Mr. Lehman holds a Bachelor of Arts degree from Central State University at Edmond, Oklahoma, where he studied Public Administration and Business Administration. He currently serves as Executive Director of the Governmental Collectors Association of Texas.

Mr. Lehman is the recipient of the Justice Achievement Award from the NCSC, and has been published in various publications including *County Progress Magazine*, *Courts Today*, and *GCAT Newsletter*.

RANDY LEVERICH

Randy Leverich has been a Marshal with the City of Abilene since December 1997. Prior to that, Marshal Leverich served on the Gorman Police Department for two and a half years, the Snyder Police Department for three years, and the Scurry County Sheriff's Office for three and a half years.

JAMES OSWALT

James Oswalt has been involved in Law Enforcement for 20 years. He has worked for the City of Lubbock since 1995, and is currently a Marshal for the City. Marshal Oswalt has been a member of the Texas Marshals Association since 1999.

ROBIN A. RAMSAY

Robin Ramsay is currently a licensed attorney and the Presiding Municipal Judge for the City of Denton. Mr. Ramsay received his undergraduate degree from Southern Methodist University in Dallas and his law degree from Texas Tech University in Lubbock.

Prior to becoming a judge, Mr. Ramsay served as Students' Attorney for the University of North Texas and as an Adjunct Professor of Business Law. After leaving the University of North Texas and prior to his current appointment, Mr. Ramsay practiced law with the Hammerle Law Firm with offices in Lewisville and Denton.

Mr. Ramsay has received his accreditation for the American Academy of Attorney Mediators and currently acts as a Mediator for both pre-litigation and litigated matters by assignment of Court and at the request of the parties or their attorneys. Mr. Ramsay also serves as alternate Mental Health Magistrate for Denton County at the assignment of the Denton County Probate Court.

MARGARET ROBBINS

Margaret Robbins is the Program Director for the Texas Municipal Courts Education Center, a position she has held since 1986.

Before joining the TMCEC staff, Ms. Robbins was Court Clerk for three years and then Municipal Court Judge for four years for the City of Cedar Park. Ms. Robbins has served as author and editor to numerous publications including the TMCEC newsletter, *TMCEC Clerks' Procedures Manual*, and the Clerks' Certification Study Guides.

AL ROGERS

Al Rogers has worked for the City of Dallas since February 1972. His tenure includes three years as a Bailiff/Warrant Officer and almost 22 years as a Chief Deputy Marshal/Chief Bailiff with the City. Marshal Rogers earned his Associates degree in Criminal Justice. He is the recipient of various department awards including TCLEOSE Master Peace Officer. Marshal Rogers is a 1968 Vietnam Veteran, and he set up the City's first security check point.

CHARLIE ROGERS

Charlie Rogers has been in law enforcement for over 25 years. He served as a police officer with the City of Deer Park, in Harris County, from August 1980 until January 2002, at which time he retired to accept the position of City Marshal for the City of La Marque, in Galveston County. Mr. Rogers has over eight years of experience as a City Marshal/Warrant Officer and Court Bailiff. He has been involved with the Texas Marshal Association since it's founding. He has served as Region 2 Director, Vice President and is currently serving as Acting President of the TMA. Mr. Rogers has been married for 34 years and has two adult children, and a poodle named Ginger. They enjoy traveling in their RV and am currently seeking certification from the American Canoe Association as a Kayak Instructor in flat-water touring.

RYAN KELLUS TURNER

Ryan Kellus Turner is General Counsel for the Texas Municipal Courts Education Center. Prior to joining the Center, he served as Briefing Attorney for Judge Sharon Keller at the Texas Court of Criminal Appeals. Mr. Turner obtained his juris doctorate from Southern Methodist University School of Law, Dallas, Texas. He received his bachelor's degree in psychology from St. Edward's University, Austin, Texas, where he now teaches as an adjunct faculty member in the School of Behavioral and Social Sciences. In 2004 he received the School's Adjunct Teaching Excellence Award. Mr. Turner is currently Deputy City Attorney for the City of Dripping Springs and previously served as a Special Assistant County Attorney for Kendall County.

A native Texan, Mr. Turner was raised in the north Texas town of Vernon. He is the co-author of the book *Lone Star Justice: A Comprehensive Overview of the Texas Criminal Justice System*.

RON WHITE

Ron White was appointed as City Marshal for the Town Of Westlake on April 1, 2002. Prior to that time he served as the Warrant Officer for the Trophy Club-Westlake Department of Public Safety since April 1999. While there he created and formed a Warrant Officer program for two separate towns and courts. When the Department of Public Safety was dissolved, the Town of Westlake realized the need for a City Marshal and appointed Marshal White as City Marshal. Marshal White accepted the challenge of creating and setting up a brand new agency.

Marshal White has been in law enforcement for 12 years. In 1990, he began his career with the Tarrant County Sheriff's Office. In 1998, Marshal White received the Purple Heart award from the American Police Hall of Fame for injuries received in the line of duty.

Marshal White serves as the President for the Texas Marshal Association. He is also a TCLEOSE Certified Instructor.

PETER H. YONG

Peter Yong is a Deputy Marshal for the City of Killeen since 2001. Previously, he had served as a Patrol Officer for five years, including one year on Bicycle Patrol. Marshal Yong has an Associates degree and a Bachelor of Science degree in Police Administration. He is currently attending graduate school at Tarleton State University.

Marshal Yong is a Master Peace Officer, recipient of the TCLEOSE Academic Achievement Award, member of the Texas Municipal Police Association and Fraternity Order of Police, and a Texas Marshal Association Director for Region 6.

In 2005, Marshal Yong was selected to represent the USA at the World Bench Press Competition held in Zlin, Czech Republic, and then again in 2006 for the Miami, Florida competition. Currently, he is also a Certified Personal Trainer for a Killeen health club.

WELCOME!

**TEXAS MUNICIPAL COURTS ASSOCIATION
TEXAS MUNICIPAL COURTS EDUCATION CENTER
OFFICERS AND DIRECTORS - FY 2005-2006**

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Presiding Judge
City of Spearman
P.O. Box 37
Spearman, TX 79081
c: 806/659-2524
FAX: 806/659-3859
EMAIL: court@antden.com

Region II Director

Hon. Ninfa Mares
Presiding Judge
City of Fort Worth
1000 Throckmorton
Fort Worth, TX 76102
c: 817/392-6715
FAX: 817/392-8670
EMAIL:
Ninfa.Mares@fortworthgov.com

Region III Director

Hon C. Victor Lander
Municipal Judge
City of Dallas
2014 Main Street, Suite 210
Dallas, TX 75201
c: 214/670-5573
FAX: 214/670-6947
EMAIL: vlander@mail.ci.dallas.tx.us

Region IV Director

Ms. Vicki Gerhardt
Municipal Court Clerk
City of New London
P.O. Box 428
New London, TX 75682
c: 903/895-4466
FAX: 903/895-4668
EMAIL: vmgerhardt@aol.com

Region V Director

Hon. Denn Whalen
Municipal Judge
City of Odessa
201 N. Grant
Odessa, TX 79761
c: 432/335-3385
FAX: 432/335-3316
EMAIL: dwhalen@ci.odessa.tx.us

Region VI Director

Hon. Walter Dick Kettler
Presiding Judge
City of Beverly Hills
P.O. Box 154355
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Region VII Director

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Presiding Judge
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Municipal Judge
City of Alvin
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Hon. Lester G. Rorick
Presiding Judge
City of Pasadena
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Pasadena, TX 77501
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Region X Director

Hon. George Bill Robinson
Presiding Judge
City of Yorktown
P.O. Box 336
326 E. Main Street
Yorktown, TX 78164
c: 361/564-9410
FAX: 361/564-9476
EMAIL: Judge.Robinson@sbcglobal.net

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Municipal Judge
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506 Franklin Avenue
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EMAIL: francisdan@sbcglobal.net

TEXAS MUNICIPAL COURTS EDUCATION CENTER

1609 Shoal Creek Boulevard, Suite 302

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(800) 252-3718

(512) 435-6118 FAX

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Qty	Cost	Title	Extended Price
_____	20.00	The Municipal Judge's Book	_____
_____	5.00	Role of Municipal Court in City Government	_____
_____	20.00	The Judge/Mock Trial videotape	_____
_____	20.00	2004 Bench Book for Municipal Court Judges	_____
_____	5.00	2004 CD-ROM Bench Book for Municipal Court Judges	_____
_____	5.00	2004 Diskette (PC 3.5") Bench Book for Municipal Court Judges	_____
_____	20.00	2004 TMCEC Municipal Court Forms Book	_____
_____	5.00	2004 CD-ROM TMCEC Municipal Court Forms Book	_____
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_____	25.00	Level II Clerks Certification Study Guide (looseleaf)	_____
_____	8.50	Level III Clerks Certification Study Questions	_____
_____	N/C	Quick Reference Trial Handbook	_____
_____	N/C	Rules of Evidence	_____
Subtotal			_____
Shipping charge (based on your order – call TMCEC for cost)			_____
TOTAL			_____

*Note: All municipal courts should have received one copy of these materials at no charge. This order form is to order **additional** copies.

All orders must be prepaid. Checks payable to Texas Municipal Courts Education Center.

Send order to:

Texas Municipal Courts Education Center 1609 Shoal Creek Boulevard, Suite 302 Austin, Texas 78701 (512) 320-8274

Name: _____

Court: _____

Court Address: _____

City, State, Zip: _____

Court Telephone Number: () _____ Email Address: _____

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Checks, cash and VISA/Mastercard are accepted in payment when purchasing at the conference. Sales will be ongoing until 4:00 p.m. during the first day of the program.

Ceramic Mugs.....	\$7
CAFÉ MUGS.....	\$8
Insulated Mugs.....	\$6
<i>Short Sleeve T-Shirts</i>	
TODDLERS (4T)	\$10
CHILDRENS	\$11
ADULT SIZES S, M, L, XL	\$13
ADULT XXL & XXXL	\$15
<i>Long Sleeve T-Shirts</i>	
SIZES S, M, L, XL	\$18
XXL & XXXL.....	\$20
Golf Shirts	\$25
Caps.....	\$12
Maroon/Canvas Bag.....	\$15
Ties	\$15
Tie Tack/Lapel Pin.....	\$5
Children's Book	\$15
"Lone Star Justice" Book.....	\$25

Orders may be placed online too. See the TMCEC website at **www.tmcec.com**.

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CDL, DSC, and Deferred Disposition Update

Presented by

Robin Ramsay
Municipal Court Judge
Denton

OBJECTIVES

By the end of the session, participants will be able to:

1. Summarize the history of CDLs and relate why the legislature passed the current CDL laws.
2. List recent legislation defining traffic violations and sanctions applicable to CDL holders.
3. Discuss DSC and Deferred as it applies to CDL holders and youthful drivers.

**DSC,
Deferred Disposition,
& Commercial Driver's License
Update**

Safety Belts & C.P.S.S.S.

- HB 183 – Effective 9/1/2005
- 545.412(a), TC
 - Offense to transport a child **UNDER** age 5 **and** **UNDER** **36"** tall w/o keeping the child in a Child Passenger Safety Seat System.

Safety Belts & C.P.S.S.S.

- 545.4121 (new), TC
 - Defense to Prosecution:
Defendant *Possesses* an appropriate CPSSS for each child to be transported.
Court determines whether satisfactory evidence has been presented.

Safety Belts & C.P.S.S.S.

- **708.052, TC (amended)**
 - **Makes transporting a child w/o appropriate CPSSS a Moving Violation.**

Safety Belts & C.P.S.S.S.

- **545.413(b), TC (amended)**
 - **Offense to operate Passenger Vehicle and allow child UNDER 17, and not required to be in CPSSS, to ride w/o a Safety Belt.**

C.P.S.S.S. & DSC

- **45.0511, CCP (amended)**
 - **Defendant may take DSC for violation of 545.412, TC, even if he/she has taken DSC in last 12 months. BUT, only if Judge requires Specialized DSC (includes 4 hours of instruction on CPSSS). TEA refers to Specialized DSC's as "Seat Belt Schools".**

C.P.S.S.S. & DSC

Find schools at:

www.tea.state.tx.us/drive/activesb.html

More DSC News

- **HB 370 – Effective 9/1/2005**
- **45.0511, CCP (amended)**
- **Allows *active duty* members of the military (w/DL from another state) to take DSC if provided they haven't completed DSC in another state in the last 12 months.**

More DSC News

- **HB 703 – *Offenses on & after 1/1/2006***
- **45.0511, CCP (amended)**
- **Judge has discretion to require \$10 fee from defendant to obtain driving record from DPS.**

More DSC News (cont.)

- **HB 468 – Effective 9/1/2005**
- **1001.056, EC (amended)**
- **TEA will now provide DSC course providers with Course Completion Certificate Numbers.**

More DSC News (cont.)

- **No more blue certificates.**
- **Each provider will issue self designed certificates.**
- **Change is intended to allow for faster verification and diminish backlogs in traffic court dockets.**

Deferred Disposition & CDL's



Fun with Deferred Disposition

■ **SB 1257 – Effective 9/1/2005**

■ **45.051, CCP (amended)**

■ **Prohibits a person that held a CDL at time of offense to be granted Deferred Disposition.**

Fun with Deferred (cont.)

■ **45.0511, CCP (amended)**

■ **Prohibits a person that held a CDL at time of offense to be granted a DSC.**

Fun with Deferred (cont.)

■ **Intended to close 'loophole' that allowed CDL holders to surrender CDL, then make appearance and request for Deferred or DSC.**

'Key' Deferred Update

- SB 1005 – Eff. 9/1/2005
- Art. 45.051, CCP – Section 1 (amends)
 - If Defendant is UNDER 25 yoa.
 - Offense is a moving violation.
 - Judge *shall* require DSC during deferral period.

'Key' Deferred Update

- 45.051, CCP – Sec. 1 (Cont.)
 - Provisional License Holder?
 - Judge *shall* require defendant to be examined by DPS as required by 521.161, TC. No exemption for previous exam. \$10 fee to DPS.

'Key' Deferred Update

- 45.051, CCP – Sec. 1 (Cont.)
 - Judge shall impose fine if evidence of completion not provided by end of period. (DSC or DPS exam)
 - Note: 'Pass' not required. Just 'be examined by DPS'.

'Key' Deferred Update

- **Judges should read this bill (SB 1005) carefully and form your own conclusions.**

'Key' Deferred Update

- **HB 2702 – Effective 9/1/2005**
 - **Art. 45.051 (f) (2), CCP (amended)**
 - **Removed words "traffic offense"**
 - **Added "violation of a state law or local ordinance relating to motor vehicle control, other than a parking violation," committed by**

'Key' Deferred Update

- **a person who holds a CDL.**
- **"Motor Vehicle Control" is not defined in TC.**
- **Interpretation is in the hands of the judge.**
- **You must decide if offense is eligible for Deferred Disposition.**

Questions?

■ TMCEC 'Hot Line'

■ 1-800-252-3718

■ Web www.tmcec.com

■ Your peers – save your roster



DRIVER TRAINING AND EDUCATION

MODIFICATIONS TO THE DRIVING SAFETY UNIFORM CERTIFICATES OF COURSE COMPLETION

The passage of House Bill 468 during the 79th Regular Session changed Section 1001.056 of the Education Code on September 1, 2005. As of that date, only driving safety course providers are authorized to print the Uniform Certificates of Course Completion and only course providers may issue *duplicate* Uniform Certificates of Course Completion to students who need them. Both of those actions were previously a Texas Education Agency (TEA) responsibility.

For the next year or so, courts will continue to receive many of the "old" Uniform Certificates of Course Completion because TEA is distributing the remaining backlog of those pre-September 1st certificates to course providers who need them.

But as many courts have already noted, the new provider-printed certificates are already being issued to some offenders. Those new certificates do not have to be a standard color, the TEA seal which was in the middle of the "old" certificates has been deleted on the new provider-printed certificates, and there must be two new entries on each provider-printed certificate: Reason For Taking the Course and a Contact Number to Check the Certificate Validity. If your court receives a certificate that appears questionable, the easiest way to validate it is to call the course provider's contact number on that certificate and ask two questions: (1) who received certificate number XXXXXXXX and (2) when that class was completed. The information received must be the same as on the certificate you are holding or you can suspect that it is a counterfeit or has been illegally modified. TEA has required that at least two anti-counterfeiting measures be employed on each provider-printed certificate, and courts can send an e-mail to the address at the bottom of this webpage for an explanation of those features.

Finally, if a court or justice needs to check a course name or the course provider number, there is a list of all 46 TEA-approved courses at www.tea.state.tx.us/drive/drivecp.html#numcps and each of those course providers is required to maintain an electronic database of information about their course completers. For recent graduates of a driving safety course, the course provider's database will be more up-to-date than TEA's database, but if you cannot reach the course provider, please contact us at TEA.

If you have questions, send an e-mail to drivertr@tea.state.tx.us

*Driver Training and
Education Home*



DRIVER TRAINING AND EDUCATION

SCHOOL AND CLASSROOM LOCATIONS

DRIVER EDUCATION:

-  [School districts that teach driver education in public schools](#)
-  [Licensed \(commercial\) driver education schools and branch schools](#)

DRUG AND ALCOHOL DRIVING AWARENESS PROGRAM (DADAP):

-  [DADAP school and classroom locations](#)

DRIVING SAFETY (a.k.a. defensive driving or ticket dismissal):

-  [Driving safety classroom locations](#)
-  [How to take an Online or Video/DVD driving safety course](#)
-  ["Seat Belt" school locations \(Driving Safety "Specialized" Course\)](#)

[Web Page Comments/Suggestions](#)

*Driver Training and
Education Home*



Driver License Division

Home
Online Services
Driver License Renewal
Change Your Address
Register Your Vehicle
Driver Record Request
Helpful Information
Driver License Office
Compliance Locations
Renew TX license while out of state (MILITARY)
Renew TX license while out of state (NON-MILITARY)
Moving to Texas
Driver License Fees
Downloadable Forms
Victim of Identity Theft?
Hazardous Materials Endorsement (HME) Procedures
FAQ's
Contact Customer Service

DRIVER RESPONSIBILITY PROGRAM (DRP)

The Driver Responsibility law (TRC Chapter 708) was enacted by the 78th legislative session (House Bill 3588) and establishes a system that assesses surcharges based on certain traffic offenses. DRP only applies to offenses that occurred on or after September 1, 2003. This program does not replace other administrative suspension, or revocation actions that result from these same convictions. The surcharges assessed for this program are in addition to other reinstatement fees required for other administrative actions. The two methods below detail how surcharges will be assessed.

Points System Surcharges

Points are assessed to moving violations classified as Class C misdemeanors. Surcharges are applied to drivers based on the type of offense and the time period in which the citation was received. Points remain on the driver record for a period of three years. Once the conviction has been reported to DPS and becomes part of the driver history, DPS will assign points to a person's license as follows:

- Two points for a moving violation conviction in Texas or that of another state.
- Points will not be assigned for speeding less than 10% over the speed limit or seat belt convictions.
- Three points for a moving violation conviction in Texas or another state that resulted in an accident.
- The three year time frame is calculated from the conviction dates.

DPS will assess a surcharge when the driver accumulates a total of six (6) points or more on their driver record during a three-year period. The driver must pay a \$100 surcharge for the first six points and \$25 for each additional point, in addition to any related services fees. Traffic offenses which result in points are designated in 37 TAC §15.89.

Conviction Based Surcharges

Drivers who receive a conviction for an offense listed below will pay an annual surcharge for a period of three (3) years from date of conviction. No points are assessed for these offenses because the surcharge is automatic upon conviction. Once the conviction is reported to DPS and becomes part of the driver history the following surcharges will be assessed:

- Driving While Intoxicated, Intoxication Assault, and Intoxication Manslaughter
 - o First time offense = \$1,000
 - o Second or subsequent offense = \$1,500
 - o DWI 0.16 or greater = \$2,000
 - o The surcharges are cumulative, meaning if a driver received two DWI offenses the total amount of surcharges to be paid would be \$2,500 annually for three years.
- Failure to Maintain Financial Responsibility
 - o \$250
- Driving While License Invalid
 - o \$250
- No Driver License
 - o \$100

Annual Assessment- Each year, on the anniversary date of the original notice DPS will review the driver history and determine if the driver still meets surcharge requirement criteria. If the record indicates that the individual's record still reflects six or more points in the previous 36 months or if the conviction is still within the previous 36 month period, then the driver must pay the surcharge again. Annual assessment based on points will include additional charges (\$25 per point) if more points have accrued since the first notice was mailed.

Deferred Adjudication - Defensive Driving Course

No points will be assessed or surcharges applied if the conviction is deferred, or a DDC course is taken.

- Only Non-CDL drivers may be granted deferred adjudication, and/or take a defensive driving course (DDC) for any points-based citation and No-DL citations.
- No-Insurance and DWLI offense are eligible for deferred adjudication.
- DWI, Intoxication Assault, and Intoxication Manslaughter are NOT eligible for deferral.

Customer Contacts

TRC Chapter 708 authorized DPS to contract with a third party vendor to collect the surcharge and allows the vendor to collect service fees in addition to the surcharge. Municipal Services Bureau (MSB) will provide contract services for this program. Service fees are listed as follows:

- 4% in addition to original surcharge
- \$2.50 for each payment made on an installment agreement
- There is an additional fee for credit card and electronic check transactions, based on the dollar amount of the surcharge.

Questions regarding payment options and status of payments made should be directed to MSB at:

1-800-688-6882 toll free
1-512-454-4759
msb@txdps.state.tx.us

Hours of operation are:
Monday through Thursday 8:00 AM to 8:00 PM.
Friday 8:00AM to 5:00 PM
Saturday 8:00AM to 12:00 PM

Compliance

Payment of surcharge fees will be mailed to:
Texas Department of Public Safety, Surcharge Processing
P.O. Box 16733
Austin, TX 78761-6733

If subject's driver license has been revoked for failure to pay surcharge, once the payment including related collection fees are received by MSB, DPS will be notified via electronic means. Compliance will then update to the driver history within 5 to 7 business days.

Installment Agreement

MSB will allow individuals to enter installment agreement to comply with surcharge requirements. Depending on the amount owed, the individual may have between four months and two years to complete the payment plan. An additional \$2.50 service fee will be charged per payment. If an individual defaults, the driving privileges will be revoked until the entire balance of the surcharge is paid. The individual will not be allowed to enter another I/A.

Occupational License

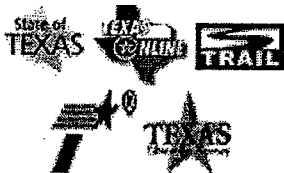
A driver who is revoked for failure to pay surcharges may not obtain an occupational license, as Texas Administrative Code requires payment of all required reinstatement fees prior to the issuance of an Occupational license. If the surcharges are paid, or an installment agreement is in force and the subject is suspended for a Non-DRP related issue, an Occupational license may be obtained. If subject is in an installment agreement and defaults, the Occupational License will be revoked.

NOTE:

All other driver license related questions may be directed to Customer Service at 512-424-2600, or by email at customerservicedl@txdps.state.tx.us.

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DRIVER TRAINING AND EDUCATION

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If you have questions, send an e-mail to drivertr@tea.state.tx.us

RECORD OF DRIVING TEST

M/C OFF STREET TEST	BAD	GOOD
IDENTIFYING CONTROL		
Rear Brake Lever	☐	☐
Front Brake Lever	☐	☐
Accelerator	☐	☐
Gearshift	☐	☐
Clutch	☐	☐
Light Switch	☐	☐
Dimmer Switch	☐	☐
Horn Button	☐	☐
Starter (Kick or button)	☐	☐
A & B PRETRIP INSPECTION		
FAIL	PASS	
AIR BRAKES		
Leak in System	☐	☐
Warning Signals	☐	☐
Emergency Brakes	☐	☐
MANEUVERS		
BAD	FAIR	GOOD
START		
Control	☐	☐
Observation	☐	☐
Signal	☐	☐
QUICK STOP		
Control	☐	☐
Observation	☐	☐
BACKING		
Control	☐	☐
Observation	☐	☐
Position	☐	☐
PARALLEL PARK		
Control	☐	☐
Observation	☐	☐
Position	☐	☐
Signal	☐	☐
UPSHIFTING		
Control	☐	☐
Position	☐	☐
DOWNSHIFTING		
Control	☐	☐
Position	☐	☐

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**Extraterritorial Jurisdiction &
Ordinance Enforcement Issues**

Presented by

Lawrence Provins
Assistant City Attorney
Pearland

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What Jurors Want: The Psychology of Juries

Presented by

John Hawkins
Assistant District Attorney
Denton County

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FAX (512) 435-6118

Case Law and Attorney General Opinion Update

Presented by

Ryan Kellus Turner
General Counsel
TMCEC
Austin

OBJECTIVES

By the end of the session, participants will be able to:

1. Explain how recent federal and state court decisions affect procedural and substantive legal issues in municipal courts.
2. Explain how recent federal and state court decisions affect procedural and substantive legal issues pertaining to state magistrates.

TMCEC Case Law and Attorney General Opinion Update 2005-2006

During the past year there were notable trends in case law relating to municipal courts. To keep yourself awake, listen for the five trends presented during the course of the presentation. Summarize them below:

1. _____

2. _____

3. _____

4. _____

5. _____

Are you still awake? If you were only able to remember the names of four published decisions, which ones should you know? Answers will be provided during the presentation.

1. _____

2. _____

3. _____

4. _____

If you were only able to remember the numbers of two recent Texas Attorney General Opinions, which ones should you know? Answers will be provided during the presentation.

1. _____

2. _____

Citation #1

In the matter of H.V. 2005 Tex. App. LEXIS 2088

**Case Law & Attorney General Opinion Update
Academic Year 2005–2006**

Ryan Kellus Turner
General Counsel
TMCEC

Except where otherwise noted, the following case law and opinions were handed down August 31, 2004 through October 1, 2005.

I. Search & Seizure

A. Arrest Warrants

Does the Exclusionary Rule Apply Where a Defendant is Arrested on Warrants for Traffic Offenses Lacking a Magistrate's Signature or Proof that Probable Cause had been Determined?

Ray v. State, 148 S.W.3d 218 (Tex. App. - Texarkana 2004).

A police officer stopped a vehicle after observing the seat belt hanging out the door. The officer took the driver and defendant, the front seat passenger, into custody after determining that they did not possess a valid driver's license and had outstanding warrants for their arrest. The officer then discovered drug paraphernalia in defendant's purse and a small bottle containing eight rocks of cocaine which was stuck between the passenger's seat, and the center console. The court of appeals agreed with defendant that the arrest warrants for traffic offenses were wholly lacking in that they were not signed by the magistrate, the officer's return was blank, there was no affidavit attached, and neither warrant set out probable cause. Accordingly, all of the evidence could be suppressed pursuant to the exclusionary rule contained in Article 38.23 of the Code of Criminal Procedure. However, in this particular case, suppression was not required because of (1) the lawful arrest of the driver, together with (2) the officer's ascertainment that the only passenger possessed no valid driver's license. The two factors provided a basis for the officer to inventory the car. Accordingly, the evidence was sufficient to support defendant's conviction because officers testified that the items in defendant's purse could be used to dilute or cut crack cocaine for delivery or sales purposes.

Note: This case was granted PDR by the Texas Court of Criminal Appeals on March 9, 2005. TMCEC will keep you posted to future developments.

B. Search Warrants

1. Did the Pornographic Images of Children on the Defendant's Hard Drive Constitute "Personal Writings?"

Mullican v. State, 157 S.W.3d 870 (Tex. App. – Fort Worth 2005)

Defendant argued that the trial court should have suppressed the pornographic images of children taken from his computer because they were "personal writings" not subject to seizure with an evidentiary search warrant under Article 18.02(10) of the Code of Criminal Procedure. The State responded that pornographic images of children did not constitute personal writings and that, even if they did, the personal writing exception would not have applied because the search warrant was not "evidentiary" (a warrant for "mere evidence." The court of appeals noted that a search warrant could be issued under

Article 18.02(10) to search for and seize property or items “constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense” and that the child pornography was such evidence. “Personal writings”, referred to diaries, memos, and journals that were not intended by the writer to be published to third parties, and personal, non-business letters. Judgment affirmed.

2. Did the Trial Court Err by Not Giving Deference to the Magistrate’s Determination that Probable Cause Existed to Issue the Search Warrant?

State v. Delagarza, 158 S.W.3d 25 (Tex. App. – Austin 2005)

On review, the State contended the district court erred in granting defendant's motion to suppress evidence of contraband. The court of appeals agreed, finding that the affidavit, when read in a common sense and realistic manner, gave the issuing magistrate a reasonable basis for concluding that contraband could be found at the residence. From the four corners of the affidavit, the magistrate learned that the officer's attention was drawn to the residence by a tip received from an anonymous informer of unknown reliability. The informer described activities that led both the informer and the officer to suspect that drug dealing was taking place. These suspicions were confirmed by four different searches of the trash at that location, in each of which considerable evidence of drug dealing and use was discovered. In light of this preference for the warrant process, and giving the magistrate's probable cause determination the deference it was due, the appellate court held that the magistrate had a substantial basis for concluding that probable cause to search existed. As such, the district court erred by granting defendant's motion to suppress. The suppression order was reversed and the case was remanded for further proceedings.

C. Exceptions

1. Did Exigent Circumstances Exist that Supported the Warrantless Search of a Residence?

Estrada v. State, 154 S.W.3d 604 (Tex. Crim. App. 2005)

The State argued that the officer had probable cause to conduct a warrantless search of defendant's house. The Court of Criminal Appeals, reversing the court of appeals, agreed. In addition to the odor of marijuana, the officer observed minors under the influence of alcoholic beverages. They told the officer that they and other minors had been consuming alcohol and smoking marijuana inside defendant's house. That evidence, in addition to the smell of marijuana on defendant and emanating from the house was enough to establish that there was probable cause for the officer to believe that a crime had been or was being committed. The court of appeals failed to take into account the trial court's finding that there was evidence from the witnesses that it believed established exigent circumstances for a warrantless search.

2. Was Inventory of Defendant’s Vehicle After Arrest for Traffic Violations Lawful?

Richards v. State, 150 S.W.3d 762 (Tex. App Houston [1st Dist.] 2004)

Defendant was arrested upon being observed committing multiple fine-only traffic violation (running a stop sign, failing to signal a turn, speeding, and running a stop light). Subsequent to his arrest, contraband was discovered in his automobile while conducting an inventory of its contents. Defendant appealed his conviction of possessing the

contraband. Defendant argued that he should have been given alternatives to having his car impounded. The court found that none of the alternatives to impoundment argued by defendant were available and therefore that the impoundment of his car was permissible. Police were not required to offer the option of moving the car closer to the curb so that it would be legally parked, because, at the time, they did not know who owned the car. They were not required to release the car to defendant's passengers, who were juveniles and unable to take possession of the car due to the fact that the juveniles were all under arrest for criminal mischief and curfew violations.

3. Does Erratic Driving Constitute a Breach of the Peace?

Taylor v. State, 152 S.W.3d 749 (Tex. App. Houston [1st Dist.] 2004)

On appeal defendant contended that the evidence seized subsequent to arrest needed to be suppressed, as the arrest was made by a deputy sheriff who was outside of his jurisdiction when he observed defendant driving erratically. The court held that the arrest was proper, because defendant's erratic driving behavior amounted to a breach of the peace. The deputy had authority under Article 14.03(d) of the Code of Criminal Procedure to arrest defendant, regardless of jurisdictional boundaries, when the deputy observed defendant driving so erratically that the behavior could be considered a breach of the peace. Affirming the decision of the trial court, the court of appeals held that the deputy had the authority to arrest defendant, the arrest was not illegal and the evidence seized pursuant to the arrest did not need to be suppressed.

Note: The import of this case should be construed in light of recent legislative changes giving peace officers countywide authority to enforce traffic laws.

II. Consequences of Refusal to Sign Citation

Does a Defendant who Refuses to Sign a Citation "Interfere with a Public Duties?"

Compare: Berrett v. State, 152 S.W.3d 600 (Tex. App. Houston [1st Dist.] 2004)

Defendant argued the evidence was insufficient to sustain his conviction for interference with public duties (Section 38.15, Penal Code). The court of appeals disagreed. After being stopped for failure to wear a seat belt, defendant became belligerent with the officer. Defendant began filming the stop on a video camera and voluntarily kept filming and moving his arm out of the officer's reach in an effort to prevent the officer from placing him in handcuffs. On more than 15 occasions, the officer told defendant to put his right arm behind his back, but each time, defendant moved his arm out of the officer's reach and continued to film the encounter in a manner that precluded his arrest. The court held that such conduct, in those circumstances, constituted voluntary action, not a mere omission to act. As a result, the State did not have to prove that defendant had a duty to submit to the arrest. Furthermore, defendant's actions in repeatedly pulling away from the officer and filming the encounter in such a way as to interfere with the arrest were more than "mere speech." Therefore, the evidence was sufficient to sustain the conviction.

Note: Defendant also asserted that he was entitled to a jury charge stating that he was not required to sign a promise to appear in order to obtain his release after receiving such a citation. The court of appeals held that such was an incorrect statement of the law. Accordingly the trial court did not err by refusing to place the requested instruction in the charge.

Contrast: Barnes v. State, 166 S.W.3d 416 (Tex. App. – Austin 2005)

On appeal, defendant contended that the evidence was insufficient to sustain her conviction. The appellate court found that defendant's prosecution rested on her lack of cooperation with the

officer as he attempted to cite her for speeding. The appellate court held that defendant, who directly or indirectly refused citation in violation of Sections 543.001- .005, could not also be prosecuted under Section 38.15 of the Penal Code. Moreover, on this record, no rational trier of fact could have found beyond a reasonable doubt that defendant negligently interrupted, disrupted, impeded, or otherwise interfered with her detention or arrest by directing her minor child to leave her vehicle and run in an area near fast-moving traffic, by driving her vehicle forward while she was lawfully detained, or by continuously refusing to obey orders regarding officer safety. There was no basis in the record for concluding that the need to repeatedly order defendant to keep her hands visible interfered with either her detention or her arrest. The court of appeals concluded that the evidence was legally insufficient to sustain the conviction. The judgment was reversed, and a judgment of acquittal was rendered.

III. Malicious Prosecution/Prosecutor Misconduct

A. Did City's Prosecution for Simple Assault Constitute Malicious Prosecution?

Fazio v. City of Dallas, 2005 Tex. App. LEXIS 1230 (Tex. App. – Dallas 2005)

While at a dinner party, the petitioner grabbed hold of a child's arm to stop the child from running. The child told the investigating officer that she was playing tag with another child when the claimant grabbed her by the arm and told her to sit down. The child's parent filed a complaint alleging assault by contact (Section 22.01, Penal Code). Petitioner was prosecuted by the city attorney's office in the Dallas Municipal Court. Subsequent to being not found guilty at trial, the petitioner filed a malicious prosecution lawsuit against the City of Dallas. The court of appeals ruled that there was no evidence to support the petitioner's argument that the City acted without probable cause or with malice in pursuing a prosecution for assault. Petitioner presented no evidence that the City lacked probable cause. In fact, all parties agreed that the petitioner touched the child, though they characterized that touching differently. Because there was no evidence of malicious prosecution, there was no deprivation of a constitutional magnitude entitling the petitioner to a remedy under 42 U.S.C. § 1983 (deprivation of rights) or by extension 42 U.S.C. § 1985 (conspiracy to interfere with civil rights).

B. After a Mistrial is Brought About by Prosecutor Misconduct, When is a Retrial Barred by Double Jeopardy?

Ex Parte Wheeler, 146 S.W.3d 238 (Tex. App. Fort Worth 2004) – Prosecutor's misconduct (violation of Rule of Evidence 411) resulted in mistrial. Upon second prosecution, defendant's motion to dismiss with prejudice was denied. In utilizing the three prong test recently promulgated by the Texas Court of Criminal Appeals in *Ex Parte Peterson*, 117 S.W.3d 804 (Tex. Crim. App. 2003) the court of appeals held that the prohibition against double jeopardy barred a second prosecution.

All judges and prosecutors should be familiar with the *Peterson* three-prong test for determining if jeopardy would attach:

- 1) Did manifestly improper prosecutorial misconduct provoke the mistrial?
- 2) Was the mistrial required because the prejudice produced from that misconduct could not be cured by an instruction to disregard?
- 3) Did the prosecutor engage in that conduct with the intent to goad the defendant into requesting a mistrial or with conscious disregard for a substantial risk that the trial court would be required to declare a mistrial?

C. Should Prosecutors Call Defense Counsel to the Witness Stand?

Flores v. State, 155 S.W.3d 344 (Tex. Crim. App. 2004)

Permitting the State to call defense counsel as a witness in a criminal trial undermines the adversarial process and inevitably confuses the distinction between advocate & witness and argument & testimony. It is only allowed if required by a compelling legitimate need.

D. Should Prosecutors during Trial Call Themselves to Testify as Witnesses?

Ramon v. State, 159 S.W.3d 927 (Tex. Crim. App. 2004)

During defendant's trial, the trial court allowed the prosecutor to take the stand and testify about a collateral matter, over defense objection. The defense was not permitted to cross-examine the prosecutor, and after a sidebar discussion, the trial court sustained the defense motion to strike the prosecutor's testimony. The trial court instructed the jury to disregard the prosecutor's testimony, but denied the defense request for a mistrial. The prosecutor continued to prosecute the case and made reference to the subject of her testimony during closing arguments. Review was granted to determine whether the appellate court erred in finding no harmful error. The reviewing court held that given the strength of the evidence against defendant, the trial court's instruction to the jury to disregard the prosecutor's testimony, and the tangential nature of that testimony, it did not find an abuse of discretion in the trial court's failure to declare a mistrial.

While, in light of the overwhelming weight of the evidence, the Court affirmed the decision of the court of appeals, the Court stated that permitting the prosecutor to testify was not only error, but also a violation of Rule 3.08(a) of the Texas Disciplinary Rules of Professional Conduct. It then noted that this was the second time in one year that the prosecutor's misconduct was brought to the attention of the Court of Criminal Appeals (see, above, *Flores v. State*, 155 S.W.3d 344 (Tex. Crim. App. 2004)).

IV. Education Code: In Pari Materia Arguments

A. Are "Criminal Trespass" and "Trespass-on School-Grounds" *in Pari Materia*?

In re JMR, 149 S.W.3d 289 (Tex. App. – Austin 2004)

Appellant, a child, was charged with criminal trespass when he returned to his former campus, after having been officially removed and enrolled in an alternative-learning center. He argued that the trespass-on-school-grounds statute, (Section 37.105, Education Code) was subsumed by the general criminal trespass statute (Section 30.05, Penal Code) and that therefore the *in pari materia* doctrine required the State to charge him with that offense, as it more specifically described his conduct. (Defendant also challenged the district court's jurisdiction to hear a Class C Misdemeanor, even though the district court was designated as a juvenile court). The court disagreed, finding that § 37.105 and Tex. Penal Code § 30.05 were not *in pari materia*. The criminal-trespass and trespass-on-school-grounds statutes effectively operated independently because their objectives were complementary: One protected a property interest; the other guarded the safety of people authorized to be on school grounds. In addition, the two statutes were contained in different legislative acts and required different elements of proof. The court also found that the petition sufficiently informed appellant of the crime with which he was charged and allowed him to prepare an adequate defense, despite the State's failure to list the correct first name of the principal, who testified as the owner of the property.

B. Are Aggravated Assault and Hazing *in Pari Materia*?

Ex parte Smith, 152 S.W.3d 170 (Tex. App. – Dallas 2004)

Defendant was a member of the Alpha Phi Alpha fraternity at Southern Methodist University (SMU). He, along with several others, required Braylan Curry, another SMU student who was pledging Alpha Phi Alpha, to consume large quantities of water as part of Curry's initiation. As the result of drinking the large amount of water, Curry suffered convulsions and was hospitalized in intensive care. Smith was charged by indictment with the felony offense of aggravated assault causing serious bodily injury. By pretrial writ of habeas corpus, appellant challenged the district court's jurisdiction over the prosecution. Appellant claimed the charge arose out of a hazing incident, and because hazing (Section 37.152, Education Code) is more specific, prosecution should be brought under it. Because hazing is a misdemeanor, appellant argued, the district court has no jurisdiction over the prosecution. Following a hearing, the trial court denied appellant's requested relief. The court of appeals held that the appellant's *in pari materia* claim is not cognizable by pretrial writ of habeas corpus. In affirming the trial court's order, the court of appeals opined that habeas corpus should not be used against a valid statute or ordinance to test the validity of a criminal complaint. It should only be used when the defendant is entitled to release.

Note: This case was granted PDR by the Texas Court of Criminal Appeals on June 29, 2005. TMCEC will keep you posted to future developments.

V. Attorney Pro Tem Issues

A. Is a Prosecutor, Mistakenly Labeled a "Special Prosecutor," without the Authority to Appeal a Pre-Trial Ruling?

State v. Ford, 158 S.W.3d 374 (Tex. App. – San Antonio 2005)

Though mislabeled a "special prosecutor" the attorney was properly appointed as an attorney pro tem and thus had all of the prosecutor's lawful powers, including the authorities to appeal the pretrial ruling. Citing *State v. Rosenbaum*, 852 S.W.2d 525, 525-30 (Tex. Crim. App. 1993), the court of appeals explained that there is a difference between "special prosecutors" and "attorneys pro tem." A special prosecutor is *permitted* to participate in a particular case to the extent allowed by the prosecuting attorney, without being required to take the constitutional oath of office. An attorney pro tem is *appointed by the court*, and after taking the oath of office assumes the duties of the attorney and in effect replaces the prosecuting attorney. (Noting the distinctions between these terms, the Court of Criminal Appeals cautioned courts in using the terms synonymously.)

While the attorney improperly labeled a "special prosecutor" did not take the oath required of attorneys pro tem, the defendant waived the issue by not raising it prior to the appeal.

B. Was the Attorney Pro Tem "Competent" to Represent the State?

Shea v. State, 167 S.W.3d 98 (Tex. App. – Waco 2005)

Attorney pro tem appointed to prosecute pursuant to Article 2.07 of the Code of Criminal Procedure was "competent" to represent the State though he was on federal probation for misprision of felony. Because the term "competent" is not defined by statute, the court of appeals used the plain meaning of the term (i.e., "legally qualified and adequate"). Thus, the court looked to the State Bar to determine if attorney was in good standing to practice law. Section 81.102 of the State Bar Act provides that only members of the State Bar may practice law in Texas, with some exceptions. The State Bar Rules define a "member in good standing" as a member of the State Bar who is not in default in payment of dues and who is not under

suspension from practice. As attorney was in good standing, the court of appeals found that he was "qualified" as require by the statute.

VI. Transportation Code

A. What Constitutes "Reasonable Suspicion" for Following too Closely?

Ford v. State, 158 S.W.3d 488 (Tex. Crim. App. 2005)

A peace officer pulled defendant's vehicle over for following another car too closely, in violation of Section 545.062(a) of the Transportation Code. When defendant lowered his passenger-side window, the officer noticed a strong odor of marijuana. A search of the car produced codeine and marijuana. The Texas Court of Criminal Appeals held that the court of appeals erred in holding that the evidence presented at the suppression hearing supported the trial court's finding of reasonable suspicion. The officer only testified that he saw defendant's car following another car at a distance that the officer believed was insufficient. Without specific, articulable facts, the court had no means in assessing whether the officer's opinion was objectively reasonable. Reliance on the officer's special training was insufficient to establish reasonable suspicion absent objective factual support. The peace officer's testimony was conclusory in character and thus wholly inadequate. The court reversed the judgment of the court of appeals and remanded the case to the trial court.

B. Is a Turn Signal Required When Turning Out of a Parking Lot?

State v. Ballman, 157 S.W.3d 65 (Tex. App. – Fort Worth 2004)

The prosecution argued that the trial court erred in granting defendant's motion to suppress, as officer had probable cause to stop defendant when the defendant committed a traffic violation by failing to use his turn signal (Section 542.001, Transportation Code). Affirming the judgment of the trial court, the court of appeals concluded that, as the parking lot was not a highway, but a privately maintained place, the signaling requirement did not apply to defendant's turn. Furthermore, the officer did not have reasonable suspicion to stop the vehicle, because the officer had no identifying information on the driver of the vehicle at the time a concerned citizen saw the vehicle being driven erratically. Therefore, the trial court properly applied the law to the facts and correctly granted defendant's motion to suppress.

C. Did the Record Support the Trial Court's Conclusion that 3.2 Miles Before Executing a Traffic Stop was Unreasonable?

State v. Dixon, 151 S.W.3d 271 (Tex. App. - Texarkana 2004)

After being stopped for failure to use turn signal (Section 545.104, Transportation Code) police found contraband on defendant's passenger. Defendant was charged and filed a motion to suppress, which the trial court granted. On appeal, the court affirmed. The State presented no argument in support of one point and admitted that the law allowed the trial court to decide the pretrial motion to suppress without hearing testimony. The State's lack of briefing on the matter waived the issue. The trial court suppressed the contraband seized subsequent to the alleged traffic violation because it found that a 3.2-mile delay between the officers' claimed observation of a traffic offense and the ultimate stop was not within a reasonable time or a reasonable distance after the alleged violation. Nothing interfered with the officer's ability to stop the vehicle sooner. The record supported the trial court's findings.

Note: This case was granted PDR by the Texas Court of Criminal Appeals on April 27, 2005. TMCEC will keep you posted to future developments.

D. Was the Warrantless Search of the Defendant's Car Following a Traffic Accident Justified Under the Community Caretaking Doctrine?

Weide v. State, 163 S.W.3d 239 (Tex. App. - Austin 2005).

Defendant contended that the trial court erred by admitting the contraband into evidence. The court of appeals reversed, noting that the Fourth Amendment applied to vehicles, and that the history of the statute authorizing the investigation of a peace officer (Section 550.041, Transportation Code) suggested that the provision was intended merely to clarify a peace officer's authority to investigate some traffic accidents which occur on private property rather than on the public roadways. The court also held that the circumstances presented at the suppression hearing did not demonstrate that the unidentified officer had probable cause to believe that defendant's vehicle contained evidence of a crime. (The prosecution was unable to even identify the officer who conducted the search and there is nothing in the record establishing any officer's knowledge that plastic bags were ordinarily used to contain drugs). Furthermore, the record did not suggest that there were suspicious circumstances that would lead an officer to believe that the defendant was in possession of contraband. Also, the search was not justified under the emergency doctrine because it was admitted that it was conducted as part of a criminal investigation.

VII. Ordinance Issues

A. Is the Bedford Sound Ordinance Constitutional?

State v. Holcombe, 145 S.W.3d 246 (Tex. App. Fort Worth – 2004)

Defendant was pulled over for playing his car radio too loudly and was subsequently arrested for driving while intoxicated. The trial court granted defendant's motion to suppress on the basis that the noise ordinance, Bedford, Tex., Code of Ordinances, ch. 54, art. II, § 36 (2002), was overbroad. The State appealed. The Court of Appeals concluded that the ordinance prohibited noise that unreasonably disturbed or interfered with the peace, comfort, and repose of "neighboring persons of ordinary sensibilities," unless a permit of variance was first obtained. Accordingly, the statute was neither overbroad nor vague. In response to the allegation that such an ordinance is too broad in scope, the court concluded that it was neutral regarding content and location. Thus, it did not reach a substantial amount of First Amendment activity (because it regulated only the volume of expression). As to terms defined in the ordinance, the court held that were adequately defined and provided sufficient notice under the objective reasonable person standard. The court reversed the trial court's judgment and remanded the case for a trial on the merits.

Note: This case was granted PDR by the Texas Court of Criminal Appeals on April 27, 2005. TMCEC will keep you posted to future developments.

B. Was the Private Driveway a Nuisance that Justified Use of Police Powers?

City of San Antonio v. TPLP Office Park, 155 S.W.3d 365 (Tex. App. - San Antonio 2004)

District court determined that the City's decision to close a private driveway was an invalid exercise of the City's police power and a substantial impairment of access to a business park. On review, the court of appeals held that the trial court acted within its discretion in disposing of all

claims. There was more than a scintilla of evidence to show the traffic entering and leaving the business park did not create a safety hazard or a nuisance, and that the closure of the private driveway would not promote the public interest.

C. Does an Ordinance Criminalizing Smoking in an Enclosed Public Place Constitute an Unlawful Use of Police Powers?

Ex parte Woodall, 154 S.W.3d 698 (Tex. App. – El Paso 2004)

In 2001, the City of El Paso adopted El Paso, Tex., Code § 9.50.030(7), an ordinance which prohibited smoking in all enclosed public places within the city, including food establishments, nightclubs, and bars. The petitioner, co-owner of the Naked Harem Nightclub was smoking in the club when an officer asked her to extinguish the cigarette. When she refused, the officer issued her a citation ordering her to appear in municipal court. The owner petitioned the district court for pre-trial habeas relief claiming that the anti-smoking ordinance violated Tex. Const. art. 1, § 17 by restricting her use of her private property. The court of appeals upheld the ordinance as a valid exercise of the city's police powers. The appellate court lacked jurisdiction over the bar owner's takings claim, because it was not ripe for review at the pretrial stage. The district court order denying habeas corpus relief was affirmed.

D. Is it Constitutional to Delegate the Authority to Create Jailable Sexually Oriented Businesses Ordinances to Municipalities?

Ex parte Smalley, 156 S.W.3d 608 (Tex. App. - Dallas 2004).

Chance Renee Smalley, a dancer at an adult cabaret called Baby Dolls, was charged by information with recklessly touching a customer by rubbing her buttocks against the clothed genitals of the customer while appellant was exposing a portion of her breast, in violation of section 41A-18.1(a) of the Dallas City Code. Appellant filed a pretrial application for writ of habeas corpus challenging the validity of section 41A-18.1. She contended that Section 243.010(b) of the Local Government Code making any violation of a municipal ordinance related to sexually oriented businesses punishable as a Class A misdemeanor is an unconstitutional delegation of authority from the legislature to municipalities because the statute is undefined and grants unlimited authority to municipalities. Following a hearing, the district court denied appellant relief.

The court of appeals concluded that because Chapter 243 permits municipalities to regulate employee/customer conduct and punish violations as Class A misdemeanors and such is not an unconstitutional delegation of authority, that section 41A-18.1(a) of the Dallas City Code was not void. Therefore, the district court did not abuse its discretion in denying appellant the relief sought by her application for writ of habeas corpus.

E. Did the District Court Err in Granting Summary Judgment for the City in Non-Conforming Land Use Case?

Baird v. City of Melissa, 2005 Tex. App. LEXIS 7132. (Tex App. – Dallas 2005)

Trial court did not err in ordering a recreational vehicle (RV) park owner to remove RVs from her property as the plain language of the City of Melissa Comprehensive Zoning Ordinance prohibited uses that were not specified as "permitted" under the schedule, and which did not list "RV park" as a permitted use.

Note: This case is a good reminder that habitual violation of local ordinances, even if they carry criminal penalties, sometimes requires the use of civil litigation.

VIII. Substantive Law Matters

A. Did the State Violate the Law of Trespass in its Efforts to Crack Down on the Sale of Alcohol to Minors?

Phillips v. State, 161 S.W.3d 511 (Tex. Crim. App. 2005).

Defendant pled nolo contendere to selling alcohol to a minor. Finding that the trial court erred in denying defendant's motion to suppress, the court of appeals remanded the case for further proceedings. The State appealed. The court of appeals held that the minor was a trespasser and was not an authorized representative of the Texas Alcoholic Beverage Commission (TABC) under Section 101.04 of the Alcoholic Beverage Code. On appeal to the Texas Court of Criminal Appeals, the State argued that suppression was improper as the minor was an authorized representative of the TABC and, therefore, was statutorily authorized to enter the premises. The Court of Criminal Appeals agreed, finding that because minors in this situation acted at the specific request of TABC officers and on behalf of the TABC to enforce the provisions of the TABC Code through sting operations, they should not be considered trespassers even in the face of a no trespassing sign. Further, by accepting a license or permit to sell alcohol, the bar consented to inspection by TABC agents. The minor was recruited by and under the immediate supervision of a TABC agent to help conduct a sting operation that was expressly contemplated by the legislature. Therefore, the minor was not a criminal trespasser. Since police officers, TABC agents, or the minor violated no laws, the trial judge did not err in denying defendant's motion to suppress. The decision of the appellate court was reversed, and the ruling of the trial court denying the motion to suppress was upheld.

B. When a Defendant is Lawfully Arrested, may the Defendant Assert a Necessity Defense?

Bowen v. State, 162 S.W.3d 226 (Tex. Crim. App. 2005)

Necessity defense under Section 9.22(3) of the Penal Code was available on a charge of resisting arrest, notwithstanding the restriction on the use of self defense, because a legislative purpose to exclude the necessity did not plainly appear in the Penal Code. Defendant's knowledge that she was being placed under arrest was irrelevant to the necessity instruction.

C. Is the Texas Criminal Justice System Ready for the 21st Century, Threats Via E-Mail?

Messimo v. State, 144 S.W.3d 210 (Tex. App.- Fort Worth 2004)

Defendant and the victim had a disagreement, leading to a physical altercation. Shortly thereafter, the victim began receiving threatening e-mails. Defendant was subsequently charged with harassment by electronic communication (Section 42.07(a)(2), Penal Code). Defendant claimed that the victim had stolen defendant's e-mail password and was sending threatening messages to herself. A jury found defendant guilty. The court affirmed, rejecting defendant's contention that the trial court erred in overruling her motion to dismiss and to prevent the prosecution from introducing evidence that the State failed to disclose pursuant to a discovery order. The contested evidence consisted of e-mails that were provided to defense counsel on the

day of trial. The court of appeals stated that it was apparent from a verbal exchange between the trial judge and defense counsel that the judge expected defense counsel to pick up the documents, but counsel failed to do so. Additionally, the trial court did not abuse its discretion in admitting certain e-mails over a lack-of-authentication objection pursuant to Texas Rule of Evidence 901. For example, e-mail was sent to the victim's e-mail address shortly after she and defendant had a physical altercation, and the e-mail referenced that altercation. Additionally, the victim recognized defendant's e-mail account address. The court affirmed the judgment.

D. When a Defendant is Voluntarily Absent from the State, Does that Toll the Statute of Limitations for Bail Jumping or Failure to Appear?

Ex parte Martin, 159 S.W.3d 262 (Tex. App. – Beaumont 2005)

Pursuant to Article 12.05 of the Code of Criminal Procedure, absence from the state after failing to appear or bail jumping tolls the statute of limitations for the underlying offense but does not toll the limitation period as to bail jumping or failing to appear (Section 38.10, Penal Code).

E. May a Business that holds an On-Premises Alcoholic Beverage Permit host a Poker Tournament?

Opinion No. GA-0335 (6/20/05)

A holder of an on-premises alcoholic beverage permit may not, without violating both section 47.04(a) of the Penal Code and Rule 35.31 of the Alcoholic Beverage Commission, host a poker tournament in which participants risk money or any other thing of value for the opportunity to win a prize. A holder of an on-premises alcoholic beverage permit may, without violating either section 47.04(a) of the Penal Code or Rule 35.31 of the Alcoholic Beverage Commission, host a poker tournament in which participants do not risk money or any other thing of value for the opportunity to win a prize.

IX. Juvenile Law Issues

A. Once a Minor is Accused of Driving Under the Influence of Alcohol, is the Statute Allowing DPS to Administratively Suspend the Minor's Driver's License Unconstitutionally Vague?

Zaborac v. Texas Department of Public Safety, 168 S.W.3d 222 (Tex. App. – Fort Worth 2005)

A police officer responded to an intoxicated driver call and saw a truck matching the vehicle's description. The truck left a parking lot at a high rate of speed and fishtailed at an intersection before turning onto another street. The truck drove across the front yard of a residence to avoid a roadblock. The truck then drove across a field before finally coming to a stop. The officer smelled alcohol on the 17-year-old driver's breath and noticed that his eyes were bloodshot and watery. The officer performed a horizontal gaze nystagmus test on the driver and observed four clues that suggested the driver was intoxicated. In addition, he found 11 cans of beer in the vehicle. The defendant was arrested for driving under the influence of alcohol (Article 106.041, Alcoholic Beverage Code), a Class C misdemeanor, prohibiting a minor with any detectable amount of alcohol from operating a motor vehicle. The defendant's driver's license was suspended pursuant to Section 524.012 of the Transportation Code. On appeal, defendant challenged the constitutionality of the statute, claiming that it was void for vagueness. The court of appeals held that the statute in question gave the driver fair notice of the type of conduct that would result in license suspension. The word "detectable" had a plain and ordinary meaning that

could be understood by a person of ordinary intelligence. Given the totality of the circumstances, the officer did not arbitrarily detect alcohol in the driver's system but articulated several factors indicating he had alcohol in his system, which were all also commonly cited in driving while intoxicated cases. The court of appeals affirmed the trial court's judgment.

B. During the "Taking" of a Juvenile Statement 16 Year-Old Murder Suspect Invoke is 5th Amendment Right?

In re H.V., 2005 Tex. App. LEXIS 2088 (Tex. App. – Fort Worth 2005)

Defendant juvenile was charged with murder. District court suppressed defendant's statement to police, finding that defendant had invoked his Fifth Amendment right to have counsel present. The juvenile court also suppressed defendant's gun as the fruit of his statement. The State appealed.

The State argued that the trial court was incorrect as a matter of law when it found that defendant unambiguously invoked his right to counsel during an interview with a municipal judge acting as a magistrate at a juvenile processing office. The court of appeals disagreed, finding that 16-year-old defendant invoked his 5th Amendment right to counsel with sufficient clarity, as interrogation should have ceased. Defendant asked to call his mother and wanted her to ask for an attorney. In response to a comment from the magistrate that he could request an attorney, he responded that he was only 16. His gun was also properly suppressed as the fruit of the subsequent improper police interrogation because all interrogation should have ceased prior to his statement regarding where he had hid the gun. Thus, the statement could not be other than the product of compulsion, subtle or otherwise; case law regarding "unwarned" statements did not apply.

X. Tow Hearings

Is There Any Point in Even Having a Tow Hearing?

AJ's Wrecker Service of Dallas v. Salazar, 165 S.W.3d 444 (Tex. App. – Dallas 2005)

Salazar was driving home from a doctor's appointment. She saw an elderly woman carrying groceries and offered to drive the woman home. When they got to the woman's apartment, Salazar parked her car, with the handicap placard properly displayed. Although Salazar did not park her car in a fire lane, it was not parked in a marked parking space. Salazar helped the woman carry her groceries into her apartment. Approximately twenty minutes later, Salazar left the apartment and discovered her car was gone.

AJ's Wrecker Service notified Salazar by mail that it had possession of her car. After several failed attempts to retrieve her car, Salazar went to court and requested a magistrate's tow hearing. The justice of the peace conducting the hearing determined that AJ's did not have probable cause to remove Salazar's car. AJ's defied two court orders. Finally, with the intervention and presence of a Dallas County Constable, Salazar obtained her car from AJ's. AJ's had possession of Salazar's car for approximately sixty days.

Salazar filed suit alleging causes of action for violations of the transportation code and city ordinances, negligence per se, promissory estoppel, negligent hiring, waiver, abuse of process, equitable estoppel, conversion, civil theft, and trespass to chattel.

The court of appeals held that all of Salazar's civil causes of action were pre-empted by the Interstate Commerce Commission Termination Act.

Note: In direct response to an Attorney General Opinion (No. GA-0316), in which the Arlington Municipal Court concluded that there was no probable cause to tow and that a tow hearing is not an appealable matter, the tow industry successfully lobbied the Legislature to eliminate the general authority of magistrates and municipal courts in cities with a population of 1.9 million

(i.e., Houston) to conduct tow hearings. Now such hearings can only occur in a justice court. In the event of an unfavorable ruling by the justice court, tow operators can appeal the courts decision without posting bond. While municipal judges, in their magistrate capacity (and the Houston Municipal Court), will no longer have the authority to conducting tow hearings, all municipal courts retain jurisdiction to hear the criminal offense of illegal towing (Section 684.085, Transportation Code). In fact, the Legislature raised the maximum fine from \$500 to \$1,500 per offense. City attorneys are reminded that in these cases, and all other cases, restitution is limited to either \$500 upon conviction (Article 45.041(b)(2) Code of Criminal Procedure) or an amount *not to exceed the fine assessed* in cases resulting in deferred disposition (Article 45.051(b)(2) Code of Criminal Procedure).

This is not the first time that municipal courts have been impacted by the Interstate Commerce Commission Termination Act (ICCTA). The City of San Antonio had one of its local towing ordinances pre-empted under the ICCTA in 2001 *See, Stuckey v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001). In 1999 the Legislature made it a criminal offense for a railway company to obstruct a railroad crossing (Section 471.007, Transportation Code). In the appeal of a civil law suit, the U.S. Court of Appeals for the Fifth Circuit concluded that the ICCTA expressly preempted Section 471.007 of the Transportation Code. *See Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001). Believing the statute to essentially be dead in the water, most local governments have stopped attempting to utilize Section 471.007. In June, the Office of the Attorney General in *Opinion No. GA-0331* reiterated what most of us already believed was settled in *Friberg*; specifically, Article 471.007 is pre-empted by federal law.

Could the criminal penalty for illegal towing be next on the pre-emption chopping block? No doubt that the attorneys for the tow operator will argue that such criminal laws should be deemed pre-empted by the ICCTA. In considering such arguments, city attorneys and municipal judges should keep in mind that in 2002 the U.S. Supreme Court ruled that the ICCTA does not bar a state from delegating to municipalities the authority to establish "safety regulations" to tow trucks. (See, *City of Columbus v. Ours Garage and Wrecker Service, Inc.* 122 S.Ct. 226 (2002). Hence, it appears that ICCTA is intended only to prohibit unauthorized economic regulation, not the passage of laws relating to the accepted use of local police powers.

XI. Procedural Law Issues

A. At Trial, Is the Defendant Entitled to Formal Notice that the State is Seeking an Affirmative Finding of Family Violence?

Thomas v. State, 150 S.W.3d 887 (Tex. App. – Dallas 2004)

Defendant argued that the trial court erred by entering an affirmative finding of family violence, as he was provided no notice that the State was seeking such a finding. The appellate court initially noted that the State did not attempt to prove that defendant had previously been convicted of an assault involving family violence, as the evidence before the trial court simply showed the single family-violence assault alleged in the information. The appellate court found that the State sufficiently notified defendant it intended to seek a family violence finding, because, in the information, the State alleged that defendant assaulted a family member; therefore, the trial court had no discretion in entering a family violence finding once it determined the offense involved family violence. The court of appeals concluded that, because defendant could not avoid the legal reality of his familial relationship with the victim, a more formal notice from the State would not have changed the outcome of his case.

B. Can a Defendant's Pleaing Guilty to Theft in Municipal Court Come Back to Haunt Them?

U.S. v. Lamm, 392 F.3d 130 (5th Cir. 2004)

Firearm possession defendant's prior Texas theft conviction, for shoplifting item valued less than \$50, was not sufficiently similar to insufficient funds check offense listed in Sentencing Guidelines as excludable when determining criminal history score, and thus was includable; although offenses were subject to similar punishment, theft offense involved heightened risk of physical confrontation and harm to others.

C. Was the Failure of the State to Prove Venue Harmless Error?

State v. Blankenship, 2005 Tex. App. LEXIS 5083 (Tex. App. – Austin 2005).

The State challenged the judgment of the County Court at Law No. 1 of Travis County, Texas, reversing defendant's judgments of conviction in the Austin Municipal Court, a court of record. The court of appeals initially held that it did not have jurisdiction to hear the appeal because it was not filed by the county attorney but rather by the city attorney with the county attorney's permission. The Texas Court of Criminal Appeals reversed holding the city's assertion in the notice of appeal was a written express personal authorization by the county attorney and found that the assertion simultaneously complied with Articles 44.01 (as to the notice of appeal) and Article 45.201(c) of the Code of Criminal Procedure (as to authorizing the city attorney to prosecute the appeal). The case was remanded to the court of appeals for consideration in light of the Court of Criminal Appeals decision.

Thirteen complaints were filed against defendant in the municipal court alleging violations of certain city ordinances, and each complaint alleged that the offense occurred in the territorial limits of the City of Austin as required by Article 45.019(c) of the Code of Criminal Procedure. Defendant was found guilty of five offenses of developing or changing the use of property without first obtaining a site plan approval and release by the City, and found guilty of three offenses of failing to observe a stop-work order posted at the site of the property involved.

The issue on appeal was the consequence of the failure of the prosecution to prove venue as laid under the particular circumstances of the cases. The court of appeals ruled that there was error in the failure to prove venue as laid, but the non-constitutional error was harmless pursuant to Texas Rule of Appellate Procedure 44.2(b) (defects, irregularity, or variance that does not affect substantial rights must be disregarded.). There was no showing that defendant was prevented from presenting a defense. The description placed the property outside the City limits but within the extraterritorial area of the City over which geographical area the municipal court had sole criminal jurisdiction to try violations of certain city ordinances. The judgments of the County Court at Law were reversed and the causes remanded to that court for consideration of Blankenship's other points of error.

XII. Pre-Trial Motions

A. Is a Pre-trial Motion to Suppress an Appropriate Vehicle to Challenge an Element of an Offense?

Wood v. State, 153 S.W.413 (Tex. Crim. App. 2005)

Defendant argued that the arresting police officer had no reasonable suspicion to detain him; therefore, his detention was illegal, and his arrest for evading arrest or detention (Sec. 38.04, Penal Code) should have been suppressed. The court of appeals reversed the trial court's ruling, stating that there were no specific, articulable facts leading to a reasonable suspicion on the part

of the officer that would have made the detention lawful. The State appealed, arguing that the court of appeals misapplied Texas law in failing to find that specific, articulable facts, coupled with the rational inferences from the facts, in light of the officer's knowledge, reasonably warranted the officer's detention of defendant for further investigation. The Texas Court of Criminal Appeals held that by asking for the trial judge to suppress the arrest, and the details of his flight and evasion of the detention by the officer, defendant was in effect asking the trial judge to rule on whether or not an offense had actually been committed. The Court further held that because the issue was improperly raised in a pre-trial motion to suppress, the court of appeals erred in reversing the trial court's ruling.

B. At Trial, If the Court Grants a Motion to Dismiss On Constitutional Grounds May the State Appeal?

State v. Stanley, 2005 Tex. App. LEXIS 5935 (Tex. App. – Waco 2005).

Following a bench trial, the trial court granted defendant's motion to dismiss the charge against her on the grounds that the municipal ordinance on which the charge was based is unconstitutional. The State appealed under Article 44.01 of the Code of Criminal Procedure. Defendant filed a motion to dismiss the appeal contending that the State has the right to appeal only the pretrial dismissal of an indictment, information, or complaint. The court of appeals granted the motion and dismissed the appeal holding that Article 44.01 does not allow the State to appeal the granting of a dismissal motion once the trial on the merits commences because jeopardy has attached.

C. Who has Jurisdiction to Hear State's Appeal of a Motion to Quash Granted in a Non-Record Trial Court?

State v. Alley, 158 S.W.3d 485 (Tex. Crim. App. 2005)

The complaints accused defendants of separate offenses of failure to stop at a stop sign. The court of appeals dismissed the State's appeal for lack of jurisdiction, finding that State should have brought its appeals to the county courts. In affirming the court of appeals, the Texas Court of Criminal Appeals held that Article 44.01(f) of the Code of Criminal Procedure spoke only to the precedence of appeals of which the court of appeals had jurisdiction. It could not be read to create jurisdiction or to assume the existence of a jurisdiction that was not elsewhere granted. Article 44.01(a) allowed the State to appeal certain orders. Articles 4.08 and 45.042 of the Code of Criminal Procedure provide that appeals from a justice court had to be taken to the county court.

D. Can a Motion to Quash be Successfully Raised in County Court after a Trial De Novo?

Casas v. State, 2004 Tex. App. LEXIS 9352 (Tex. App. Houston [1st Dist.] 2004)

In his sole issue on appeal, defendant argued that the county court erred in denying his motion to quash because neither the citation, nor the affidavit on the back of the citation, stated an offense. The notice of violation served as the charging instrument. Specifically, defendant contended that, because the word paraphernalia was misspelled as "pheraphalia" on the citation and improperly abbreviated as "phera" on the accompanying affidavit, the complaint did not state an offense for which he could prepare a defense. The court of appeals, citing Article 44.181 of the Code of Criminal Procedure, concluded that a county court conducting a *trial de novo* based on an appeal from a justice court or non-record municipal court could dismiss a cause because of a defect in the complaint only if the defendant objected to the defect before the trial began in the justice or municipal court. In this instance, the record did not reflect that defendant objected to the

complaint's defect until after the trial in the justice court had already concluded and the cause was on appeal in the county court. Accordingly, the county court did not abuse its discretion in denying the motion to quash.

XIII. Trial Issues

A. Did the Judge's Refusal to Recuse Deny Defendant the Right to Election of Punishment?

Roman v. State, 145 S.W.3d 316 (Tex. App. Houston [14th Dist.] 2004)

On appeal defendant challenged the denial of his motion to recuse the trial court judge. Defendant contended that because his motion to recuse was wrongly denied, he was forced to go to the jury for punishment rather than have the choice between the trial court judge and the jury. In affirming the denial of the recusal motion, the court of appeals held that the evidence presented showed that the judge conducted a fair and impartial trial and that he limited the range of punishment because of an opinion he formed based on the specific facts of defendant's case. The statements regarding punishment were not arbitrary. Nothing at the hearing on the recusal motion rebutted the presumption of a neutral and detached judge. The judge's comments represented opinions formed on the basis of facts occurring in the course of the current proceedings, or of prior proceedings, and were the type of opinions that case law had held nearly exempt from causing recusal. The judge's opinions were based on his knowledge of the case from having tried defendant's co-defendant, and he had no improper bias. Any alleged bias was not prejudicial in nature, nor did it deny defendant due process of law.

Note: Though municipal courts are criminal courts, remember that the recusal provisions contained in Rule 18 of the Rules of Civil Procedure govern all Texas trial courts.

B. Does the Excited Utterance Exception to the Hearsay Rule apply to Statements Conveyed by Translators?

Cassidy v. State, 149 S.W.3d 712 (Tex. App. – Austin 2004)

Defendant contended the trial court erroneously admitted double hearsay and, by so doing, violated his Sixth Amendment confrontation right. His point of error concerned the admission of the officer's testimony recounting the victim's statements at the hospital. Defendant asserted the testimony was double hearsay: first from the victim to the interpreter, and then from the interpreter to the officer. Defendant did not challenge the trial court's ruling that the victim's statements were excited utterances pursuant to Texas Rule of Evidence 803(2). He argued, however, that this exception applied only to the victim's statements to the interpreter, and the trial court erred by not requiring the State to demonstrate that a second exception applied to the interpreter's statements to the officer. Under the circumstances shown by the record, the trial court correctly treated the interpreter as a language conduit who did not add an additional level of hearsay. The admission of the victim's excited utterances to the officer did not violate the Sixth Amendment. If the admission was error, it was harmless.

C. May an Attorney Waive a Defendant's Right to a Licensed Language Interpreter?

Fonseca v. State, 163 S.W.3d 98 (Tex. App. – Fort Worth 2005)

Although the defendant did not personally waive his right to an interpreter at the "plea docket," his attorney waived the right by stating that he could interpret. The rule that an attorney acts on behalf of the client was deemed applicable by the court of appeals.

Note: While the Court of Criminal Appeals denied the PDR on this case, it is surprising that the court of appeals seems to rest its reasoning on only two prior cases. One of the two decisions was overruled. The other decision is an unpublished opinion about the waiver of the right to a jury trial in municipal court.

D. May a Justice of the Peace establish a Standing Pool of Qualified Volunteers to serve for Jury Duty?

Opinion No. GA-0336 (6/28/05)

Chapter 62 of the Government Code provides broadly for summoning juries for trial in a justice court. Articles 45.027 and 45.028 of the Code of Criminal Procedure additionally provide for summoning a jury for a criminal trial in a justice court. For the trial of a criminal matter, a justice court may utilize the procedures in either chapter 62 of the Government Code or articles 45.027 and 45.028 of the Code of Criminal Procedure. While articles 45.027 and 45.028 do not prohibit utilizing a pool of volunteers for empaneling a venire, such a method must guard against a due process challenge that it systematically excludes a distinctive group in the community from the venire.

XIV. Judgments

Is an Irregularity in a Judgment Following a Trial De Novo From Municipal Court Correctable *Nunc Pro Tunc*?

Modica v. State, 151 S.W.3d 716 (Tex. App. - Beaumont 2004)

The alleged assault occurred while defendant was inspecting a cosmetology school for violations. Defendant was convicted of assault in the Beaumont Municipal Court and appealed. On trial de novo, in county court, defendant was once again convicted. On appeal to the court of appeals, defendant argued that the trial court erred by holding in its judgment that defendant was convicted of "City Appeal-Other," which is not an offense under Texas law. Therefore, the judgment was void, and defendant was entitled to appropriate relief.

The opinion of the court of appeals is a rare and refreshing review of the case law relating to judgments. In reforming the judgment of the trial court, substituting the properly-worded offense "assault" for the improperly worded term "city appeal - other" wherever necessary, the court affirmed stating that "a judgment is void only in very rare situations, usually due to a lack of jurisdiction." Examples of when a judgment of conviction for a crime is void are when (1) the document purporting to be a charging instrument (i.e. indictment, information, or complaint) does not satisfy the constitutional requisites of a charging instrument, thus the trial court has no jurisdiction over the defendant, (2) the trial court lacks subject matter jurisdiction over the offense charged, such as when a misdemeanor involving official misconduct is tried in a county court at law, (3) the record reflects that there is no evidence to support the conviction, or (4) an indigent defendant is required to face criminal trial proceedings without appointed counsel, when such has not been waived. "The written judgment is not itself the conviction but evidence, among other things, that a conviction has occurred. And while it is true that an appeal may not be taken until a written judgment has been entered, it is not the signing of the judgment that constitutes the "appealable event"; it is the pronouncement of sentence in open court that is the appealable event."

Note: This case also addressed the authority of someone to prosecute as an attorney pro tem. The trial court appointed a criminal district attorney pro tem to prosecute defendant, but the oath of office portion of the order did not appear to have been executed. The court of appeals held that Article 2.07(c) of the Code of Criminal Procedure was not the type of evidentiary or procedural

rule that belonged to an accused and that had to be protected unless expressly waived. Because defendant failed to complain in the trial court, the issue was not preserved for appellate review.

XV. *Pro Se* Issues

What are the Responsibilities of Pro Se Defendants on Appeal?

Gleason v Isbell, 145 S.W.3d 354 (Tex. App. Houston [14th Dist.] 2004)

In a nutshell, Michael Gleason is apparently not a big fan of the City of Pasadena. Subsequent to an unsatisfactory encounter with the city that included being prosecuted in municipal court, Mr. Gleason attempted to file a lawsuit against a wide range of city officials (including the municipal judge and city attorney) in their official and personal capacities. Subsequent to the district court granting summary judgment against Mr. Gleason he appealed. The opinion by the court of appeals is important, not in that it sets forth any new precedent, but in the way it illustrates that even appellate courts face the difficulties of adjudicating individuals appearing *pro se*. Excerpts of Gleason's rhetoric, reveal him to be disrespectful. The court's published decision reads, at times, like a warning to anyone who thinks that those who proceed without counsel are immune from discipline. To this end, it is evident why the court opted to publish this opinion.

XVI. Expunctions

A. Did the City have Standing to Oppose Employee's Expunction?

City of Fort Worth v. Tuckness, 165 S.W.3d 425 (Tex. App. – Fort Worth 2005)

After a misdemeanor assault charge against appellee, a Fort Worth police officer was dismissed in Parker county, he successfully petitioned to have the dismissed charge expunged. The officer then requested a hearing to recover back pay; his employer, appellant City of Fort Worth, moved to set aside the order of expunction because the city was entitled to notice of the officer's petition for expunction pursuant to Article 55.02, § 2(b)(8), (c) of the Code of Criminal Procedure. The court of appeals disagreed, finding that because the city was not a party to the expunction proceedings, was not bound by the expunction order's mandate to destroy records or to return them, and would not suffer, by virtue of the expunction order, any peculiar injury not suffered by the public generally, that the city lacked standing to challenge the order of expunction. The judgment was affirmed.

B. Was Evidence Sufficient to Grant Expunction Arising From Arrest for Misdemeanor Assault?

Collin County District Attorney's Office v. Dobson, 167 S.W.3d 625 (Tex. App. – Dallas 2005)

Defendant accused of misdemeanor assault was not entitled to expunction due to insufficiency of evidence. Defendant has not established that the alleged offense was outside of the two-year statute of limitations or that the charge against her was the product of mistake, false information, or lack of probable cause.

XVII. Mandamus of a Municipal Court

A. Does a Court of Appeals Have the Authority to Mandamus a Municipal Judge?

In re Chang, 2004 Tex. App. LEXIS 9945 (Tex. App. [Houston] 1st Dist 2004)

Applicant for writ of mandamus in court of appeals requested that the municipal judge be ordered to: “remove each defendant's case from the jury trial docket, provide each defendant with a copy of the complaint, and reschedule each case to a pre-trial hearing not less than seventeen (17) days to, at the very least, arraign each defendant and to allow each defendant to file pleadings and raise exceptions to the form or substance of the complaint; . . .” In dismissing the petition for lack of jurisdiction the court explained that its mandamus jurisdiction is governed by Section 22.221 of the Government Code and that Section 22.221 expressly limits the court or appeals mandamus jurisdiction to: (1) writs against a district court judge or county court judge in the court of appeals' district, and (2) all writs necessary to enforce the court of appeals' jurisdiction. As it was not asserted that issuance of the writ was necessary for the court of appeals to enforce its jurisdiction, the court ruled that it has no authority to issue a writ of mandamus against a municipal judge.

Note: The Houston Court of Appeals was not the only court or appeals to hear the exact same issue in the last three year. The same issue was considered by the Dallas Court of Appeals and the San Antonio Court of Appeals in unpublished decisions.

B. Does a District Court have the Authority to Mandamus a Municipal or Justice Court?

Thompson v. Velsquez, 155 S.W.3d 551(Tex. App. – San Antonio 2004)

Under Article V, Section 8 of the Texas Consitution, the district court has jurisdiction to hear an individual's mandamus petition filed against justices of the peace concerning municipal misdemeanor convictions. The court of appeals ruled that the district court erred in dismissing the petition. It remanded the case for further consideration consistant with its ruling.

Note: Not to take issue with the holding that a district court has jurisdiction to mandamus a justice or municipal court, but the following excerpt from the decision requires clarification that is unfortunately not provided in the opinion: “Thompson filed a petition for writ of mandamus in district court seeking mandamus relief in relation to two municipal court misdemeanor convictions. The *justices of the peace in the two municipal courts* filed an answer and a motion to dismiss. After a hearing, the trial court dismissed the petition finding that it had no jurisdiction.”(Emphasis added) *Thompson* at 552.

XVIII. Court Administration

A. Did a Former Sanitarian Alleging a “Ticket Fixing” Scheme by the City Health Department, Warrant Whistleblower Protection?

City of Houston v. Cotton, 2005 Tex. App. LEXIS 5831 (Tex. App. [Houston] 14th Dist. 2005)

Cotton alleged the City of Houston terminated her employment as a sanitarian in retaliation for her having reported violations of law by two of her superiors. She had written citations involving a food store and a restaurant. She was later told that the citations would be destroyed. On appeal, the City alleged that the evidence was insufficient. Indeed, the court of appeals agreed that the employee failed to show that destroying the tickets was a violation of law (for reasons set forth below). Further, the facts did not show that the employee's managers were accepting bribes.

Also, reporting certain behaviors of the restaurant owners was not the same as reporting incriminating behavior on the part of the employee's manager. The court of appeals reversed the judgment and rendered judgment that the employee takes nothing from the City.

Note: TMCEC is aware of at least three instances in the last year where individuals directly or indirectly associated with municipal courts have been investigated or formally accused of tampering with a governmental document. In light of this troubling trend, local governmental employees, public officials, and legal advisors are urged to not misconstrue the court's opinion in *Cotton*. First, this is not a criminal case; it is an employment law case. Nevertheless, the allegations addressed in the opinion are relevant to municipal court operations. By no means should the holding of *Cotton* be construed as authorizing, excusing, or justifying the destruction of citations. The court of appeals makes it clear that its decision in the civil matter pivoted on the fact that the former employee in claiming whistleblower protection failed to provide substantial proof that a violation of the law occurred (and that subsequently she was terminated for reporting it). The court further explains that if Cotton's supervisor destroyed, tore up, or threw away a citation before it was in the municipal court system, there would have been no violation of the law. If, however, the supervisor or any other person destroyed a citation once it was "in the system," there would have been a violation of the law. One witness testified, and the court did not disagree, that a document was officially designated a "government document" once "it goes through the system." Accordingly, under the unambiguous language of Section 37.10 of the Penal Code (tampering with a governmental document), if managers in the City of Houston Health Department, in the course of their official duties, marked citations as void or decided not to pursue them further, without destroying, concealing, removing, or otherwise impairing the verity, legibility, or availability of the citations, their conduct would not violate Section 37.10.

B. May a County Commissioners Court compel a Justice of the Peace to use a Vendor under Contract with the County to Collect Court Fines, Fees, and Costs?

Opinion No. *GA-0313* (3/21/05)

A defendant in a matter described in section 706.002 of the Transportation Code who has failed to pay court-ordered fines or costs must pay both (1) a 30% fee if the county has contracted with a collection agent under Code of Criminal Procedure article 103.0031(g) and (2) a \$30 fee if the county has entered a contract under Transportation Code section 706.002.

Under articles 103.003 and 103.0031 of the Code of Criminal Procedure, a county commissioners court may contract with a private collection agent to collect delinquent fines and court costs that were imposed by a justice court. The commissioners court may not thereby abrogate the justice court's authority to collect or otherwise dispose of the fines and costs, however.

Whether a collection agent may collect a 30% collection fee under article 103.0031(b) of the Code of Criminal Procedure on the \$30 administrative fee levied under section 706.006 of the Transportation Code will depend on whether the \$30 fee is 60 days past due.

C. What is the Authority of a Court without General Civil Jurisdiction to Entertain a Petition for an Order of Nondisclosure?

Opinion No. *GA-0330* (6/10/05)

Only a court that has the authority to place a person on deferred adjudication community supervision has jurisdiction to entertain the person's petition for nondisclosure under section 411.081(d).

D. Is Frustration with the Escalating Rate of Court Costs, Limited Only to Judges in Texas?

Greater New Orleans Expressway Commision v. Oliver, 892 So.2d 570 (La. 2005)

Parish judges who refused to collect additional five dollar courts cost relating to motor vehicle violations committed on the Huey P. Long Bridge, or the Lake Pontchartrain Causeway Bridge, or on approaches to and from the bridges were deemed to have no standing to challenge the constitutionality of the court cost.

XIX. Dual Office Holding

A. Is a Provision of a Home-Rule City Charter Regulating Dual Office Holding Inconsistent with the Texas Constitution to the Extent it Prohibits a Municipal Judge from Serving as Justice of the Peace?

Opinion No. *GA-0362* (10/3/05)

A provision of a home-rule city charter regulating dual office holding that prohibits a municipal judge from serving as justice of the peace is not inconsistent with article XVI, section 40 of the Texas Constitution.

B. May a County Commissioner Simultaneously hold the Position of Municipal Judge of a City Located within his County?

Opinion No. *GA-0348* (8/19/05)

Neither Article XVI, section 40, nor Article II, section 1 of the Texas Constitution prohibits a county commissioner from simultaneously serving as a municipal judge for a municipality within the county. Similarly, the common-law doctrine of incompatibility does not bar the contemplated dual service. While Canons 5(3) and 4H of the State Code of Judicial Conduct do not prevent a municipal judge from holding the office of county commissioner, other canons might, and the question as to whether other canons preclude such service is a matter for the State Commission on Judicial Conduct.



LEXSEE

IN THE MATTER OF H.V.

NO. 2-04-029-CV

COURT OF APPEALS OF TEXAS, SECOND DISTRICT, FORT WORTH

2005 Tex. App. LEXIS 2088

March 17, 2005, Delivered

PRIOR HISTORY: [*1] FROM THE 323RD DISTRICT COURT OF TARRANT COUNTY.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant juvenile was charged with murder. The 323rd District Court of Tarrant County, Texas, suppressed defendant's statement to police, finding that defendant had invoked his Fifth Amendment right to have counsel present. The juvenile court also suppressed defendant's gun as the fruit of his statement. The State appealed.

OVERVIEW: The State argued that the trial court was incorrect as a matter of law when it found that defendant unambiguously invoked his right to counsel during an interview with a judge magistrate at a juvenile processing office. The court disagreed, finding that defendant's statement to police was properly suppressed because he had articulated with sufficient clarity his desire to have counsel present. A reasonable magistrate judge would have understood the 16-year-old defendant's request to call his mother to be an unambiguous request for an attorney when that request was followed by his statement that he wanted his mother to ask for an attorney and by his exclamation, in response to the magistrate judge's comment that he could ask for an attorney, that he was only 16. His gun was also properly suppressed as the fruit of the subsequent improper police interrogation because all interrogation should have ceased prior to his statement regarding where he had hid the gun. Thus, the statement could not be other than the product of compulsion, subtle or otherwise; case law regarding "unwarned" statements did not apply.

OUTCOME: The court affirmed the order suppressing the statement and the gun obtained as a result of the statement.

CORE TERMS: juvenile, gun, written statement, right to counsel, causal connection, interrogation, Fifth Amendment, invocation, detective, motion to suppress, warning, suppressed, fruit, totality, suppression, patrol car, unambiguous, confession, minutes, custodial interrogation, suppress, taint, invoked, talk, court of appeals, processing, attenuation, credibility, arraignment, firearm

LexisNexis(R) Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence

[HN1] The court reviews a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. In reviewing the trial court's decision, the court does not engage in its own factual review. At a suppression hearing, the trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. Therefore, the court gives almost total deference to the trial court's rulings on (1) questions of historical fact and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. However, the court reviews de novo a trial court's rulings on mixed questions of law and fact if they do not turn on the credibility and demeanor of witnesses.

Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

Criminal Law & Procedure > Juvenile Offenders > Statements

[HN2] Prior to a custodial interrogation, a suspect must be advised that he has a right to consult with an attorney.

Interrogation must cease immediately if the suspect states that he wants an attorney. A request for counsel must be unambiguous, meaning the suspect must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. This standard, applied to adult suspects, also applies to juvenile suspects.

Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver

[HN3] As explained in *Miranda*, a suspect may waive his rights, including his right to counsel. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. The question whether the accused waived his rights is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in *Miranda*. Thus, the determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation to ascertain whether the accused in fact knowingly and voluntarily decided to forego his right to remain silent and to have the assistance of counsel.

Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver

Criminal Law & Procedure > Juvenile Offenders > Statements

[HN4] The United States Supreme Court, in holding that the totality-of-the-circumstances approach is adequate to determine whether there has been a waiver of *Miranda* rights even when interrogation of juveniles is involved, has explained: There is no reason to assume that such courts--especially juvenile courts, with their special expertise in this area--will be unable to apply the totality-of-the-circumstances analysis so as to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved. Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination. At the same time, that approach refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who

knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation. This test includes an evaluation of the juvenile's age, experience, education, background, and intelligence.

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

[HN5] The rule in *Miranda* is based on the critical position lawyers occupy in our legal system because of a lawyer's unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of a lawyer's special ability to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege.

Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence

Criminal Law & Procedure > Witnesses > Credibility

[HN6] At a hearing on a motion to suppress evidence, the trial court is the sole judge of the credibility of the witnesses and the weight of their testimony.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Constitutional Right

[HN7] The Sixth Amendment right to counsel does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial proceedings against the defendant.

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

[HN8] Once an accused in custody has requested the assistance of an attorney, officers must terminate all interrogation until counsel is made available or the accused voluntarily reinitiates communication. An accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease. The presence of counsel insures the process of police interrogation conforms to the dictates of the Fifth Amendment privilege by insuring that an accused's statements made in a government-established atmosphere are not the product of compulsion. Any statement taken after a person invokes his Fifth Amendment privilege cannot be other than the product of compulsion, subtle or otherwise.

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule

[HN9] U.S. Supreme Court case law articulates the need for close fit between Fifth Amendment privilege and exclusionary rule implemented to protect it and recog-

nizes that a strong deterrence-based argument exists for exclusion of fruits obtained through a violation of constitutional rights.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule Exceptions > Inevitable Discovery
[HN10] Texas does not recognize the inevitable discovery doctrine.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule
[HN11] Under Tex. Fam. Code Ann. § 54.03(e) (Supp. 2004-05), evidence illegally seized or obtained is inadmissible in an adjudication hearing.

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For APPELLEE: M. Shawn Matlock, LANDRITH & KULESZ, L.L.P., Arlington, TX.

JUDGES: PANEL B. HOLMAN, WALKER, and MCCOY, JJ. HOLMAN, J. filed a dissenting opinion.

OPINIONBY: SUE WALKER

OPINION:

I. INTRODUCTION

This is an interlocutory appeal by the State from the juvenile court's order granting a motion to suppress a confession and a gun obtained as a result of that confession. n1 In three points, the State contends that (1) Appellee H.V.'s second written statement should not have been suppressed because H.V. did not make an unequivocal request for counsel, (2) there was no justification for suppression of the firearm as alleged "fruit" of H.V.'s second written statement, and (3) section 52.02 of the Texas Family Code did not provide a basis to suppress either H.V.'s second written statement or the fruit of that statement. We will affirm.

n1 H.V. also requested that the trial court suppress his first written statement given on the morning of September 12, 2003, all evidence listed in the search warrant return (i.e., swabs, carpet, couch sample, carpet tack, shower curtain and rod, door handle, spray bottle, rag, t-shirt, towels, lint from dryer, shorts, briefs, plastic cover, cell phone, carpet sample from 1999 Honda Accord, seat sample from 1999 Honda

Accord, camera from 1999 Honda Accord, 2 HP computers, blue trash bin, and brown trash bin), any evidence seized from his computer pursuant to the search warrant, and his spontaneous statements made while under arrest the afternoon of September 12, 2003. The trial court denied H.V.'s motion to suppress his first written statement, the evidence seized pursuant to the search warrants, the spontaneous statements H.V. made at the patrol car, and any statement H.V. made without being warned of his rights under the Vienna Convention. These rulings are not at issue here.

[*2]

II. FACTUAL AND PROCEDURAL BACKGROUND

On September 10, 2003, police began investigating the death of Daniel Oltmanns, a North Crowley High School student, whose body was found at a construction site. Daniel's wounds revealed that he had been shot in the head with a small caliber gun.

The next day, police and school administrators began interviewing students at North Crowley High School about the incident. A student at another high school notified the police that H.V. had purchased a gun a few days before the victim was shot. n2 On September 12, 2003, an officer questioned H.V. at the high school, and he stated that he thought that Daniel might have owed somebody money for drugs and that this debt may have caused his death.

n2 During the week following the initial investigation, the police spoke to witnesses who saw H.V. purchase the gun.

Detective Cheryl Johnson said that she wanted to take H.V. from school to the Youth Division and question him, and he agreed to go. Upon arrival, Municipal Judge [*3] Alicia Johnson read H.V. the *Miranda* n3 warnings. H.V.'s only concern was that his parents did not know where he was, so Detective Johnson made an effort to contact H.V.'s parents. Detective Johnson interviewed H.V. regarding the gun or his knowledge of the gun. H.V. admitted having bought a gun but said that he had returned it to the seller before Daniel's body was found. Detective Johnson did not believe H.V.'s statement and suspected that the gun was at H.V.'s house. After H.V. and Judge Johnson signed H.V.'s statement, Detective Johnson took H.V. back to North Crowley High School and then drove to H.V.'s house, where she had requested that Officer Petrovic meet her. n4

n3 *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

n4 Detective Johnson requested Officer Petrovic's presence because she knew that H.V. had moved to the United States from Bosnia when he was in the fifth grade and suspected that she might need a translator when speaking with H.V.'s parents.

[*4]

By the time the police arrived at H.V.'s house, H.V. was home from school, and H.V.'s father was home also. n5 Police asked for consent to search the home. Officer Petrovic translated for Detective Johnson as she introduced herself to H.V.'s father, explained that she was investigating the murder of Daniel Oltmanns, stated that officers had spoken with H.V. that morning and that he admitted to having bought a weapon, and said that she would like to search the house for the weapon. H.V.'s father initially gave his consent but then spoke to his wife by phone and withdrew his permission to search the house. The police secured the residence while Detective Johnson went to obtain a search warrant.

n5 H.V. made a phone call after Detective Johnson returned him to the school, and then he left campus.

The officers securing the house told H.V. and his father that they could not reenter the house. Despite this instruction, H.V. and his father tried a couple of times to gain access to the house but then left in a pickup [*5] truck. Later, an off-duty officer, who lived near H.V., spotted H.V. jumping over H.V.'s backyard fence. H.V. was carrying a rolled-up piece of carpet, and the off-duty officer told H.V. to drop the carpet and return to the front yard. n6 H.V. complied. The officers securing the house noticed that the carpet appeared to have blood on it. They arrested H.V. for tampering with evidence, handcuffing him and placing him in the back of a patrol unit. H.V. spent approximately ninety minutes in the patrol car before he arrived at the juvenile processing office downtown. Before being transported to the juvenile processing office, H.V. made a spontaneous statement: "I didn't kill anyone. He shot himself with my gun." n7

n6 Officers did not see H.V. enter the house; the off-duty officer spotted him as he was leaving the residence.

n7 The trial court did not suppress this statement.

After H.V. arrived at the juvenile processing office, he was interviewed by Municipal Judge Bendslev around 7:30 p.m. and was given [*6] *Miranda* warnings. Judge Bendslev appeared as a witness at the hearing on H.V.'s motion to suppress. She testified as follows:

Q. Okay, and at this point, you read him his rights: He had the right to remain silent, right to an attorney, okay?

A. (Nods affirmatively).

Q. And it's at this point when he said he didn't know; he would have to call his mom?

....

A. He said, *I want to call my mother.*

Q. Okay.

A. *I want her to ask for an attorney.*

Q. Okay, and you said that he could not call his mother?

A. I said at that point I was in the process of giving him his magistrate warnings, and that calling his mother was not an option at that time.

Q. Okay, and you again advised him that he could ask for an attorney, make a statement, or not make a statement?

A. That's correct.

Q. And it's at this point that he said, but I'm only 16?

A. That's correct.

Q. As in, I'm only 16; I don't know how to contact an attorney?

A. No, I think he -- I'm not sure what he meant when he said that. I mean, my impression was that he thought because of his age that he wasn't allowed to ask for an attorney, and I indicated to him that that was not a problem, that he was 16 and he [*7] could ask for an attorney if he wanted to ask for an attorney.

Q. And is it possible that he simply did not know the manner in which one goes about contacting an attorney?

A. It's possible. [Emphasis added.]

Judge Bendslev testified that, after H.V. said he wanted to talk to his mother; he wanted her to ask for an attorney,

I told him, we also had a brief conversation, he asked, well, I explained to him that if he chose not to make a statement at that time, that was fine, that he was currently being held in custody for tampering with physical evidence, and that he was being under investigation for murder, and that if he wanted to speak to his mother, that he would be taken back down to the Juvenile facility at that time. I said, I don't know what timeframe would be involved as far as your being able to see your mother.

Thereafter, H.V. agreed to make a statement, and Detective Carroll sat down to talk with H.V. about Daniel's death. H.V. inquired about the "worst-case scenario" of what could happen to him, and Detective Carroll said that was for the court to decide. H.V. then gave his version of the events surrounding Daniel's death, stating that it was an accident and [*8] that Daniel had shot himself. H.V. drew a diagram of where he had disposed of the gun, and police subsequently located it. After H.V. signed his statement, along with the judge, police secured a warrant to arrest him for murder.

Based on the above testimony, the trial court made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On September 12, 2003, Fort Worth Police officers attempted to secure a search warrant for the Respondent's residence. During that time, the Respondent and his father were advised not to re-enter the residence pending the search. Respondent was arrested after exiting his residence with a rug.

2. Respondent was placed in the back of a patrol car for approximately one hour. He was later taken out to remove his handcuffs. The Respondent was then placed back into the patrol car for approximately another thirty minutes before being transported to the Fort Worth Police Department to be interviewed by Detective Carroll. At no point while Respondent was in the patrol car was any attempt made by Fort Worth Police to contact Respondent's parents as required by Texas Family Code Section 52.02.

3. Upon arrival, Fort Worth Magistrate [*9] Judge Gabrielle Bendslev interviewed the Respondent, and advised him of the warning required by Texas Family Code Section 51.095.

4. In response to questioning by Judge Bendslev regarding an attorney, the Respondent advised that he was only sixteen, that he did not know how to obtain an attorney, and that he wanted to contact his mother because he "wanted his mother to ask for an attorney."

5. Judge Bendslev advised the Respondent that he was not entitled to contact his mother at that time.

6. Following this, Respondent indicated that he would speak with police.

7. Respondent made a written statement, Exhibit 4, that among other things, indicated the location of the firearm involved in the death of Daniel Oltmanns. The police were able to locate the weapon.

CONCLUSIONS OF LAW

....

3. *The Respondent's request to speak to his mother was an unambiguous request for counsel.*

4. *Because of the foregoing conclusions of law, and considering the totality of the circumstances, the statement made by Respondent, Exhibit 4, following his arrest was obtained improperly and is inadmissible in trial.*

5. The firearm recovered by the Fort Worth Police Department was [*10] only obtained as a result of improper questioning of Respondent, and therefore, is a "fruit of the poisonous tree" and is likewise inadmissible. [Emphasis added.]

III. INVOCATION OF RIGHT TO COUNSEL

In its first point, the State contends that the trial court erred by concluding that H.V.'s comments to Judge Bendslev constituted an unequivocal invocation of counsel. Specifically, the State argues that the trial court misapplied the law to the facts when it suppressed H.V.'s second written statement because its conclusion--that

H.V. unambiguously invoked his right to counsel--is incorrect as a matter of law. H.V. responds that the trial court properly concluded that he made an unambiguous request for counsel, which should have ended the interview, when H.V. requested to speak to his mother so that she could ask for an attorney.

A. Standard of Review for Motion to Suppress

[HN1] We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). In reviewing the trial court's [*11] decision, we do not engage in our own factual review. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Best v. State*, 118 S.W.3d 857, 861 (Tex. App.--Fort Worth 2003, no pet.). At a suppression hearing, the trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Ross v. State*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). Therefore, we give almost total deference to the trial court's rulings on (1) questions of historical fact and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Johnson v. State*, 68 S.W.3d 644, 652-53 (Tex. Crim. App. 2002); *Best*, 118 S.W.3d at 861-62. However, we review de novo a trial court's rulings on mixed questions of law and fact if they do not turn on the credibility and demeanor of witnesses. *Johnson*, 68 S.W.3d at 652-53.

B. Law Regarding Unambiguous Request for Counsel

[HN2] Prior to a custodial interrogation, a suspect must be advised that he has a right to consult with an attorney. *Miranda*, 384 U.S. at 467-68, 86 S. Ct. at 1624-25. [*12] Interrogation must cease immediately if the suspect states that he wants an attorney. *Id.* at 474, 86 S. Ct. at 1628; see also *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981); *McCarthy v. State*, 65 S.W.3d 47, 51 (Tex. Crim. App. 2001), cert. denied, 536 U.S. 972, 153 L. Ed. 2d 862, 122 S. Ct. 2693 (2002); *Dinkins v. State*, 894 S.W.2d 330, 350 (Tex. Crim. App. 1995), cert. denied, 516 U.S. 832, 133 L. Ed. 2d 59, 116 S. Ct. 106 (1995). A request for counsel must be unambiguous, meaning the suspect must "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355, 129 L. Ed. 2d 362 (1994). This standard, applied to adult suspects, also applies to juvenile suspects. *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 2572, 61 L. Ed. 2d 197 (1979).

[HN3] As explained in *Miranda*, a suspect may waive his rights, including his right to counsel. 384 U.S. at 467-68, 86 S. Ct. at 1624-25. [*13] But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. *Id.* at 475, 86 S. Ct. at 1628. Presuming waiver from a silent record is impermissible. *Id.* The record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer. *Id.* Anything less is not waiver. *Id.* The question whether the accused waived his rights is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. *Fare*, 442 U.S. at 724-25, 99 S. Ct. at 2571-72. Thus, the determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation to ascertain whether the accused in fact knowingly and voluntarily decided to forego his right to remain silent and to have the assistance of counsel. *Id.* (citing *Miranda*, 384 U.S. at 475-77, 86 S. Ct. at 1628-29); [*14] see also *Lucas v. State*, 791 S.W.2d 35, 45-46 (Tex. Crim. App. 1989) (holding court must look at totality of circumstances surrounding the interrogation and the alleged invocation of right to counsel to determine whether right to counsel was invoked).

[HN4] The United States Supreme Court, in holding that the totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even when interrogation of juveniles is involved, explained,

There is no reason to assume that such courts--especially juvenile courts, with their special expertise in this area--will be unable to apply the totality-of-the-circumstances analysis so as to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved. *Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination.* At the same time, that approach refrains from imposing [*15] rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior re-

cord who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation.

Fare, 442 U.S. at 725-26, 99 S. Ct. at 2572 (emphasis added). This test includes an evaluation of the juvenile's age, experience, education, background, and intelligence. *Id.* at 725, 99 S. Ct. at 2572; *In re R.D.*, 627 S.W.2d 803, 806-07 (Tex. App.--Tyler 1982, no writ).

C. Totality of the Circumstances

Here, the trial court heard live testimony from seven witnesses, and H.V. was present throughout the hearing, allowing the trial court to view his demeanor. The trial court found that before police transported H.V. to the police department where he made his second statement, he was detained for approximately one hour and thirty minutes in the back of a patrol car and was handcuffed for the majority of that time. H.V. was arrested and placed in the patrol car at approximately 4:30 p.m. At approximately 7:30 p.m., Judge Bendslev arrived to provide warnings to H.V., and she spent approximately ten [*16] minutes with him before she turned him over to police for interrogation. During H.V.'s ten minutes with Judge Bendslev, he stated that he wanted to talk to his mother; he wanted her to ask for an attorney; he was only sixteen. Judge Bendslev did not inform police that H.V. had asked to speak with his mother. She told police that "she did advise [H.V.] of his rights at that point, he had no questions, and he was agreeing to talk with [officers] at that point."

Thereafter, police began questioning H.V. Police spoke to H.V. "for probably over an hour, 45 minutes to an hour, before the statement was actually taken." Detective Carroll testified, "We talked about things such as soccer [and] the number of languages he spoke." At approximately 9:50 p.m., Detective Carroll began typing H.V.'s statement, and he finished at 10:35 p.m. Judge Bendslev reviewed the statement with H.V. at approximately 11:00 p.m.

The totality of the circumstances surrounding the interrogation reflects that H.V. was a sixteen-year-old junior in high school. H.V. is from Bosnia; he had lived in the United States fewer than six years when he was arrested. There is no evidence that H.V. had been in trouble before [*17] or had any prior juvenile record that would have familiarized him with the criminal justice system. n8 H.V. was in custody for more than four hours before he made the statement, was handcuffed for one hour, and had no prior juvenile record. During the ten minutes that he received warnings from Judge Bendslev, he specifically asked to talk with his mother and said he wanted her to ask for an attorney. Judge Bendslev told

him that he could not talk to his mother; if he did not want to talk to police, he would be returned to the juvenile facility, and she did not know what the timeframe was for H.V. to be able to speak to his mother. When Judge Bendslev tried to explain to H.V. that he himself could ask for an attorney, he said, "But I am only sixteen," clearly indicating that he did not understand how a sixteen-year-old person could ask for and go about contacting an attorney. n9 Judge Bendslev did not testify that H.V. affirmatively indicated that he did not want an attorney. Nor did she indicate that H.V. affirmatively stated that he wanted to talk to police despite his right to an attorney. *Cf. Dewberry v. State*, 4 S.W.3d 735, 747 (Tex. Crim. App. 1999) (holding trial [*18] court properly denied motion to suppress confession when defendant was advised of right to counsel and responded by stating he had not "done anything wrong. I don't need a lawyer."), *cert. denied*, 529 U.S. 1131, 146 L. Ed. 2d 958, 120 S. Ct. 2008 (2000). Police chatted with H.V. for forty-five minutes to an hour before moving to the issue of the disappearance of Daniel Olmanns.

n8 The State points to H.V.'s initial contact with the magistrate judge on the morning of September 12, 2003 to show that he was familiar with the magistrate warning process. The trial court as sole trier of the facts and judge of the credibility of the witnesses, however, was free to determine the weight to be accorded this fact in light of the totality of the circumstances. *See Ross*, 32 S.W.3d at 855.

n9 The trial court heard the witnesses, including Judge Bendslev, testify and the trial court interpreted H.V.'s statement that he was only sixteen as meaning, "that he did not know how to ask for an attorney." *See Finding of Fact Number 4.*

[*19]

The record demonstrates that H.V. articulated his desire to have counsel present sufficiently clearly that a reasonable magistrate judge in the circumstances would understand H.V.'s request to call his mother to be an unambiguous request for an attorney when such request was followed by his statement that he wanted his mother to ask for an attorney and his exclamation that he was only sixteen in response to Judge Bendslev's comment that he could ask for an attorney. *See Davis*, 512 U.S. at 459, 114 S. Ct. at 2355. This is not a situation in which the juvenile requested only to speak with his mother. *Compare R.D.*, 627 S.W.2d at 806-07 (applying totality-of-circumstances test to hold that in light of defendant's juvenile record and experience on probation, psycholo-

gist's report indicating defendant was functioning in average cognitive range, and lack of evidence juvenile was worn down by improper interrogation tactics or lengthy questions, juvenile's statement that "he wanted to talk to his mother" standing alone was not invocation of right to counsel). The undisputed evidence establishes that H.V. said, "I want to call my mother. I want her to ask for [*20] an attorney." When H.V. was told that he could ask for an attorney, he said, "But I am only sixteen." Consequently, this is more than a situation in which the defendant, with regard to hiring an attorney, equivocally says, "I want to talk to my mother *about whether to hire* an attorney"; this is a situation in which H.V. unequivocally indicated that he wanted an attorney--he wanted to call his mother; he wanted her to ask for an attorney. *Accord Lored v. State*, 130 S.W.3d 275, 284 (Tex. App.--Houston [14th Dist.] 2004, pet. ref'd) (holding appellant's question of whether he could ask for a lawyer, followed by a police officer's comment that he could and that if he did the interrogation would cease, did not constitute an unambiguous invocation of the right to counsel when appellant thereafter continued to speak with the officer).

Moreover, the totality of the circumstances surrounding the interrogation supports the trial court's determination that H.V. invoked his right to counsel. The facts at bar are the type of facts contemplated by the United States Supreme Court in *Fare*. 442 U.S. at 724-25, 99 S. Ct. at 2571-72. Here, H.V.'s age and [*21] lack of experience indicate that his request to call his mother, coupled with his statement that he wanted her to ask for an attorney and his exclamation that he was only sixteen, was in fact an invocation of his right to counsel, and the totality-of-the-circumstances approach allows the juvenile court the necessary flexibility to take this into account in making a waiver determination. *See id.*

The cases relied upon by the State are distinguishable. The State cites *State v. Hyatt*, 355 N.C. 642, 566 S.E.2d 61 (N.C. 2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823, 123 S. Ct. 916 (2003). But in *Hyatt*, evidence at the suppression hearing conclusively established that the defendant "whispered" to his father that he wanted his father to get an attorney for him. *Id.* at 70-71. In *Hyatt*, both officers testified that they did not hear the defendant ask his father to obtain an attorney, and the trial court made a specific finding of fact that "neither Agent Shook nor Detective Benjamin heard defendant's alleged invocation of his right to counsel." *Id.* Here, there is no question that Judge Bendslev heard H.V. state that he wanted to call his mother, [*22] he wanted her to ask for a lawyer, he was only sixteen.

The State also relies upon *Fare*. 442 U.S. at 719-20, 99 S. Ct. at 2569. But in *Fare*, the juvenile did not state

that he wanted to call his mother because he wanted her to ask for a lawyer; the juvenile said he wanted to call his probation officer. *Id.* The United States Supreme Court held that [HN5] the rule in *Miranda* is based on the critical position lawyers occupy in our legal system because of a lawyer's unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. *Id.* Because of a lawyer's special ability to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." *Id.* (quoting *Miranda*, 384 U.S. at 469, 86 S. Ct. at 1625). Here, H.V. specifically indicated that he wanted to talk to his mother; he wanted her to ask for a lawyer. Through this request, H.V. sought a lawyer's unique ability and assistance, not simply the assistance of his mother or a probation officer. [*23] The State also cites *Flamer v. Delaware*, 68 F.3d 710, 725 (3d Cir. 1995), *cert. denied*, 516 U.S. 1088, 133 L. Ed. 2d 754, 116 S. Ct. 807 (1996). *Flamer* involved a twenty-five-year-old adult suspect. *Id.* at 719. At his arraignment hearing, Flamer asked permission to call his mother "to inquire about bail and possible representation by counsel." *Id.* at 725. The Third Circuit held that "a request for an attorney at arraignment is, in itself, insufficient to invoke the Fifth Amendment right to counsel at subsequent custodial interrogation." *Id.* at 726. Here, H.V. did not request an attorney at arraignment; he indicated he wanted his mother to ask for an attorney prior to custodial interrogation.

Because [HN6] the trial court is the sole judge of the credibility of the witnesses and the weight of their testimony, we hold that the trial court's findings and conclusions are supported by the record. *Ross*, 32 S.W.3d at 855. Viewing the totality of the circumstances, we hold that the trial court did not abuse its discretion in suppressing H.V.'s second written statement when it properly determined that H.V. [*24] 's request to talk to his mother because he wanted her to hire an attorney was a request for counsel. n10 *Compare R.D.*, 627 S.W.2d at 805-07 (applying totality of the circumstances and holding that bare request to talk to mother, without more, was not request for counsel). We overrule the State's first point.

n10 The dissent, in our view, reweighs the testimony and evidence to support suppressing H.V.'s second statement instead of giving deference to the historical facts set forth in the trial court's findings of fact, including finding of fact number four.

IV. SUPPRESSION OF WEAPON

In its second point, the State argues that even if H.V.'s second written statement is suppressed, the trial court erred by suppressing the firearm as the alleged "fruit" of H.V.'s second written statement. H.V. responds that the violation of his Fifth Amendment right to counsel mandates the suppression of not only his second statement but also the derivative evidence obtained from that statement. n11 [*25]

n11 [HN7] The Sixth Amendment right to counsel does not attach until a prosecution is commenced, that is, "at or after the initiation of adversary judicial proceedings against the defendant." *Green v. State*, 934 S.W.2d 92, 97 (Tex. Crim. App. 1996) (quoting *United States v. Gouveia*, 467 U.S. 180, 187, 104 S. Ct. 2292, 2297, 81 L. Ed. 2d 146 (1984)), *cert. denied*, 520 U.S. 1200, 137 L. Ed. 2d 707, 117 S. Ct. 1561 (1997). In this case, no charges had been brought against H.V. prior to the custodial interrogation at issue. Accordingly, we analyze the issue under the Fifth Amendment.

In his second statement, which the trial court suppressed, H.V. explained that he "threw the gun in the gutter close to [his] house." n12 At the suppression hearing, Detective Carroll indicated that, as a result of H.V.'s second statement, police located the gun. During Detective Carroll's questioning, he said that H.V. told him that he took the gun and placed it in a sewer near his house, that H.V. drew a diagram of the gun's [*26] location, and that police found the gun.

n12 In H.V.'s first statement, which was not suppressed, he admitted purchasing a gun from a friend and identified the individuals present when he purchased it as well as the individuals to whom he subsequently showed the gun. In this first statement, H.V. claimed that he returned the gun to the seller because he decided he did not want it.

[HN8] Once an accused in custody has requested the assistance of an attorney, officers must terminate all interrogation until counsel is made available or the accused voluntarily reinitiates communication. See *Minnick v. Mississippi*, 498 U.S. 146, 153, 111 S. Ct. 486, 491, 112 L. Ed. 2d 489 (1990); *Edwards*, 451 U.S.

at 484-85, 101 S. Ct. at 1885; *Cross v. State*, 144 S.W.3d 521, 526 (Tex. Crim. App. 2004). An accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease. *Edwards*, 451 U.S. at 485, 101 S. Ct. at 1885; [*27] *Fare*, 442 U.S. at 719, 99 S. Ct. at 2569; *Rhode Island v. Innis*, 446 U.S. 291, 298, 100 S. Ct. 1682, 1688, 64 L. Ed. 2d 297 (1980). The presence of counsel insures the process of police interrogation conforms to the dictates of the Fifth Amendment privilege by insuring that an accused's statements made in a government-established atmosphere are not the product of compulsion. *Miranda*, 384 U.S. at 466, 86 S. Ct. at 1623; *see also Fare*, 442 U.S. at 719, 99 S. Ct. at 2569. Any statement taken after a person invokes his Fifth Amendment privilege "cannot be other than the product of compulsion, subtle or otherwise." *Fare*, 442 U.S. at 717, 99 S. Ct. at 2568. Here, the trial court found that H.V. invoked his right to counsel. Deferring, as we must, to the historical facts found by the trial court and not challenged by the State, we have held that the trial court did not abuse its discretion by concluding that H.V. invoked his Fifth Amendment right to counsel. Consequently, all interrogation should have ceased. *Edwards*, 451 U.S. at 485, 101 S. Ct. at 1885; *Fare*, 442 U.S. at 719, 99 S. Ct. at 2569; [*28] *Innis*, 446 U.S. at 298, 100 S. Ct. at 1688. H.V.'s subsequent statement, "cannot be other than the product of compulsion, subtle or otherwise." *Fare*, 442 U.S. at 717, 99 S. Ct. at 2568. The remaining question is whether our holdings that H.V.'s statement disclosing the location of the gun was compelled in violation of his invoked Fifth Amendment privilege mandates suppression of the gun as determined by the trial court.

The State points out, and we agree, that the "fruit of the poisonous tree" doctrine articulated in *Wong Sun* n13 does not apply to a mere failure to provide *Miranda* warnings to a suspect prior to custodial interrogation when the suspect makes a voluntary statement: while the statement must be suppressed, other evidence subsequently obtained as a result of that unwarned statement, that is the "fruit" of the statement, need not be suppressed. *United States v. Patane*, 542 U.S. 630, 159 L. Ed. 2d 667, 124 S. Ct. 2620, 2628 (2004) (holding failure to give suspect *Miranda* warnings did not require suppression of physical fruits of suspect's unwarned but voluntary statement); *Oregon v. Elstad*, 470 U.S. 298, 307, 105 S. Ct. 1285, 1292, 84 L. Ed. 2d 222 (1985) [*29] (holding uncoerced statements taken without *Miranda* warnings may be used to impeach defendant's testimony at trial); *see also Michigan v. Tucker*, 417 U.S. 433, 452, 94 S. Ct. 2357, 2368, 41 L. Ed. 2d 182 (1974); *Baker v. State*, 956 S.W.2d 19, 22 (Tex. Crim. App. 1997). Here, however, H.V.'s second statement was not simply an "unwarned" statement; H.V. invoked his right to counsel. Because H.V.'s post-invocation-of-counsel statement was

the product of compulsion, subtle or otherwise, n14 the cases cited by the State--holding that the fruit-of-the-poisonous-tree doctrine does not apply to cases in which *Miranda* warnings are not given and the accused makes an "uncompelled" statement--do not apply. *Patane*, 124 S. Ct. at 2628; *Elstad*, 470 U.S. at 314, 105 S. Ct. at 1296; *Marsh v. State*, 115 S.W.3d 709, 715 (Tex. App.--Austin 2003, no pet.) (involving allegation of post-arrest interrogation before receiving *Miranda* warnings); *Montemayor v. State*, 55 S.W.3d 78, 90 (Tex. App.--Austin 2001, pet. ref'd) (same). Nor was evidence introduced at the suppression hearing that the gun [*30] would have been, n15 or was, discovered by means sufficiently distinguishable to be purged of the violation of H.V.'s Fifth Amendment privilege. Compare *Thornton v. State*, 145 S.W.3d 228, 233-34 (Tex. Crim. App. 2004) (holding sufficient attenuating factors existed dissipating taint of illegal arrest from derivative evidence obtained as a result of arrest). And finally, the "fit" between H.V.'s invocation of his Fifth Amendment privilege and suppression of the gun is a proper "fit" between the violation of H.V.'s Fifth Amendment constitutional right and an exclusionary rule to protect it. Accord *Patane*, 124 S. Ct. at 2628 [HN9] (articulating need for close fit between Fifth Amendment privilege and exclusionary rule implemented to protect it and recognizing that strong deterrence-based argument exists for exclusion of fruits obtained through violation of constitutional rights).

n13 *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

n14 See *Fare*, 442 U.S. at 717, 99 S. Ct. at 2568.

n15 [HN10] Texas does not recognize the inevitable discovery doctrine. *State v. Daugherty*, 931 S.W.2d 268, 269 (Tex. Crim. App. 1996); see also *Roquemore v. State*, 60 S.W.3d 862, 870 n.12 (Tex. Crim. App. 2001) (same).

[*31]

For these reasons, we hold that the trial court did not abuse its discretion by granting H.V.'s motion to suppress the gun located by police as a result of his second statement. See also TEX. FAM. CODE ANN. § 54.03(e) (Vernon Supp. 2004-05) (stating that [HN11] evidence illegally seized or obtained is inadmissible in an adjudication hearing). We overrule the State's second point. n16

n16 In its third point, the State contends that the violation of Texas Family Code section 52.02

found by the trial court does not provide a basis for suppressing H.V.'s statement or the fruit of that statement. Because we have upheld the trial court's suppression rulings as set forth above, we need not address this argument. See TEX. R. APP. P. 47.1.

V. CONCLUSION

Having overruled all of the State's points, we affirm the trial court's order suppressing H.V.'s second written statement and the gun obtained as a result of that statement.

SUE WALKER

JUSTICE

DISSENT BY: DIXON W. HOLMAN

DISSENT:

DISSENTING OPINION

I respectfully [*32] dissent. I would reverse the trial court's decision to grant Appellee's motion to suppress and would render judgment denying the relief requested in the motion to suppress.

INVOCATION OF RIGHT TO COUNSEL

The State argues that Appellee's second written statement should not have been suppressed on the basis of a failure to honor an invocation of the right to counsel because Appellee did not make an unambiguous request for counsel prior to giving his second written statement.

As stated by the majority, when a suspect indicates his desire to speak with an attorney or to have an attorney present during questioning, he is deemed to have invoked his right to counsel. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981). The State relies on a federal case that held a suspect's request to call his mother to inquire about possible legal representation is not an unambiguous invocation of the right to counsel. *Flamer v. Delaware*, 68 F.3d 710, 725 (3d Cir. 1995). I agree with the opinion in *Flamer*. The majority states and Appellee argues that the State's reliance on *Flamer* is distinguishable [*33] because the invocation of counsel in *Flamer* was at the arraignment and not during interrogation. Although the court in *Flamer* did not address the difference between invocation of counsel during interrogation versus during arraignment, the court clearly held that "Flamer's request to call his mother 'to inquire about possible . . . representa-

tion" is insufficient to trigger *Edwards. Id.* (holding *Edwards* only applies if a defendant unambiguously requests counsel). Moreover, two Texas appellate courts have held that a request to speak to a parent during custodial interrogation is not a per se invocation of Fifth Amendment rights. See *Randall v. State*, 712 S.W.2d 631, 632 (Tex. App.—Beaumont 1986, pet. ref'd) (requesting to speak to father not invocation of right to counsel); *In re R.D.*, 627 S.W.2d 803, 806 (Tex. App.—Tyler 1982, no writ) (requesting to talk to mother did not per se invoke Fifth Amendment rights); see also *United States v. Posada-Rios*, 158 F.3d 832, 867 (5th Cir. 1998) (holding statement to mother that suspect "needed a lawyer" was not unambiguous request for counsel).

The question in this case [*34] is whether Appellee's request to speak to his mother so she could hire an attorney was an unambiguous request for counsel. The magistrate read and explained to Appellee his right to have an attorney or to have one appointed for him. When Appellee continued to ask for his mother, the magistrate explained to him two more times that he had the option of asking for an attorney, making a statement, or not making any statement. At that point, Appellee decided to speak to the detective.

The magistrate testified that Appellee was articulate and appeared well educated; he was aware of the circumstances and charges; and he read and understood the English language. Furthermore, Appellee was only three months shy of his seventeenth birthday, and he had already been through the magistrate warning process earlier that same day. Although as mentioned by the majority, this is not a situation where Appellee only requested to speak to his mother, it is a situation where he requested to speak to a third party, who was not an attorney, in order to have the third party request an attorney on his behalf. Appellee made this request despite undergoing the magistrate warning process earlier that same day, [*35] and being told twice before giving his second written statement that he could request an attorney himself. I would not hold that a juvenile's request for a parent must never be construed as a request for counsel or as an invocation of his Fifth Amendment privilege; rather, I believe that the proper characterization of such a request militates in favor of a case-by-case approach. See *Chaney v. Wainwright*, 561 F.2d 1129 (5th Cir. 1977) (holding that a seventeen-year-old street-wise defendant's request to speak to his mother was not a request for counsel where the defendant knew he had a right to counsel but did not request an attorney), *cert. denied*, 443 U.S. 904, 61 L. Ed. 2d 871, 99 S. Ct. 3095 (1979). Independent and older juveniles must be distinguished from younger ones. See *id.* Because the Supreme Court's perception is that there are no persuasive reasons for adopting a different test for juveniles than for adults,

Fare v. Michael C., 442 U.S. 707, 725, 99 S. Ct. 2560, 2572, 61 L. Ed. 2d 197 (1979); *R.D.*, 627 S.W.2d at 806 (interpreting *Fare* as holding that there are no persuasive reasons for adopting a different test [*36] for juveniles than for adults) the facts of this case support reversing the trial court's granting of the motion to suppress Appellee's second written statement.

After reviewing the dialogue between Appellee and the magistrate with deference and applying the totality of the circumstances test, I would hold that Appellee's request to speak to his mother was not an unambiguous invocation of his right to counsel and that the trial court erred in granting Appellee's motion to suppress his second written statement. I would sustain the State's first point.

SUPPRESSION OF GUN

Because we should hold that the second written statement was improperly suppressed on constitutional grounds, we should also hold that the suppression of the gun recovered as a fruit of that statement was improper and sustain the State's second point.

SECTION 52.02 FAMILY CODE VIOLATION

The State contends that section 52.02 of the family code did not provide a basis to suppress Appellee's statement, and that the trial court specifically rejected section 52.02 as a basis for suppression of the statement. See TEX. FAM. CODE ANN. § 52.02 (Vernon Supp. 2004-05). I agree. The order suppressing [*37] Appellee's second written statement and gun suppresses them on constitutional grounds, which we have previously addressed, and expressly denies suppression on all other grounds. The order states:

1) The Court suppresses Respondent's second written police statement. This written statement was obtained after Respondent [H.V.] was warned of his rights by Municipal Court Judge Gabrielle Bendslev and Respondent [H.V.] then unambiguously asserted his right to counsel by telling Judge Bendslev that he "wanted his mother to ask for an attorney."

2) The Court suppresses the firearm recovered as a fruit of the above-discussed improperly obtained written police statement.

3) All other grounds seeking suppression of evidence (listed above or otherwise) are hereby DENIED. [Emphasis added.]

In reviewing a trial court's decision on a motion to suppress, appellate courts must affirm the decision if it is correct on any theory of law that finds support in the record. *Roquemore v. State*, 60 S.W.3d 862, 866 (Tex. Crim. App. 2001); *Pettigrew v. State*, 908 S.W.2d 563, 567 (Tex. App.--Fort Worth 1995, pet. ref'd). This principle applies even [*38] when the trial judge gives the wrong reason for his or her decision. See *Salas v. State*, 629 S.W.2d 796, 799 (Tex. App.--Houston [14th Dist.] 1981, no pet.).

Section 52.02(b) of the family code provides that "[a] person taking a child into custody shall promptly give notice of the person's action and a statement of the reason for taking the child into custody, to . . . the child's parent, guardian, or custodian." TEX. FAM. CODE ANN. § 52.02(b). The trial court's written findings of fact and conclusions of law state that law enforcement officers failed to promptly notify Appellee's parents that he was in custody and unnecessarily delayed transporting him to the juvenile processing office downtown, violating family code section 52.02. See *id.* The State concedes that the trial court found violations of section 52.02, n1 but I believe that the record plainly shows that no causal connection exists between those alleged violations and the confession obtained from Appellee. Therefore, his confession should not have been suppressed. The State also contends that even if Appellee had carried his burden and had shown a causal connection, any taint was attenuated prior [*39] to Appellee giving his confession. I agree. The State cites *Gonzales v. State* and *Pham v. State* in support of its argument. *Gonzales*, 125 S.W.3d 616, 618 (Tex. App.--Houston [1st Dist.] 2003, pet. granted); *Pham*, 125 S.W.3d 622, 626 (Tex. App.--Houston [1st Dist.] 2003, pet. granted) (en banc).

n1 The trial court's finding of fact number 2 states the following:

Respondent was placed in the back of a patrol car for approximately one hour. He was later taken out to remove his handcuffs. The Respondent was then placed back into the patrol car for approximately another thirty minutes before being transported to the Fort Worth Police Department to be interviewed by Detective Carroll. At no point while Respondent was in the patrol car was any attempt made by Fort Worth Police to contact Respondent's parents as

required by Texas Family Code Section 52.02.

The defendant in *Gonzales* was fifteen years old when he shot and killed a convenience store clerk. He [*40] was subsequently arrested and given *Miranda* warnings in the police car en route to a designated juvenile processing office. His parents were notified five to six hours after the arrest. The defendant filed a motion to suppress his statement, contending that suppression was proper because his parents were not promptly notified as required under the family code. The trial court denied the motion to suppress. The court of appeals held that the trial court erred in denying the motion to suppress and that the statement was automatically inadmissible due to the violation of section 52.02(b). *Gonzales v. State*, 9 S.W.3d 267, 271 (Tex. App.--Houston [1st Dist.] 1999, pet. granted), *vacated by* 67 S.W.3d 910 (Tex. Crim. App. 2002). n2 In its brief to the court of criminal appeals, the State argued that a juvenile's written statement should not be suppressed without some showing of a causal connection between the failure to notify the parents and the concession. *Gonzales*, 67 S.W.3d at 912. The court of criminal appeals eventually held that a juvenile's written statement obtained after a violation of section 52.02(b) is not automatically [*41] inadmissible, and if evidence is to be excluded, article 38.28 of the code of criminal procedure n3 is the proper mechanism for excluding evidence obtained in violation of the family code. *Id.* Following its prior decisions, the court of criminal appeals held that evidence is not obtained in violation of a provision of law if there is no causal connection between the illegal conduct and the acquisition of evidence. *Id.*; see *Roquemore*, 60 S.W.3d at 870; *Comer v. State*, 776 S.W.2d 191, 197 (Tex. Crim. App. 1989). The court of criminal appeals reversed and remanded *Gonzales* to the court of appeals for consideration of whether a causal connection existed between the statutory violation requirement for police to promptly notify parents and the taking of the juvenile's statement. *Gonzales*, 67 S.W.3d at 913-14. On remand, the court of appeals held that no causal connection existed. *Gonzales*, 125 S.W.3d at 618-19. n4

n2 The previous explanation of the events in the *Gonzales* case reference the prior history of *Gonzales*.

[*42]

n3 Article 38.23(a) provides that "no evidence obtained by an officer or other person in

violation of any provisions of the Constitution or laws of the State of Texas . . . shall be admitted in evidence. . . ." TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2004-05).

n4 The Texas Court of Criminal Appeals has granted petition for discretionary review on the following issue: "Did the court of appeals adopt the wrong standard by which a causal connection must be established under art. 38.23 to justify suppression of evidence seized in violation of the family code?" Gonzales v. State, 125 S.W.3d 616 (Tex. App.--Houston [1st Dist.] 2003, pet. granted).

Similar to Gonzales and the appeal of the present matter, the Pham case involved a sixteen-year-old and a drive-by shooting. Pham, 125 S.W.3d at 624. n5 The court of appeals in Pham reversed the conviction and held that the trial court erred in admitting appellant's confession because of a violation of section 52.02(b) of the family code. Pham v. State, 36 S.W.3d 199, 203-05 [*43] (Tex. App.--Houston [1st Dist.] 2000), vacated by 72 S.W.3d 346 (Tex. Crim. App. 2002). The Texas Court of Criminal Appeals vacated the judgment and remanded the cause for consideration in light of Gonzales. Pham, 72 S.W.3d at 346; Gonzales, 67 S.W.3d at 910. On remand the court of appeals held that: 1) there were separate analyses for causal connection and attenuation of the taint; 2) the burden is on the juvenile to show a causal connection; and 3) there was no causal connection. Pham, 125 S.W.3d at 627-28.

n5 The Texas Court of Criminal Appeals has granted petition for discretionary review on the following issues: 1) "Did the court of appeals err in holding causal connection and attenuation of the taint constitute separate analyses?" 2) "Did the court of appeals err by requiring appellant to prove a casual connection between the violation of section 52.02(b) of the Texas Family Code and appellant's confession?" Pham v. State, 125 S.W.3d 622 (Tex. App.--Houston [1st Dist.] 2003, pet. granted).

[*44]

Pham specifically set out separate analyses for causal connection and attenuation of the taint. *Id.* Using the Roquemore decision, the court of appeals concluded that a causal connection must exist before proceeding to attenuation of the taint analysis. *Id.* at 625-26. While the court of appeals concedes in Pham that there is no direct authority on who has the burden to prove the causal con-

nection, the court cites cases with analogous situations in concluding that the burden properly lies with the juvenile to show some evidence of a causal connection. *Id.* at 627; see Boyd v. State, 811 S.W.2d 105, 124 (Tex. Crim. App.) (holding the accused is generally expected to make showing of a causal connection between the failure to take accused before magistrate and accused's ensuing confession), *cert. denied*, 502 U.S. 971, 116 L. Ed. 2d 466, 112 S. Ct. 448 (1991); Schultz v. State, 510 S.W.2d 940, 943 (Tex. Crim. App. 1974) (same); Shadrick v. State, 491 S.W.2d 681, 684 (Tex. Crim. App. 1973) (same). On the other hand, the court held that it is "more reasonable to place the burden on the State [*45] to show attenuation of the taint because the State has control of the detention and interrogation process so that it may engage in conduct that dissipates and neutralizes the taint from any unlawful police conduct." Pham, 125 S.W.3d at 627.

If Appellee's statement in the instant case is to be excluded on statutory violations alone, both the State and Appellee agree that there must be a causal connection between law enforcement's violation of section 52.02(b) and the making of a statement by Appellee. See Roquemore, 60 S.W.3d at 870; see also Pham, 125 S.W.3d at 628; Gonzales, 125 S.W.3d at 618. Here, the record contains nothing to indicate whether Appellee's parents would have obtained an attorney for him. At the hearing on the motion to suppress, there is no evidence to support any causal connection between the family code violations and Appellee's second written statement. Therefore, I cannot speculate what Appellee's parents would or would not have done had they been contacted. Neither can I speculate that if Appellee had been transported more speedily to the juvenile processing office, he would not have given [*46] his second written statement. I conclude that the evidence did not establish a causal connection between the family code violations and Appellee's second written statement. Thus, neither the second written statement nor the gun should have been suppressed because of violations of section 52.02. Therefore, I would sustain the State's third point.

CONCLUSION

I dissent and would hold that the trial court erred in granting the motion to suppress Appellee's second written statement and the gun that was recovered as a result of that statement. I would render judgment denying the relief requested in the motion to suppress.

DIXON W. HOLMAN JUSTICE

Citation #2

State v. Blankenship, 2005 Tex. App. LEXIS 5083

LEXSEE

The State of Texas, Appellant v. Robert Blankenship, Appellee

NO. 03-03-00287-CR, NO. 03-03-00288-CR, NO. 03-03-00289-CR, NO. 03-03-00290-CR, NO. 03-03-00291-CR, NO. 03-03-00292-CR, NO. 03-03-00293-CR, NO. 03-03-00294-CR

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

170 S.W.3d 676; 2005 Tex. App. LEXIS 5083

June 29, 2005, Filed

SUBSEQUENT HISTORY: [*1] Rehearing overruled by State v. Blankenship, 2005 Tex. App. LEXIS 8180 (Tex. App. Austin, Sept. 30, 2005)

Released for Publication September 30, 2005.

PRIOR HISTORY: FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY. NOS. 624903, 624904, 624905, 624906, 624907, 624908, 624909 & 624910. HONORABLE J. DAVID PHILLIPS, JUDGE PRESIDING. State v. Blankenship, 146 S.W.3d 218, 2004 Tex. Crim. App. LEXIS 1651 (Tex. Crim. App., 2004)

DISPOSITION: Reversed and Remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: The State challenged the judgment of the County Court at Law No. 1 of Travis County, Texas, reversing defendant's judgments of conviction in the municipal court of record of the City of Austin.

OVERVIEW: Thirteen complaints were filed against defendant in the municipal court alleging violations of certain city ordinances, and each complaint alleged that the offense occurred in the territorial limits of the City of Austin as required by Tex. Code Crim. Proc. Ann. art. 45.019(c) (Supp. 2004-2005). Defendant was found guilty of five offenses of developing or changing the use of property without first obtaining a site plan approval and release by the City, and found guilty of three offenses of failing to observe a stop-work order posted at the site of the property involved. The issue on appeal was the consequence of the failure of the prosecution to prove venue as laid under the particular circumstances of the cases. The appellate court ruled that there was error in the failure to prove venue as laid, but the non-constitutional error was harmless, Tex. R. App. P. 44.2(b). There was no showing that defendant was prevented from presenting a defense. The description placed the property outside the City limits but within the extraterritorial area of the City over which geographical area the municipal court had sole criminal jurisdiction to try violations of certain city ordinances.

OUTCOME: The judgment was reversed and remanded.

CORE TERMS: venue, territorial, municipal, county attorney, ordinance, reversal, prosecuting attorney, notice of appeal, extraterritorial, city limits, non-constitutional, variance, notice, criminal jurisdiction, municipality, proven, city attorney, motions to quash, reversible error, harmless error, vicinage, geographical area, harmless, harmless error analysis, district attorney, legal description, criminal case, general law, preponderance, constituent

LexisNexis(R) Headnotes

Criminal Law & Procedure > Appeals > Right to Appeal > Government

[HN1] Tex. Code Crim. Proc. Ann. art. 44.01 was amended to grant the State an extremely limited right of appeal in certain designated circumstances, including when a court order "arrests or modifies a judgment." Tex. Code Crim. Proc. Ann. art. 44.01(a)(2) (Supp. 2004-05). The statute provides that the "prosecuting attorney" may not "make" an appeal later than the 15th day after the date on which the court's order, ruling, or sentence is entered. Tex. Code Crim. Proc. Ann. art. 44.01(d).

Criminal Law & Procedure > Appeals > Right to Appeal > Government

[HN2] See Tex. Code Crim. Proc. Ann. art. 44.01(i) (Supp. 2004-05).

Criminal Law & Procedure > Appeals > Reviewability > Notice of Appeal

Criminal Law & Procedure > Appeals > Right to Appeal > Government

[HN3] It is clear from Tex. Code Crim. Proc. Ann. art. 44.01 (Supp. 2004-05) that a duly authorized subordinate of the "prosecuting attorney" may not "make" an appeal. In order for a State's notice of appeal to invoke the court of appeals' jurisdiction, it must be timely, it must be in writing, and it must be "made" by the elected prosecuting attorney.

Criminal Law & Procedure > Appeals > Right to Appeal > Government

[HN4] See Tex. Code Crim. Proc. Ann. art. 45.201 (Supp. 2004-05).

Criminal Law & Procedure > Appeals > Right to Appeal > Government

[HN5] Tex. Code Crim. Proc. Ann. art. 45.201(c) (Supp. 2004-05) permits the city attorney to prosecute appeals from municipal court only "with the consent of the county attorney." The statute has no time limitations and does not require the request or consent to be in writing. It appears to apply to appeals that have been perfected.

Criminal Law & Procedure > Accusatory Instruments > Complaints

[HN6] See Tex. Code Crim. Proc. Ann. art. 45.019(c) (Supp. 2004-05).

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Criminal Law & Procedure > Jurisdiction & Venue > Venue

[HN7] Venue is distinct from jurisdiction. The terms are not synonymous. Jurisdiction is the authority or power conferred upon a court by the constitution and laws of the State that allows a court to hear and try a case. Venue means the place where the case may be tried. At common law, venue meant the neighborhood, place, or county in which the injury is declared to have been done or in fact declared to have happened. Venue denotes locality, and its prevailing meaning is the place of trial, the geographical location in which an action or proceeding should be brought to trial.

Criminal Law & Procedure > Jurisdiction & Venue > Venue

[HN8] When venue is not a constituent element of the offense charged, venue must be proved only by a preponderance of the evidence. Tex. Code Crim. Proc. Ann. art. 13.17 (2005). The failure of proof of venue by the prosecution does not negate the guilt of the accused. It is presumed that venue is proved at trial unless disputed at trial or the record affirmatively shows the contrary. Tex. R. App. 44.2(c)(1). It must be remembered, however, that if the issue of venue is timely raised, reversible error may result from the failure to prove venue as laid in the charging instrument.

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence

Evidence > Criminal Evidence > Weight & Sufficiency

Criminal Law & Procedure > Jurisdiction & Venue > Venue

[HN9] Normally, venue variance claims are treated as sufficiency of the evidence problems. A state review of the sufficiency of the evidence is measured by the elements of the offense as defined by the hypothetically correct charge for the case. This test is also applicable to non-jury or bench trials.

Criminal Law & Procedure > Jurisdiction & Venue > Venue

[HN10] When venue is not a constituent element of the offense, it need only be proved by the preponderance of the evidence, and the failure to prove venue does not negate the guilt of the defendant.

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors

[HN11] See Tex. R. App. P. 44.2(a) and (b).

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors

[HN12] Except for certain federal constitutional errors labeled by the United States Supreme Court as "structural," no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis. Appellate courts should not automatically foreclose the application of the harmless error test to certain categories of error. Where an error is shown to be harmless, it is not a ground for reversal, regardless of the category or label attached to that particular error.

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors

Criminal Law & Procedure > Jurisdiction & Venue > Venue

[HN13] It is clear that the failure to prove venue when the issue is raised at trial is now subject to a harm analysis rather than an automatic reversal of the conviction.

Constitutional Law > Criminal Process > Compulsory Process

Criminal Law & Procedure > Jurisdiction & Venue > Venue

[HN14] The "vicinage" provision of the Sixth Amendment stipulates that in all criminal prosecutions, the accused shall be tried by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. U. S. Const. amend. VI. Neither federal nor state authorities, however, currently require application of this clause to state prosecutions.

Criminal Law & Procedure > Jurisdiction & Venue > Venue

[HN15] "Vicinage" means vicinity, proximity. The place where the crime is committed, or a trial is held; the place from which jurors are to be drawn for trial use, the locale from which the accused is entitled to have jurors selected.

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors

[HN16] The appellate court must determine the harm of the non-constitutional error on the basis of whether it affects a defendant's substantial rights. Tex. R. App. P. 44.2(b). A substantial right is affected when the error has a substantial and injurious effect or influence in determining the jury's verdict or the fact-finder's decision. A criminal conviction should not be overturned for non-constitutional error if the reviewing court, after examining the record as a whole, has a fair assurance that the error did not influence the fact-finder, or had slight effect.

Criminal Law & Procedure > Double Jeopardy > Attachment Jeopardy

Criminal Law & Procedure > Jurisdiction & Venue > Venue

[HN17] The issue of venue falls outside the protection of the Double Jeopardy Clause. If there is a reversal for the failure to prove venue as alleged, no prohibition exists against reprosecution.

COUNSEL: For APPELLANT: Ms. Gaye Lynn Brewer, Austin, TX.

For APPELLEE: Mr. Terrence L. Irion, Ms. Anatole R. Barnstone, THE LAW OFFICE of TERRENCE L. IRION, Austin, TX.

JUDGES: Before Chief Justice Law, Justices Puryear and Onion *.

* Before John F. Onion, Jr., Presiding Judge (retired), Court of Criminal Appeals, sitting by assignment. See Tex. Gov't Code Ann. § 74.003(b) (West 1998).

OPINIONBY: John F. Onion, Jr.

OPINION: ON REMAND

This appeal by the State of Texas involves eight judgments, nos. 624903 through 624910, entered in the County Court at Law No. 1 of Travis County, each of which reversed a judgment of conviction in the municipal court of record of the City of Austin.

On original submission, this Court concluded that it was confronted with a jurisdictional question in light of the amended notice of appeal filed by an assistant city attorney. Prior to November 1987, there was a traditional prohibition against the State's right to appeal in a criminal case. See *Pittman v. State*, 829 S.W.2d 897, 898 [*2] (Tex. App.--

Austin 1992, no pet.). In 1987, the citizens of Texas voted to amend the State Constitution to read: "The State is entitled to appeal in criminal cases as authorized by general law." Tex. Const. art. V, § 26. [HN1] Article 44.01 of the Code of Criminal Procedure was amended to grant the State an extremely limited right of appeal in certain designated circumstances, including when a court order "arrests or modifies a judgment." Tex. Code Crim. Proc. Ann. art. 44.01(a)(2) (West Supp. 2004-05). The statute provided that the "prosecuting attorney" may not "make" an appeal later than the 15th day after the date on which the court's order, ruling, or sentence was entered. Art. 44.01(d).

The statute further provides:

[HN2] (i) In this article, "prosecuting attorney" means the county attorney, district attorney, or criminal district attorney who has the primary responsibility of prosecuting cases in the court hearing the case and does not include an assistant prosecuting attorney.

Tex. Code Crim. Proc. Ann. art. 44.01(i) (West Supp. 2004-05).

[HN3] It is clear from the statute [*3] that a duly authorized subordinate of the "prosecuting attorney" may not "make" an appeal. And we know that "in order for a State's notice of appeal to invoke the Court of Appeals' jurisdiction, it must be timely, n1 it must be in writing, n2 and it must be 'made' by the elected prosecuting attorney. n3 *State v. Rieue*, 13 S.W.3d 408, 411 (Tex. Crim. App. 2000).

n1 *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996).

n2 *Shute v. State*, 744 S.W.2d 96, 97 (Tex. Crim. App. 1988).

n3 *State v. Muller*, 829 S.W.2d 805, 811-12 (Tex. Crim. App. 1992).

The notice of appeal in the instant case was signed and executed by an assistant city attorney and contained the following:

IV.

The County Attorney has consented to the City Attorney prosecuting this appeal under article 45.201 of the Code of Criminal Procedure. n4

n4 Article 45.201 provides:

[HN4] (a) All prosecutions in a municipal court shall be conducted by the city attorney of the municipality or by a deputy city attorney.

(b) The county attorney of the county in which the municipality is situated may, if the county attorney so desires, also represent the state in such prosecutions. In such cases, the county attorney is not entitled to receive any fees or other compensation for those services.

(c) With the consent of the county attorney, appeals from municipal court to a county court, county court at law, or any appellate court may be prosecuted by the city attorney or a deputy city attorney.

(d) It is the primary duty of a municipal prosecutor not to convict, but to see that justice is done.

Tex. Code Crim. Proc. Ann. art. 45.201 (West Supp. 2004-05).

[*4]

The State's brief acknowledges that the foregoing sentence is "ambiguous." The notice was signed by a person not connected to the county attorney's office. It did not reflect the name of the county attorney or the county and made express reference to article 45.201 but not to article 44.01, which governs the "making" of the State's notice of appeal. [HN5] Article 45.201(c) permits the city attorney to prosecute appeals from municipal court only "with the consent of the county attorney." The statute has no time limitations and does not require the request or consent to be in writing. It would appear to apply to appeals that have been perfected.

For the reasons set forth in *State v. Blankenship*, 123 S.W.3d 99 (Tex. App.--Austin 2003), this Court found that the notice was not "made" by the county attorney and that this Court lacked jurisdiction to entertain the appeal. The State's petition for discretionary review was granted. Our judgment was reversed and the cause remanded for further proceedings. *State v. Blankenship*, 146 S.W.3d 218, 220 (Tex. Crim. App. 2004). The Court of Criminal Appeals found the city's assertion in the notice of appeal was a written [*5] express personal authorization by the county attorney and found the assertion simultaneously complied with article 44.01 as to the notice of appeal and with article 45.201(c) as to authorizing the city attorney to prosecute the appeal. *Id.* at 218-20. Since the Court of Criminal Appeals found that this Court had jurisdiction to hear the State's appeal, we turn to the only point of error before this Court.

Background

On April 24, 2002, thirteen complaints were filed against Blankenship in the Austin Municipal Court of Record charging him with violations of certain city ordinances. Each complaint alleged that the offense occurred in the territorial limits of the city of Austin as required by article 45.019(c) of the Code of Criminal Procedure. n5 Trial by jury was waived and Blankenship entered a plea of not guilty in each case. The cases were heard on July 17, 2002. Blankenship filed pretrial motions to quash each complaint on the basis that the complaints alleged all the offenses occurred in the territorial limits of the city when in fact the offenses occurred outside the city or its territorial limits. The motions were [*6] called to the trial court's attention on the day of trial. After some discussion as to the date of filing, the motions were overruled as being untimely "under local rules." *See also* Tex. Code Crim. Proc. Ann. art. 45.019(f) (West Supp. 2004-05); *cf.* Tex. Code Crim. Proc. Ann. art. 4.14(b) (West 2005) (relating to indictments and informations). The motions to quash are not in the appellate record.

n5 Article 45.019(c) (Requisites of Complaint) provides:

[HN6] A complaint filed in municipal court *must* allege that the offense was committed in the territorial limits of the municipality in which the complaint was made.

Tex. Code Crim. Proc. Ann. art. 45.019(c) (West Supp. 2004-05) (emphasis added). Act of May 30, 1999, 76th Leg., R.S., vol. 5, ch. 1545, § 16, 1999 Tex. Gen. Laws 5314, 5317.

After the State rested its case, Blankenship moved for an instructed judgment of acquittal in [*7] each case, *inter alia*, on the basis that the State had failed to prove the allegation that the offenses occurred in the territorial limits of the city but in fact had proved without dispute that the offenses had occurred outside the territorial limits of the city. The trial court asked for "written arguments." We find no ruling on the motions for instructed judgments of acquittal. Blankenship testified and presented his defense. The municipal court acquitted Blankenship of five of the thirteen charges and took the other cases under advisement. On August 22, 2002, the municipal court found Blankenship guilty of five offenses of developing or changing the use of property without first obtaining a site plan approval and release by the city of Austin. Blankenship was also found guilty of three offenses of failing to observe a stop-work order posted at the site of the property involved. The trial court assessed a \$ 1,000 fine in each of the eight cases.

Blankenship filed a motion for new trial setting forth, *inter alia*, a "point of error" n6 complaining the State failed to prove venue as alleged in each complaint. The motion was overruled. Notice of appeal was given to County [*8] Court at Law No. 1 of Travis County. In his appellate brief in county court, Blankenship again raised the contention that venue had not been proven as alleged. On appeal, the County Court at Law No. 1 of Travis County considered only one

of Blankenship's points of error—that being the failure of the State to prove its allegation in each complaint that the offenses occurred in the territorial limits of the city of Austin. The county court in its opinion sustained Blankenship's contention, reversed the eight convictions, and did not reach Blankenship's other points of error.

n6 In order to perfect an appeal from a municipal court of record, an appellant must file a motion for new trial setting forth "the points of error of which he complains." See Tex. Gov't Code Ann. § 30.00014(c) (West 2004).

The county court found that the evidence showed and the parties agreed that the actions giving rise to the alleged offense occurred outside the territorial limits of the city of Austin [*9] but inside the city of Austin's extraterritorial jurisdiction as provided in Chapter 42 of the Texas Local Government Code. See Tex. Loc. Gov't Code Ann. § § 42.001, .021(5) (West 1999).

It is clear that the Austin Municipal Court of Record had original exclusive criminal jurisdiction to try violations of certain city ordinances both within the territorial limits of the city and outside those limits but within a geographical area located within the extraterritorial jurisdiction of the city. n7 The issue is not one of jurisdiction, but failure to prove venue as laid.

n7 A municipal court of record has criminal jurisdiction over misdemeanors punishable by a fine only. See Tex. Code Crim. Proc. Ann. arts. 4.01, 4.14 (West 2005); Tex. Gov't Code Ann. § § 29.003(a), 30.00005(a), (b) (West 2004). It is observed that said section 30.00005(a), (b) provides a municipal court of record the jurisdiction provided by general law for a regular, non-record municipal court and jurisdiction over criminal cases arising under ordinance authorized by sections 215.072, 217.042, 341.903, and 401.002 of the Texas Local Government Code. See generally Treadgill v. State, 160 Tex. Crim. 658, 275 S.W.2d 658 (Tex. Crim. App. 1954).

[*10]

The county court recognized the requirement of article 45.019(c) but concluded it was "nonsense" to argue the complaint must allege the offense occurred within the territorial limits of a city when "the truth of the matter is that the offense, if any, occurred in ETJ [extra territorial jurisdiction] of the city." The county court's opinion discussed how in its opinion each complaint should have alleged venue as being in the extraterritorial jurisdiction and the basis for extending the court's reach beyond the territorial limits of the city such as referencing section 401.002(a) of the Texas Local Government Code or other applicable law. The county court concluded that "because the prosecution did not prove an essential element of its case, this prosecution must fail."

In light of Blankenship's point of error, the issue was not whether each complaint properly charged an offense. Each complaint did charge an offense and was sufficient on its face to invoke the jurisdiction of the Austin Municipal Court of Record. Further, the issue was not the proper manner of pleading each offense. The sole issue is the consequence of the failure of the prosecution [*11] to prove venue as laid under the particular circumstances of these cases.

The State has appealed the judgments of reversal to this Court. The State concedes the failure to prove the venue allegation but contends that the error was harmless and the convictions must stand.

Venue

[HN7] Venue is distinct from jurisdiction. Skillern v. State, 890 S.W.2d 849, 859 (Tex. App.—Austin, 1994, pet. ref'd). The terms are not synonymous. Martin v. State, 385 S.W.2d 260, 261 (Tex. Crim. App. 1964). Jurisdiction is the authority or power conferred upon a court by the constitution and laws of the State that allows a court to hear and try a case. Riewe, 13 S.W.3d at 410; Olivo v. State, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996); Ex parte Watson, 601 S.W.2d 350, 351; Skillern, 890 S.W.2d at 859. Venue means the place where the case may be tried. Soliz v. State, 97 S.W.3d 137, 141 (Tex. Crim. App. 2003); Thomas v. State, 699 S.W.2d 845, 854 (Tex. Crim. App. 1975); Skillern, 890 S.W.2d at 859. At common law, venue meant the neighborhood, place, [*12] or county in which the injury is declared to have been done or in fact declared to have happened. Black's Law Dictionary 1557 (6th ed. 1991); Soliz, 97 S.W.3d at 141. Venue denotes locality, and its prevailing meaning is the place of trial, the geographical location in which an action or proceeding should be brought to trial. 92 C.J.S. Venue § 2.

[HN8] Venue is not a constituent element of the offense charged. *Skellern*, 890 S.W.2d at 860; *see also Henley v. State*, 98 S.W.3d 732, 734 (Tex. App.—Waco 2003, pet. ref'd); 40 Dix § 2.82 (citing *Fairfield v. State*, 610 S.W.2d 771, 779 (Tex. Crim. App. 1981)). Venue must be proved only by a preponderance of the evidence. *See Tex. Code Crim. Proc. Ann. art. 13.17* (West 2005); *Banks v. State*, 530 S.W.2d 940, 943 (Tex. Crim. App. 1975); *Gonzales v. State*, 784 S.W.2d 140, 142 (Tex. App.—Austin 1990, no pet.). The failure of proof of venue by the prosecution does not negate the guilt of the accused. *Fairfield*, 610 S.W.2d at 779. It is presumed that venue was proved at trial unless disputed [*13] at trial or the record affirmatively shows the contrary. *See Tex. R. App. 44.2(c)(1)*. n8 It must be remembered, however, that if the issue of venue is timely raised, reversible error may result from the failure to prove venue as laid in the charging instrument. *See Black v. State*, 645 S.W.2d 789, 791 (Tex. Crim. App. 1983); *cf. Sander v. State*, 52 S.W.3d 909, 917 (Tex. App.—Beaumont 2001, pet. ref'd).

n8 The presumption is clearly not applicable in the instant case.

With this background, we turn to the variance between the venue alleged and the venue proven. The failure to prove venue as laid in each complaint was error. Was it harmless error or reversible error? The State relies upon *Gollihar v. State*, 46 S.W.3d 243 (Tex. Crim. App. 2001), claiming that there was only an immaterial variance that did not prejudice Blankenship's substantial rights. *Id.* at 248. The State acknowledges that the venue actually [*14] proved was outside the city limits but in a geographical area within the extraterritorial jurisdiction of the city in Travis County, State of Texas, and over which the Austin Municipal Court of Record had exclusive criminal jurisdiction to try violations of certain city ordinances. Hence, the variance between the venue alleged and the venue proven was immaterial regarding Blankenship's substantial rights.

[HN9] Normally, variance claims are treated as sufficiency of the evidence problems. *Id.* at 247. A state review n9 of the sufficiency of the evidence is measured by the elements of the offense as defined by the hypothetically correct charge for the case. *Id.* at 253 (citing *Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1987)). The *Malik* test is also applicable to non-jury or bench trials. *Malik*, 953 S.W.2d at 240.

n9 In *Gollihar v. State*, 46 S.W.3d 243 (Tex. Crim. App. 2001), the court created a dichotomy between federal and state review. *See Smith v. State*, 135 S.W.3d 259, 262 (Tex. App.—Texarkana 2004, no pet.). In *Fuller v. State*, 73 S.W.3d 250, 252 (Tex. Crim. App. 2002), the Court of Criminal Appeals recognized that the *Gollihar* standard was clearly not the same as the *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) standard of measuring evidence sufficiency against the substantive elements of the criminal offense as defined by state law.

[*15]

As observed earlier, [HN10] venue is not a constituent element of the offense. It need only be proved by the preponderance of the evidence, and the failure to prove venue does not negate the guilt of the defendant. The *Gollihar* construct does not apply to the issue here presented. We reject the State's argument that it does.

Blankenship relies upon *Black v. State*, 645 S.W.2d 789, 791 (Tex. Crim. App. 1983) for the proposition that when venue is made an issue in the trial court, the failure to prove venue constitutes reversible error. The failure to prove venue in Smith County as laid in the *Black* indictment resulted in a summary reversal of the conviction. *Black* has been repeatedly cited with approval, *e.g., Edwards v. State*, 97 S.W.3d 279, 285 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd); *Sander v. State*, 52 S.W.3d 909, 917 (Tex. App.—Beaumont 2001, pet. ref'd); *Williams v. State*, 924 S.W.2d 189, 191 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd); *Sixta v. State*, 875 S.W.2d 17, 18 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *O'Hara v. State*, 837 S.W.2d 139, 142-43 [*16] (Tex. App.—Austin 1992, pet. ref'd). In most cases citing *Black*, however, venue was proven as alleged by direct or circumstantial evidence or venue was presumed under Rule 44.2(c)(1) of the Texas Rules of Appellate Procedure. We have not found in recent cases a discussion of *Black*'s summary reversal approach.

Black was decided before the adoption of the Texas Rules of Appellate Procedure and its harmless error analysis provisions. Rule 44.2(a), (b) provide:

[HN11] (a) *Constitutional Error*. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

(b) *Other Errors*. Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Tex. R. App. P. 44.2(a), (b).

In Cain v. State, 947 S.W.2d 262 (Tex. Crim. App. 1997), the Court of Criminal Appeals wrote:

[HN12] Except for certain federal constitutional [*17] errors labeled by the United States Supreme Court as "structural," no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis. . . . Appellate courts should not automatically foreclose the application of the harmless error test to certain categories of error. Where an error is shown to be harmless, it is not a ground for reversal, regardless of the category or label attached to that particular error.

Id. at 264.

[HN13] It is clear that the failure to prove venue when the issue is raised at trial is now subject to a harm analysis rather than an automatic reversal of the conviction. Is the error in failing to prove venue in the instant case a constitutional or non-constitutional error for harm analysis purposes? We believe that Bath v. State, 951 S.W.2d 11 (Tex. App.-Corpus Christi 1997, pet. ref'd) answers the question:

[HN14] The "vicinage" n10 provision of the Sixth Amendment stipulates that in all criminal prosecutions, the accused shall be tried by an impartial jury of the State "and district wherein the crime shall have been committed, which [*18] district shall have been previously ascertained by law. . . ." U. S. Const., amend. VI. Neither federal nor state authorities, however, currently require application of this clause to state prosecutions. See Cook v. Morrill, 783 F.2d 593, 595 (5th Cir. 1986); Martin v. Beto, 397 F.2d 741, 748 (5th Cir. 1968), cert. denied, 394 U.S. 906, 89 S. Ct. 1008, 22 L. Ed. 2d 216 (1969); State v. Paiz, 817 S.W.2d 84, 85 (Tex. Crim. App. 1991); but see Paiz, 817 S.W.2d at 86 (assuming, *arguendo*, that it did apply). We therefore hold that no error in relation to the vicinage provision of the Sixth Amendment was committed in the transfer of appellant's case from Webb to Nueces County. Point of error ten is overruled.

Id. at 19. See also Garza v. State, 974 S.W.2d 251, 259 (Tex. App.-San Antonio 1998, pet. ref'd).

n10 [HN15] "Vicinage" means "1. vicinity; proximity. 2. The place where the crime is committed, or a trial is held; the place from which jurors are to be drawn for trial use, the locale from which the accused is entitled to have jurors selected." Black's Law Dictionary 7th ed. at 1561.

[*19]

[HN16] We must determine the harm of the non-constitutional error on the basis of whether it affected Blankenship's substantial rights. See Tex. R. App. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict or the fact-finder's decision. See King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997); Rankin v. State, 995 S.W.2d 210, 215 (Tex. App.-Houston [14th Dist.] 1999, pet. ref'd). A criminal conviction should not be overturned for non-constitutional error if the reviewing court, after examining the record as a whole, has a fair assurance that the error did not influence the fact-finder, or had slight effect.

Johnson v. State, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998); *Lemmons v. State*, 75 S.W.3d 513, 525 (Tex. App.--San Antonio 2002, pet. ref'd).

In our harm analysis, we examine certain factors which are not exclusive. See *Orona v. State*, 791 S.W.2d 125, 130 (Tex. Crim. App. 1990). The source of the error was article 45.019(c) which mandatorily required the prosecution to allege [*20] the offense occurred within the territorial limits of the municipality. The nature of the error was the failure to prove venue as laid. Each complaint expressly referred to the State of Texas, Travis County, and the City of Austin. Each complaint contained a legal description of the property involved. The description placed the property outside the city limits but within the extraterritorial area of the city of Austin over which geographical area in Travis County the Austin Municipal Court of Record had sole criminal jurisdiction to try violations of certain city ordinances. Such legal description should have alerted Blankenship and given notice that the offenses concerning the property occurred outside the city. Blankenship's counsel filed motions to quash the complaints on the basis of misallegation of venue. Counsel argued that if any witness testified the property was within the city limits, the witness would be guilty of perjury. The motions were overruled as being untimely filed. It does not appear Blankenship was misled by the improper venue allegation. The State's witnesses and Blankenship all testified the property was outside the city limits. The State did not emphasize the [*21] error.

There is no showing that Blankenship was prevented from presenting a defense, including his own designated "1704" defense that the property had been "grandfathered in" by earlier law and was exempt from the application of city ordinances.

Further, holding the error harmless will not encourage the State to repeat with impunity. The State is burdened with article 45.019(c) until a legislative revision occurs. [HN17] The issue of venue is not an element of the offenses alleged and falls outside the protection of the Double Jeopardy Clause. If there was a reversal here for the failure to prove venue as alleged, no prohibition exists against reprosecution. See *Martin*, 385 S.W.2d at 261; *O'Hara*, 837 S.W.2d at 143; 40 Dix § 2.83. A reversal would not accord Blankenship protection from a retrial.

An examination of the record as a whole in this bench trial gives us fair assurance that the error did not influence the trial judge. See *Scaggs v. State*, 18 S.W.3d 277, 290 (Tex. App.--Austin 2000, pet. ref'd).

Like the County Court at Law No. 1 of Travis County, we find that there was error in the failure to prove venue as laid, but unlike [*22] that court, we have performed a harm analysis and have concluded that the non-constitutional error is harmless. See Tex. R. App. P. 44.2(b).

The judgments of the County Court at Law No. 1 of Travis County are reversed and the causes are remanded to that court for consideration of Blankenship's other points of error.

John F. Onion, Jr., Justice

Citation #3

State v. Alley, 158 S.W.3d 485

LEXSEE

THE STATE OF TEXAS v. LEE MICHAEL ALLEY, Appellee, & PATRICIA ANN
DELAROSA, Appellee

PD-1300-04 & PD-1301-04

COURT OF CRIMINAL APPEALS OF TEXAS

158 S.W.3d 485; 2005 Tex. Crim. App. LEXIS 400

March 9, 2005, Delivered

PRIOR HISTORY: **[**1]** ON DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS. HARRIS COUNTY. State v. Alley, 137 S.W.3d 866, 2004 Tex. App. LEXIS 4585 (Tex. App. Houston 1st Dist., 2004)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The court granted discretionary review after the First Court of Appeals, Harris County (Texas), dismissed the State's appeal from the justice court, which granted defendants' motions to dismiss the misdemeanor complaints against them because neither complaint alleged the specific location of the offense.

OVERVIEW: The complaints accused defendants of separate offenses of failure to stop at a stop sign. The court of appeals dismissed the State's appeal for lack of jurisdiction, finding that State should have brought its appeals to the county courts. The court held that Tex. Code Crim. Proc. Ann. art. 44.01(f) spoke only to the precedence of appeals of which the court of appeals had jurisdiction. It could not be read to create jurisdiction or to assume the existence of a jurisdiction that was not elsewhere granted. Article 44.01(a) allowed the State to appeal certain orders. Tex. Code Crim. Proc. Ann. arts. 4.08 and 45.042 established that appeals from a justice court had to be taken to the county court.

OUTCOME: The court affirmed the judgment of the court of appeals.

CORE TERMS: de novo, municipal, original jurisdiction, precedence, trial de novo, appellate jurisdiction, inferior, originally commenced, motions to dismiss, stop sign, misdemeanor, punishable, fine

LexisNexis(R) Headnotes

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Governments > Courts > Creation & Organization
[HN1] See Tex. Code Crim. Proc. Ann. art. 4.08.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Governments > Courts > Creation & Organization
[HN2] See Tex. Code Crim. Proc. Ann. art. 45.042.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Governments > Courts > Creation & Organization
[HN3] See Tex. Gov't Code Ann. § 26.046.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Governments > Courts > Creation & Organization
[HN4] See Tex. Gov't Code Ann. § 25.003(a).

Criminal Law & Procedure > Appeals > Right to Appeal > Government

[HN5] See Tex. Code Crim. Proc. Ann. art. 44.01(f).

Criminal Law & Procedure > Appeals > Right to Appeal > Government

[HN6] See Tex. Code Crim. Proc. Ann. art. 44.01(a).

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Traffic Rules & Regulations

Criminal Law & Procedure > Sentencing > Fines

[HN7] The offense of failure to stop at a stop sign is a misdemeanor that is punishable by fine only. Tex. Transp. Code Ann. §§ 542.301, 542.401.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

[HN8] See Tex. Code Crim. Proc. Ann. art. 4.11(a).

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

[HN9] See Tex. Code Crim. Proc. Ann. art. 44.17.

Criminal Law & Procedure > Appeals > Right to Appeal > Government

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Governments > Courts > Creation & Organization

[HN10] Tex. Code Crim. Proc. Ann. art. 44.01(f) speaks only to the precedence of appeals of which the court of appeals has jurisdiction. It cannot be read to create jurisdiction, or to assume the existence of a jurisdiction that is not elsewhere granted. The basic principles of statutory construction require that all the provisions be given effect. This is easily and naturally done. Article 44.01(a) allows the State to appeal certain orders. Tex. Code Crim. Proc. Ann. arts. 4.08 and 45.042 establish that appeals from a justice court must be taken to the county court. Tex. Code Crim. Proc. Ann. arts. 44.17 and 45.042 specify that an appeal to county court shall be conducted de novo. If the State takes an appeal after such a de novo proceeding in the county court, Tex. Code Crim. Proc. Ann. art. 44.01(f) means that that appeal shall be given precedence by the court of appeals.

COUNSEL: For APPELLANT: George McCall Secrest, Jr., Houston, TX.

For STATE: Alan Curry, ASSIST. DA, Houston, TX.

JUDGES: WOMACK, J., delivered the opinion for a unanimous Court.

OPINIONBY: WOMACK

OPINION:

[*486] The issue in this case is whether the State may appeal from a justice court directly to a court of appeals. We hold that it may not.

The State filed complaints, in the Justice Court for Precinct 5 of Harris County, that accused the appellees of separate offenses of failure to stop at a stop sign. The justice court granted the appellees' motions to dismiss the misdemeanor complaints against them because neither complaint alleged the specific location of the offense.

The State filed notices of appeal in the justice court. The notices said, "The State now gives written Notice of Appeal to the Court of Appeals sitting at Houston, Texas." The appeals went to the First Court of Appeals.

The appellees argued that courts of appeals did not have jurisdiction. They relied on Articles 4.08 and 45.042 of the Code of Criminal Procedure, which speak to the county courts' jurisdiction of appeals from justice courts.

Article 4.08 reads, [HN1] "The county courts shall have appellate jurisdiction in criminal cases of which justice courts and other inferior [**2] courts have original jurisdiction."

Article 45.042 reads:

[HN2] "(a) Appeals from a justice or municipal court, including appeals from final judgments in bond forfeiture proceedings, shall be heard by the county court except in cases where the county court has no jurisdiction, in which counties such appeals shall be heard by the proper court.

"(b) Unless the appeal is taken from a municipal court of record and the appeal is based upon error reflected in the record, the trial shall be de novo."

Also relevant are sections of the Government Code that give the constitutional county courts [HN3] "appellate jurisdiction in criminal cases of which justice courts and [*487] other inferior courts have original jurisdiction," n1 and that give the statutory county courts [HN4] "jurisdiction over all causes and proceedings, civil and criminal, original and appellate, prescribed by law for county courts." n2

n1 TEX. GOV'T CODE § 26.046.

n2 *Id.*, § 25.0003(a).

The State based its argument that a State's appeal [**3] will be heard by the court of appeals on the first sentence of Article 44.01(f) of the Code of Criminal Procedure: [HN5] "The court of appeals shall give precedence in its docket to an appeal [by the State] filed under Subsection (a) or (b) of this article." Subsections (a) and (b) set out most of the grounds of appeal by the State; the only other grounds are in Subsections (c) and (k), which authorize cross-appeals and appeals in habeas-corpus proceedings involving probationers. The State filed these appeals under Subsection (a): [HN6] "The State is entitled to appeal an order of a court in a criminal case if the order: (1) dismisses an indictment, information, or complaint"

The court of appeals concluded that "Article 44.01 allows the State to appeal, and Articles 4.08 and 45.042 establish[] the court with the initial appellate jurisdiction to hear the case." n3 Because "the State should have brought [its] appeals to the county courts," the court of appeals dismissed the State's appeal for lack of jurisdiction. n4

n3 *State v. Alley*, 137 S.W.3d 866, 868 (Tex. App. -- Houston [1st Dist.] 2004).

[**4]

n4 *Id.*, at 867.

We granted review.

The prosecutions in these cases were for the offense of failure to stop at a stop sign. n5 [HN7] The offense is a misdemeanor n6 that is punishable by fine only. n7

n5 See TEX. TRANSP. CODE § 544.010.

n6 See *id.*, § 542.301.

n7 See *id.*, § 542.401.

[HN8] "Justices of the peace shall have original jurisdiction in criminal cases: (1) punishable by fine only" n8 Therefore, the justice court had original jurisdiction of these cases.

n8 TEX. CODE CRIM. PROC. art. 4.11(a).

"In criminal cases of which justice courts and other inferior courts have original jurisdiction," Article 4.08 of the Code of Criminal Procedure [**5] provides that "the county courts shall have appellate jurisdiction." Similarly, Article 45.042 provides that "Appeals from a justice or municipal court ... shall be heard by the county court except in cases where the county court has no jurisdiction, in which counties such appeals shall be heard by the proper court."

Article 45.042 also says, "Unless the appeal is taken from a municipal court of record and the appeal is based on error reflected in the record, the trial shall be de novo." Likewise, Article 44.17 provides, [HN9] "In all appeals to a county court from justice courts and municipal courts other than municipal courts of record, the trial shall be de novo in the trial in the county court, the same

as if the prosecution had been originally commenced in that court."

As the First Court of Appeals' opinion put it, "The State asks us to hold Article 4.08 inapplicable on a theory that 'the appeal from a justice court to a county court is clearly intended to be an appeal by the defendant because such appeals are required to be trials de novo.'... The State contends that Article 44.01 therefore 'effectively [*488] prevails' over Article 4.08." n9

n9 *Alley*, *supra* note 3 at 868.

[**6]

The State questions how there can be a trial *de novo* in cases in which it is appealing the justice court's rulings which granted the defendants' motions to dismiss the complaint. It queries, "Is the trial de novo to be upon the complaint that the justice court had previously dismissed -- in which case the justice court's ruling on the defendant's motion to dismiss would be ignored?" and "Is the trial de novo to be upon another complaint or an amended complaint -- in which case the State's right to appeal the justice court's ruling would have been abrogated?"

The answer to the State's first rhetorical question is, Yes. A trial *de novo* on a complaint that a justice court dismissed would ignore the justice court's ruling. That is what Article 44.17 means when it says "the trial shall be de novo in the trial in the county court, the same as if the prosecution had been originally commenced in that court."

The State also argues that article 44.01(f) "contemplates that a State's appeal brought under that statute will be heard by the court of appeals." Article 44.01(f) provides that "The court of appeals shall give precedence in its docket to an appeal filed under Subsection (a) [**7] or (b) of this article." The State contends that this provision about precedence in court of appeals' dockets means that courts of appeals have jurisdiction of every appeal filed under subsection (a) or (b). The language of the statute will not bear the weight of that inference.

[HN10] Article 44.01(f) speaks only to the precedence of appeals of which the court of appeals has jurisdiction. It cannot be read to create jurisdiction, or to assume the existence of a jurisdiction that is not elsewhere granted. The basic principles of statutory construction require that all the provisions be given effect. This is easily and naturally done. Article 44.01(a) allows the State to appeal certain orders. Articles 4.08 and 45.042 establish that appeals from a justice court must be taken to the county court. Articles 44.17 and 45.042 specify that an appeal to county court [**8] shall be conducted

de novo. If the State takes an appeal after such a *de novo* proceeding in the county court, Article 44.01(f) means that that appeal shall be given precedence by the court of appeals.

We affirm the judgment of the Court of Appeals.

En banc.

Citation #4

Modica v. State, 151 S.W.3d 716

LEXSEE

CAROLYN MODICA, Appellant v. THE STATE OF TEXAS, Appellee

NO. 09-03-351-CR

COURT OF APPEALS OF TEXAS, NINTH DISTRICT, BEAUMONT

151 S.W.3d 716; 2004 Tex. App. LEXIS 10797

September 28, 2004, Submitted
December 1, 2004, Opinion Delivered

NOTICE: [**1] PUBLISH

SUBSEQUENT HISTORY: Petition for discretionary review refused by In re Modica, 2005 Tex. Crim. App. LEXIS 1606 (Tex. Crim. App., Sept. 14, 2005)

PRIOR HISTORY: On Appeal from the County Court at Law No. 3, Jefferson County, Texas. Trial Cause No. 227,291.

DISPOSITION: AFFIRMED AS REFORMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed from a judgment of the County Court at Law No. 3, Jefferson County (Texas), which convicted her of a Class C misdemeanor offense of assault, Tex. Penal Code Ann. § 22.01(a)(3), (c) (Supp. 2004).

OVERVIEW: The alleged assault occurred while defendant was inspecting a cosmetology school for violations. The trial court appointed a criminal district attorney pro tem to prosecute defendant, but the oath of office portion of the order did not appear to have been executed. The court held that Tex. Code Crim. Proc. Ann. art. 2.07(c) (Supp. 2004) was not the type of evidentiary or procedural rule that belonged to an accused and that had to be protected unless expressly waived. Because defendant failed to complain in the trial court, the issue was not preserved for appellate review. Any error by the trial court during closing argument did not affect defendant's substantial rights. Although the trial court overruled defendant's timely objection to the prosecutor's mischaracterization of the record, the jury had already been instructed in great detail that nothing the attorneys said was evidence, to disregard the trial court's ruling on objections, and that only the members of the jury were to recall and decide what the evidence was. Trial counsel's

performance was not deficient for not having requested an instruction on self-defense because defendant denied even touching the victim.

OUTCOME: The court reformed the judgment of the trial court, substituting the properly-worded offense "assault" for the improperly worded term "city appeal - other" wherever necessary. The court affirmed the judgment as reformed.

CORE TERMS: prosecutor, municipal, fair trial, misconduct, self-defense, deficient, closing argument, jury argument, assault, forfeited, systemic, trial strategy, new trial, offensive, shoulder, pushed, void, failing to request, cosmetology, inspected, inspector, oath of office, ineffective assistance, cumulative effect, pro tem, disqualification, ineffectiveness, eye-witness, provocative, appointed

LexisNexis(R) Headnotes

Governments > Courts > Authority to Adjudicate

[HN1] A judgment is void only in very rare situations, usually due to a lack of jurisdiction.

Governments > Courts > Authority to Adjudicate

[HN2] A judgment of conviction for a crime is void when (1) the document purporting to be a charging instrument (i.e. indictment, information, or complaint) does not satisfy the constitutional requisites of a charging instrument, thus the trial court has no jurisdiction over the defendant, (2) the trial court lacks subject matter jurisdiction over the offense charged, such as when a misdemeanor involving official misconduct is tried in a county court at law, (3) the record reflects that there is no evidence to support the conviction, or (4) an indigent defendant is required to face criminal trial proceedings without appointed counsel, when such has not been waived. This is very nearly an exclusive list.

Governments > Courts > Authority to Adjudicate

[HN3] The written judgment is not itself the conviction but evidence, among other things, that a conviction has occurred. And while it is true that an appeal may not be taken until a written judgment has been entered, it is not the signing of the judgment that constitutes the "appealable event"; it is the pronouncement of sentence in open court that is the appealable event.

Criminal Law & Procedure > Counsel > Prosecutors

[HN4] The provisions contained in Tex. Code Crim. Proc. Ann. art. 2.07 (Supp. 2004) do not concern the jurisdiction of the trial court or the constitutionality of a statute.

Criminal Law & Procedure > Appeals > Reviewability > Waiver

[HN5] The system of adjudication at work in Texas contains rules of three distinct types: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request.

Criminal Law & Procedure > Counsel > Prosecutors

[HN6] See Tex. Code Crim. Proc. Ann. art. 2.07(c) (Supp. 2004).

Criminal Law & Procedure > Appeals > Reviewability > Waiver

Criminal Law & Procedure > Counsel > Prosecutors

[HN7] The provisions of Tex. Code Crim. Proc. Ann. art. 2.07(c) (Supp. 2004) fall into that class of rules and procedures that are forfeited if not insisted upon by objection, request, motion, or some other behavior calculated to call its lack of implementation to the attention of the system's impartial representative, usually the trial judge.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

[HN8] The Code of Criminal Procedure provides that in appeals from a justice or municipal court, the trial must be de novo, unless the appeal is taken from a municipal court of record and the appeal is based on error reflected in the record. Tex. Code Crim. Proc. Ann. art. 45.042(b) (Supp. 2004). It also provides that in all appeals to a county court from justice or municipal courts, other than municipal courts of record, the trial must be de novo in the trial in the county court, the same as if the prosecution had originally been commenced in that court. Tex. Code Crim. Proc. Ann. art. 44.17 (Supp. 2004).

Criminal Law & Procedure > Sentencing > Costs

[HN9] In Title 2, Chapter 102 of the Texas Code of Criminal Procedure, there are various costs and fees assessed to defendants upon conviction for criminal offenses ranging from "fine-only" crimes to felonies. Tex. Code Crim. Proc. Ann. arts. 102.005 & 102.075 (Supp. 2004).

Criminal Law & Procedure > Sentencing > Costs

[HN10] Chapter 103 of Title 2 contains a provision to be utilized when a defendant believes erroneous costs have been assessed. Tex. Code Crim. Proc. Ann. art. 103.008 (Supp. 2004).

Criminal Law & Procedure > Appeals > Reviewability > Waiver

[HN11] Except for complaints involving systemic (or absolute) requirements, or rights that are waivable only, all other complaints, whether constitutional, statutory, or otherwise, are forfeited by failure to comply with Tex. R. App. P. 33.1(a).

Criminal Law & Procedure > Appeals > Reviewability > Waiver

Criminal Law & Procedure > Sentencing > Costs

[HN12] The proper assessment of court costs us neither a systemic requirement nor a waivable-only right.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Constitutional Right

[HN13] An appellant seeking reversal of her conviction on the basis of a Sixth Amendment violation must allege the basis for a Sixth Amendment claim, such as that the error deprived her of her right to confront witnesses, or deprived her of the assistance of counsel for her defense.

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors

[HN14] A harm analysis is employed only when there is error, and ordinarily, error occurs only when the trial court makes a mistake.

Criminal Law & Procedure > Trials > Closing Arguments > Fair Comment & Fair Response

[HN15] Jury argument must be confined to four permissible areas: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Criminal Law & Procedure > Appeals > Reversible Error

Criminal Law & Procedure > Trials > Closing Arguments > Reference to Evidence Not Admitted

[HN16] If error is found in the trial court's ruling on an improper jury argument a three-prong test is used to determine if the error is reversible: (1) severity of the prosecutor's misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of the conviction absent the misconduct (the strength of the evidence supporting the conviction). For prosecutorial argument that strikes over the shoulders of defense counsel and for comments upon matters outside the record, the standard of harm for non-constitutional errors applies. Tex. R. App. P. 44.2(b)

Criminal Law & Procedure > Appeals > Reversible Error

Criminal Law & Procedure > Trials > Closing Arguments > Reference to Evidence Not Admitted

[HN17] An isolated mischaracterization of the record by the State which was not severe and was made in the context of a plethora of prophylactic admonishments from the trial court and the parties does not require appellate analysis of the record for the effects of cumulative error.

Criminal Law & Procedure > Appeals > Reversible Error

[HN18] A number of errors may be found harmful in their cumulative effect. However, there appears to be no precedent for holding that non-errors may, in their cumulative effect, cause error, much less reversible error.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

[HN19] In general, to obtain a reversal of a conviction on the ground of ineffective assistance, an appellant must demonstrate that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding would have been different. In assessing a claim of ineffective assistance, an appellate court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance; that is, the appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

[HN20] Texas courts have consistently adhered to the standard set out in Strickland. Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged inef-

fectiveness. It is also recognized that counsel is presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Criminal Law & Procedure > Defenses > Self-Defense Criminal Law & Procedure > Jury Instructions > Particular Instructions > Theory of Defense

[HN21] When the defensive issue in question is one contained in Chapter Nine of the Texas Penal Code, and the defendant fails to admit to having committed the charged act, the defendant is not entitled to an instruction on self-defense.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

[HN22] Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decisionmaking as to overcome the presumption that counsel's conduct was reasonable and professional. Trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

[HN23] No Texas court defines the right to effective assistance of counsel as the right to error-free counsel.

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence

[HN24] In a factual sufficiency review, the appellate court reviews all of the evidence in a neutral light, and it will set the verdict aside only if the evidence is so weak that the verdict is clearly wrong and manifestly unjust, or the contrary evidence is so strong that the standard of proof beyond a reasonable doubt could not have been met.

Criminal Law & Procedure > Appeals > Records on Appeal

[HN25] An appellate court has the power to correct and reform a trial court judgment to make the record speak the truth when it has the necessary data and information to do so.

COUNSEL: For APPELLANT: Jack Lawrence, Beaumont, TX.

For STATE: Michael D. Papania, Nederland, TX.

JUDGES: Before McKeithen, C.J., Burgess and Gaultney, JJ.

OPINIONBY: STEVE MCKEITHEN

OPINION:

[*719] Appellant, Carolyn Modica, was convicted by a jury for having committed a Class C misdemeanor offense of Assault. See Tex. Pen. Code Ann. § 22.01(a)(3), (c) (Vernon Supp. 2004). The trial court assessed a fine of \$ 200 and costs. Eight issues are raised for our consideration. We will recount facts elicited at trial only when necessitated by the issue under consideration.

Issue one reads: "The trial court erred by holding in its judgment only that defendant is convicted of 'City Appeal-Other,' which does not constitute an offense under Texas law, and therefore, said judgment is void, and appellant is correspondingly entitled to appropriate relief." In *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001), the Court of Criminal Appeals noted that [HN1] a judgment is void only in very rare situations, "usually due to a lack of jurisdiction." The Court went on to enumerate the circumstances as follows:

[HN2] A judgment of conviction for a crime is void when (1) the [**2] document purporting to be a charging instrument (i.e. indictment, information, or complaint) does not satisfy the constitutional requisites of a charging instrument; thus the trial court has no jurisdiction over the defendant, (2) the trial court lacks subject matter jurisdiction over the offense charged, such as when a misdemeanor involving official misconduct is tried in a county court at law, (3) the record reflects that there is no evidence to support the conviction, or (4) an indigent defendant is required to face criminal trial proceedings without appointed counsel, when such has not been waived, in violation of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)]. While we hesitate to call this an exclusive list, it is very nearly so.

Id. (footnotes omitted). In the instant case, none of the four enumerated situations appear in the record. The assault charge against appellant stemmed from the filing of a complaint with the municipal court of the City of Beaumont by the victim, [M.E.P.]. Therefore, the complaint is the document purporting to be the charging instrument. See *Zulauf v. State*, 591 S.W.2d 869, 871 n.3 (Tex. Crim. App. 1979). [**3] The complaint lists the offense as "Assault (Simple)," and alleges that on or about December 21, 2000, appellant did "intentionally, or knowingly cause physical contact with [M.E.P.] when he/she knew or should reasonably have believed that said [M.E.P.] would regard the contact as offensive or pro-

vocative." Furthermore, the trial court's written instructions to the jury listed appellant's charge as "assault," and set out the following language in the application paragraph:

Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, CAROLYN MODICA, [*720] did in Beaumont, Jefferson County, Texas, on or about the 21st day of December, 2000, intentionally or knowingly cause physical contact with [M.E.P.] when she knew or should reasonably have believed that said [M.E.P.] would regard the contact as offensive or provocative, you will find the defendant guilty.

Unless you so find beyond a reasonable doubt or if you have a reasonable doubt thereof, you will find the defendant not guilty.

At any rate, we agree with the State that the "City Appeal - Other" language shown on the face of the judgment is merely an irregularity that can be corrected by a judgment [**4] *nunc pro tunc* or by this Court on appeal. First, it must be remembered that the written judgment is merely a record of events which have occurred in fact; [HN3] the written judgment is not itself the conviction but evidence, among other things, that a conviction has occurred. See *Jones v. State*, 795 S.W.2d 199, 202 (Tex. Crim. App. 1990). And while it is true that an appeal may not be taken until a written judgment has been entered, it is not the signing of the judgment that constitutes the "appealable event"; it is the pronouncement of sentence in open court that is the appealable event. See *Thompson v. State*, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003); *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998); *Rodarte v. State*, 860 S.W.2d 108, 109-10 (Tex. Crim. App. 1993). As the judgment in the instant case is not void, we overrule issue one.

Issue two states, "The trial court erred as a matter of law by proceeding to trial without the appointed attorney pro tem, Mr. Holmes, having first taken the mandatory oath required by Texas Code of Criminal Procedure Article 2.07(c)." The record [**5] reflects that the trial court appointed a "Criminal District Attorney Pro Tem" to prosecute appellant and the "Oath Of Office" portion of said order does not appear to have been executed. While appellant implicitly concedes in her brief that no objection was raised to the failure of the appointed prosecutor to take the oath of office, she essentially contends that being prosecuted by a *sworn* prosecutor is a "systemic" and "absolute" right possessed by her and, therefore, unwaivable. In *Marbut v. State*, 76 S.W.3d 742, 750 (Tex. App.--Waco 2002, pet. ref'd), the Court found [HN4] the provisions contained in Tex. Code Crim. Proc. Ann. art. 2.07 (Vernon Supp. 2004), "[do]

not concern the jurisdiction of the trial court or the constitutionality of a statute." *Marbut*, 76 S.W.3d at 750. The Court also found that a defendant's right to have a prosecutor qualified under article 2.07 to represent the State is not a right so fundamental to the proper functioning of our adjudicatory process that it cannot be forfeited. *Id.* (quoting from *Marin v. State*, 851 S.W.2d 275, 278 (Tex. Crim. App. 1993)).

Although [**6] appellant vigorously argues her fundamental constitutional and statutory rights were violated when the appointed prosecutor apparently neglected to take the oath of office, she fails to demonstrate the alleged error was preserved for appellate review by citing to *Marin v. State* or any of its progeny. See *Marin*, 851 S.W.2d 275 (Tex. Crim. App. 1993). It is imprudent, to say the least, for an appellant to raise a "fundamental" or "systemic" rights violation, in the face of a failure to object at trial, without attempting to place said rights in the *Marin* "continuum." As the Court of Criminal appeals recently reiterated:

Marin has been a watershed decision in the law of error-preservation. After *Marin* we have held that a right that formerly was thought to be "waivable [**721] only" actually requires an objection at trial. We have held that some requirements that were formerly held to be absolute requirements are not. We have held that a party may be estopped from relying on an absolute requirement. On the other hand, we have recognized three more absolute requirements since *Marin*: a constitutional requirement that a district court must conduct its proceedings [**7] at the county seat, the constitutional prohibition of ex post facto laws, and certain constitutional restraints on the comments of a judge.

See *Sanchez v. State*, 120 S.W.3d 359, 365-66 (Tex. Crim. App. 2003) (quoting from *Saldano v. State*, 70 S.W.3d 873, 888-89 (Tex. Crim. App. 2002) (citations omitted)).

[HN5] The system of adjudication at work in Texas contains rules of three distinct types: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request. *Marin*, 851 S.W.2d at 279. The particular provision in question is found in Tex. Code Crim. Proc. Ann. art. 2.07(c) (Vernon Supp. 2004), which provides: [HN6] "If the appointed attorney [pro tem] is not an attorney for the state, he is qualified to perform the duties of the office for the period of absence or disqualification of the attorney for the state on filing an oath with the clerk of the court." On its face, article 2.07(c) does not appear to be the type of evidentiary or procedural rule that belongs to an accused [**8] and which must be protected by the system unless expressly

waived, unlike the language of the rule at issue in *Marin*. n1 *Marin*, 851 S.W.2d at 277, 279. Nor can we say that article 2.07(c) is such a requirement that "implementation of this requirement[] is not optional and cannot, therefore, be waived or forfeited by the parties." *Id.* at 279. We have found no cases which have raised the provisions of article 2.07(c) to a "systemic requirement." We find that [HN7] the provisions of article 2.07(c) fall into that class of *Marin*'s rules and procedures that are forfeited if not insisted upon by objection, request, motion, or some other behavior calculated to call its lack of implementation to the attention of the "system's impartial representative, usually the trial judge." *Marin*, 851 S.W.2d at 279. As appellant failed to complain either at trial or in her motion for new trial, we find the issue is not preserved for appellate review. Tex. R. App. P. 33.1(a). Issue two is overruled.

n1 The provision at issue in *Marin* states: "An appointed counsel is entitled to 10 days to prepare for a proceeding but may waive the preparation time *with the consent of the defendant in writing or on the record in open court.*" See Tex. Code Crim. Proc. Ann. art. 1.051(e) (Vernon Supp. 2004) (emphasis added); see *Marin*, 851 S.W.2d at 281-82.

[**9]

Issue three is presented to us as follows:

The costs of court assessed cannot be enlarged upon on an appeal from a municipal court conviction of a "fine only" citation offense where the additional assessments for items such as fugitive apprehension and correctional management do not correspond to the purposes behind creating said offense, and similar assessments are not made by the municipal court, thus causing the county court entertaining the appeal to assess an excessive penalty, in violation of the Eighth Amendment of the United States Constitution, and Article I, § 13, of the Texas Constitution, and necessitating that these parts of the order be vacated.

Once again, the record reflects no objection was made to the trial court of the various assessments contained in the court costs. Appellant appears to be under the mistaken belief that the proceeding in the [**722] County Court at Law was an "appeal" from the proceeding in the municipal court. [HN8] The Code of Criminal Procedure provides that in appeals from a justice or municipal court, the trial must be *de novo*, unless the appeal is taken from a municipal court of record and the appeal is based on error reflected in the record. [**10] See Tex. Code Crim. Proc. Ann. art. 45.042(b) (Vernon Supp. 2004). It also provides that in all appeals to a

county court from justice or municipal courts, other than municipal courts of record, the trial must be *de novo* in the trial in the county court, the same as if the prosecution had originally been commenced in that court. See Tex. Code Crim. Proc. Ann. art. 44.17 (Vernon Supp. 2004). [HN9] In Title 2, Chapter 102 of the Texas Code of Criminal Procedure, there are various costs and fees assessed to defendants upon conviction for criminal offenses ranging from "fine-only" crimes to felonies. See Tex. Code Crim. Proc. Ann. arts. 102.005 & 102.075 (Vernon Supp. 2004). n2 [HN10] Chapter 103 of Title 2 also contains a provision to be utilized when a defendant believes erroneous costs have been assessed. See Tex. Code Crim. Proc. Ann. art. 103.008 (Vernon Supp. 2004).

n2 Article 102.075 was repealed effective January 1, 2004. See Act of June 2, 2003, 78th Leg. R.S., ch. 209, § 85(a)(7), (b) 2003 Tex. Gen. Laws 979, 1003. For relevant provisions which took effect on January 1, 2004, see Chapter 133 of the Texas Local Government Code, and particularly Tex. Loc. Gov't Code Ann. § 133.101-133.104 (Vernon Supp. 2004).

[**11]

Appellant, in effect, attempts to again couch this issue in terms of an unwaivable violation of constitutional rights. We reiterate that [HN11] except for complaints involving systemic (or absolute) requirements, or rights that are waivable only, which are not involved here, all other complaints, whether constitutional, statutory, or otherwise, are forfeited by failure to comply with Tex. R. App. P. 33.1(a); see also Mendez v. State, 138 S.W.3d 334, 342 (Tex. Crim. App. 2004). [HN12] The proper assessment of court costs are neither a systemic requirement nor a waivable-only right. By failing to call the trial court's attention to any alleged improper court costs, appellant has forfeited review of the issue on appeal. Issue three is overruled.

Appellant presents and argues issues four, five, and six together. Issues four and five provide the following:

Issue Four: The trial court erred by allowing the prosecutor to improperly comment to the jury in closing argument, thereby denying appellant her right to a fair trial under the Sixth Amendment of the United States Constitution.

Issue Five: The trial court erred by allowing the prosecutor to improperly comment [**12] to the jury by misstating applicable law, the cumulative effect of which prevented appellant from receiving a fair trial under the Sixth Amendment of the United States Constitution.

We initially note that appellant's argument under these issues, along with the authorities cited, is woefully inadequate. [HN13] An appellant seeking reversal of her conviction on the basis of a Sixth Amendment violation must allege the basis for a Sixth Amendment claim, such as that the error deprived her of her right to confront witnesses, or deprived her of the assistance of counsel for her defense. See generally Bishop v. State, 85 S.W.3d 819, 822 (Tex. Crim. App. 2002). See also Faretta v. California, 422 U.S. 806, 818, 95 S. Ct. 2525, 45 L. Ed. 2d 562, 572 (1975). n3 Instead, citing [*723] to Cortez v. State, 683 S.W.2d 419, 420 (Tex. Crim. App. 1984), appellant argues, "a fair trial cannot be had if it is not free from improper jury argument." An examination of Cortez indicates this "fair trial" observation was taken from Richardson v. State, 158 Tex. Crim. 536, 257 S.W.2d 308 (Tex. Crim. App. 1953). Cortez, 683 S.W.2d at 420. [**13] A reading of Richardson does turn up the statement:

The law provides for and presumes a fair trial free from such arguments as above quoted, and we do not think that this defendant has had a fair trial with such denunciations of the district attorney ringing in the ears of the jury who tried him.

Richardson, 257 S.W.2d at 309. However, there is absolutely no authority - - statutory, constitutional, rule, or common law - - cited in the entire Richardson opinion. Therefore, we feel appellant's "fair trial" argument, like the "'mandatory statute' mantra," is "based on questionable lineage and is inconsistent with more recent precedent[.]" See Hawkins v. State, 135 S.W.3d 72, 78 (Tex. Crim. App. 2004).

n3 Faretta states that, because Sixth Amendment rights are basic to our adversary system of criminal justice, they are part of the "due process of law" that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States. *Id.*, 422 U.S. at 818. Therefore, a defendant's "right of self-representation" finds support in the "structure of the Sixth Amendment." *Id.* at 819. Because the Sixth Amendment does not contain explicit language providing for a defendant's "right" to proceed without counsel when he voluntarily and intelligently elects to do so, the Court was required to "find" such a right within the meaning of the Sixth Amendment as applied to the States through the Fourteenth Amendment. *Id.* at 818-20. The instant appellant argues that a prosecutor whose closing arguments contain evidentiary assertions that are outside the record violates her "right to a fair trial" under the same Sixth

Amendment. Yet, unlike the Court in *Faretta*, appellant does not attempt to inform us specifically where such an argument, even if erroneous, falls within the right afforded by the Sixth Amendment so as to be "necessarily implied by the structure of the Amendment." *Faretta*, 422 U.S. at 819.

[**14]

Additionally, appellant's argument and authorities blur the distinct line between the determination of *error* and *harm*. See *Hawkins*, 135 S.W.3d at 76 [HN14] ("A harm analysis is employed only when there is error, and ordinarily, error occurs only when the trial court makes a mistake.") We must initially decide whether the jury arguments in question were improper. [HN15] Jury argument must be confined to four permissible areas: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement. *Wilson v. State*, 938 S.W.2d 57, 59 (Tex. Crim. App. 1996); *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973). [HN16] If error is found in the trial court's ruling on an improper jury argument a three-prong test is used to determine if the error is reversible: (1) severity of the prosecutor's misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of the conviction absent the misconduct (the strength of [**15] the evidence supporting the conviction). *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998). For prosecutorial argument that strikes over the shoulders of defense counsel and for comments upon matters outside the record, the standard of harm for non-constitutional errors applies. Tex. R. App. P. 44.2(b); *Martinez v. State*, 17 S.W.3d 677, 692 (Tex. Crim. App. 2000).

Appellant's brief directs our attention to three instances during the State's closing remarks to the jury, the first appearing in the record as follows:

[Prosecutor]: And that those are routine inspections and that something went wrong on this particular day because [*724] as the inspection started before the noon break, half of the students, half of the students had left that school because they did not find it to be comfortable to be around the inspector under those circumstances.

[Trial Counsel]: Your Honor, I object to that. There's absolutely no testimony from anybody who left the school that they - -

THE COURT: What is your objection, counselor?

[Trial Counsel]: My objection is that he's arguing outside of the record, Your Honor.

THE COURT: Overruled. [**16] Jurors, remember my instructions to you.

We find no error here as the State's comments were proper summation of the evidence. Testimony indicated that on the day in question approximately fifty students were present at Dolphin Technical Institute when appellant arrived to inspect. Further testimony indicated that before appellant arrived, the atmosphere at the school among students and instructors was basically normal, but after appellant's arrival that morning there was a "building tension" in the school. From this tension, testimony revealed that about "20 to 25" students left at lunch time and did not return. Therefore, the State's remarks were supported by the evidence.

The second alleged instance of improper jury argument refers to the following:

[Prosecutor]: Ms. Modica tells you that she got there that day and that she was suspicious. She had had some reports from somebody, and she was there to see if she could catch them in violations.

She says she entered from the rear of the building and caught two people smoking in a fashion that violated the regulations. When I challenged her on that provision, she did not - - she did not deny that the commission had given special [**17] permission to that school for letting the smokers smoke in the back because the building permits for that building did not allow smokers in the front.

[Trial Counsel]: Your Honor, again, I object that he's arguing outside of the record.

THE COURT: Overruled.

The record reflects the following exchange during appellant's cross-examination testimony:

Q. [Prosecutor]: Did you know that your boss at that time, Mr. Knowles, had already approved - - had previously approved smoking outside that building in the back because of the City regulations concerning smoking in the front? Did you know that?

A. [Appellant]: He didn't.

Q. He didn't?

A. No.

Q. You're saying that that's a false statement?

A. Yes, sir.

Clearly, appellant did indeed challenge the State's assertion that the cosmetology commission gave permis-

sion to the school's students to smoke at or near the back entrance of the school. However, the record reflects somewhat unique circumstances as is shown by the continuation of the State's argument immediately following the overruling of appellant's above-noted objection:

[Prosecutor]: But be all of that as it may, whether it's a violation or not, one of the things that [**18] did come out that whatever Mrs. Modica wrote in that report, by February her supervisor had been sent from Austin down here, reviewed everything, and gave them a 100 percent perfect score.

[*725] [Trial Counsel]: Your Honor, again, I object to his arguing outside of the record.

THE COURT: Sustained.

[Trial Counsel]: Ask the jury to be instructed to disregard that argument, Your Honor.

THE COURT: Sustained. Disregard what argument.

[Trial Counsel]: You sustained my objection that he's arguing outside the record. I'm merely asking for an instruction to [ask the] [sic] jury - -

THE COURT: That they disregard what?

[Trial Counsel]: The statement that he made, Your Honor, that was outside of the record.

[Prosecutor]: Your Honor, I don't believe it's outside the record. That's something we could recess and get the court reporter - -

THE COURT: No. We're not going to call a recess.

Members of the jury, you have - - one of your responsibilities is to recall the facts. I trust that you will do that. Disregard any statement made by either attorney that is outside of the record.

[Trial Counsel]: Your Honor, move for a mistrial.

THE COURT: Denied.

In this instance, the record [**19] does support the State's argument. The following exchange took place during cross-examination of appellant:

Q. [Prosecutor]: Now, you inspected - - and I'm going to cut to the chase. You inspected that day; and you cited numerous violations, did you not?

A. [Appellant]: Yes, I did.

Q. Okay. Isn't it true that that report - - your report was set aside and superseded by a report of Mr. Knowles not even two months later and that that school got a 100 percent perfect score? That's true, isn't it?

A. Would you repeat that statement?

Q. Yes. Isn't it true that within, say, the month of February about two months or less from the time you inspected and cited that school on all those violations that the - - Mr. Knowles inspected that school and it got a perfect score, did it not?

A. Yes.

It is necessary at this point to place the closing argument of the parties in its proper perspective. The charge of the court was read to the jury prior to the commencement of jury argument. The jury was also provided with the written instructions, which contained the following general instructions in pertinent part:

Questions and comments of the attorneys do not constitute testimony and must not [**20] be considered as evidence. You must also disregard any statement of the attorneys that is inconsistent with the law contained in this charge.

....

You must not consider facts that have not been introduced into evidence or legal principles not contained in this charge. It is improper for any juror to discuss or consider anything which he or she knows or has learned outside of the testimony presented to you and the law contained in this charge. . . .

....

You are the exclusive judges of the facts proven, the believability of the witnesses and the weight to be given their testimony. However, you must be bound by and strictly follow the law contained in this charge. . . .

....

After the attorneys present their arguments, you will retire, select a foreperson, [*726] and consider your verdict. The arguments are not evidence and you should give the arguments only the consideration you feel they deserve during the evaluation of the evidence. . . .

Moments later, during the closing argument of appellant's trial counsel, the trial court sustained the State's objection that trial counsel was arguing outside the record and gave the following verbal instruction to the jury:

THE COURT: [**21] Members of the jury, I may sustain or overrule an objection as to what was said but it is not my interpretation or understanding of what is said that is crucial. It is your understanding that - - what the witnesses said that is crucial. So, [Trial Counsel] will be given some latitude to give his rationale and relate to you how he recalls the facts. [The Prosecutor] will likewise be given an opportunity to tell you how they [sic] recall the facts. I may rule one way or the other. But disregard

those statements, even the Court's ruling. You'll recall the facts as you understand them to be because what [Trial Counsel] says is not evidence. What [The Prosecutor] says is not evidence, and what the judge says is not evidence. You decide what the evidence is.

That having been said, move forward, [Trial Counsel].

Trial counsel immediately followed the trial court's instructions with his own "admonishment":

[Trial Counsel]: Thank you, Your Honor.

Questions and comments of the attorneys do not constitute testimony and must not be considered as evidence. I'm not giving you evidence. I'm giving you what I think my opinion is drawn from the evidence. . . .

Thereafter, the prosecutor [**22] prefaced his final remarks to the jury with the following:

[Prosecutor]: Thank you. The first thing - - I don't want to be repetitive but I do want to remind you you're the exclusive judges of the facts. So, regardless of what I say I think came from that stand and what I say I recall or [Trial Counsel], that's not the way it is. You heard the testimony. You heard the evidence. I ask you to be very careful in that regard. . . .

It was only after being verbally instructed by the trial court, with echoing remarks by counsel for the parties, that the improper remark by the State was made. Although the trial court overruled appellant's timely objection to the improper remark, the jury had already been instructed in great detail that nothing the attorneys said was evidence, to disregard the trial court's ruling on objections, and that only the members of the jury were to recall and decide what the evidence was. While appellant did deny that the cosmetology commission had given the school permission to allow students to smoke in the rear of the building, the State's improper comment to the contrary during final argument did not affect appellant's substantial rights so as to require [**23] reversal of her conviction. *Tex. R. App. P. 44.2(b)*. Under the test for reversible error in jury argument as set out in *Mosley*, we find the cautionary instruction given by the trial court and affirmed by counsel for the parties combined to cure the error by the trial court in overruling appellant's objection. *See Mosley*, 983 S.W.2d at 259. Additionally, the prosecutor's "misconduct" was not severe and the strength of the evidence in support of the conviction was not given added weight in any significant degree. *Id.* We also find, under *Mosley*, that any error by the trial court during closing argument did not affect [**27] appellant's substantial rights. Issues four and five are overruled.

Issue six avers: "The trial court erred by failing to provide sufficient curative instructions to the jury following the sustaining of defense objections to the prosecutor's improper comments." As noted above, two of the three instances of the State's closing argument in question found support in the evidence. Nevertheless, appellant argues that because any curative instructions given by the trial court were insufficient to cure the State's misconduct, [**24] the "cumulative effect" of the improper argument raised in appellate issues four and five require us to "review other misstatements of law and twisting of facts performed by [the prosecutor]." As only one of the three instances of alleged improper argument had merit, we find it unnecessary to conduct the sweeping review of the record for other "misstatements" by the State.

[HN17] An isolated mischaracterization of the record by the State which was not severe and was made in the context of a plethora of prophylactic admonishments from the trial court and the parties does not require appellate analysis of the record for the effects of cumulative error. We recognize the proposition that [HN18] a number of errors may be found harmful in their cumulative effect. *See Feldman v. State*, 71 S.W.3d 738, 757 (Tex. Crim. App. 2002) (op. on rehearing); *Stahl v. State*, 749 S.W.2d 826, 832 (Tex. Crim. App. 1988). However, there appears to be no precedent for holding that non-errors may, in their cumulative "effect," cause error, much less reversible error. *See Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999). We overrule issue six.

Issue seven [**25] registers this complaint: "Trial counsel's failures to request indicated jury instructions, to properly file a motion for new trial, to obtain rulings on filed discovery motions, to raise [the prosecutor's] disqualification, and failure to use certain highly exonerating exhibits supplied by appellant, cumulatively and singularly constituted a denial of the effective assistance of counsel, in violation of appellant's rights to effective counsel under the Sixth and Fourteenth Amendments to the United States Constitution."

[HN19] In general, to obtain a reversal of a conviction on the ground of ineffective assistance, an appellant must demonstrate that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674, 693, 698 (1984). In assessing a claim of ineffective assistance, an appellate court "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance; [**26] that is, the [appellant] must overcome the presumption that,

under the circumstances, the challenged action might be considered sound trial strategy." 466 U.S. at 689 (some punctuation omitted; citation omitted).

[HN20] Texas courts have consistently adhered to the standard set out in *Strickland*. See generally *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). "Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness." *Id.* at 500. It is also recognized that counsel is presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See *id.*; see also *Strickland*, 466 U.S. at 689.

[*728] The deficiencies of trial counsel alleged by appellant include (1) failing to request an instruction on self-defense, (2) failing to secure a jury instruction to the effect that the victim and her brother were not permitted to interfere or impede appellant's inspection of the school per cosmetology commission rules and regulations and provisions of the Texas Administrative Code, [**27] (3) failing to request disqualification of the prosecutor as he had been previously consulted by appellant regarding legal representation for the instant offense, (4) failing to properly "present" appellant's motion for new trial to the trial court for a ruling, (5) failing to obtain rulings on the pretrial motions he filed thereby failing to obtain "complete" discovery, and (6) failing to utilize certain "materials" acquired through prior State investigations of the victim's cosmetology school "which would have aided in [appellant's] defense."

With regard to most of these alleged deficiencies, appellant essentially asks us to assume no trial strategy existed or only an unreasonable one at best. Yet, what appellant asserts "ought to have been done" by trial counsel has virtually no legal foundation or factual support. For example, we are unaware of any statutory provision or common law precedent which would have permitted the trial court to have provided the jury with the provisions of Texas Cosmetology Commission's Regulation § 1602.551 so as to "have informed jurors that Appellant had both a right and a duty to protect such evidence [time cards] of violations." n4 Indeed, such [**28] an instruction could arguably have been subjected to an objection by the State as a comment by the trial court on the weight of the evidence. See *Tex. Code Crim. Proc. Ann. art. 36.14* (Vernon Supp. 2004) (Judge shall deliver to the jury a written charge "distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury.")

n4 Similar language to that quoted in appellant's brief appears in *Tex. Occ. Code Ann. § 1602.551* (Vernon 2004), and reads as follows:

(a) The commission, an inspector, or an authorized representative of the commission may enter a license holder's premises at any time during normal business hours to determine whether the license holder is in compliance with this chapter and commission rules.

(b) If an inspector discovers a violation of this chapter or a commission rule, the inspector shall:

(1) give to the violator written notice of the violation on a form prescribed by the commission; and

(2) file a complaint with the executive director.

[**29]

In a similar vein, appellant's insistence that trial counsel's performance was grossly deficient for failing to request an instruction on self-defense is entirely misplaced in light of the testimony of appellant. On direct examination, appellant testified as to how she sustained injuries to her hand and wrist. She continued her testimony concerning the events in question as follows:

Q. [Trial Counsel]: Did you knock [the victim] to the ground?

A. [Appellant]: No.

Q. Did you grab her by the shoulders and push her in a fashion that she would have hit her head on a wall?

A. No.

Q. Did you cause any injury to [the victim]?

A. No.

Q. Are you still feeling any of the effects of your injuries?

[*729] A. Yes.

....

Q. Okay. Did you in any way provoke [victim's brother] into doing what he did?

A. No.

Q. Did you in any form or fashion have any intention of touching [the victim] --

A. No. I'm sorry.

Q. Well, let me just finish.

-- in a manner that she would have considered provocative or offensive?

A. No.

The record reflects that appellant denied even touching the victim or the victim's brother, but said she was herself assaulted by the victim and the victim's brother. [**30] Appellant contends that because trial counsel "argued" for the "fallback position of self-defense," his performance was deficient for failing to request such an instruction from the trial court.

We agree with the general proposition that when evidence from any source raises a defensive issue, and the defendant properly requests a jury instruction on that issue, the trial court must submit the issue. See *Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993). However, we have previously held that [HN21] when the defensive issue in question is one contained in Chapter Nine of the Texas Penal Code, and the defendant fails to admit to having committed the charged act, the defendant is not entitled to an instruction on self-defense. See *Gilmore v. State*, 44 S.W.3d 92, 96-97 (Tex. App.--Beaumont 2001, pet. refd). As we explained, Chapter Nine is titled, "Justification Excluding Criminal Responsibility," and includes "justifications" such as "necessity" and "public duty," as well as self-defense. *Id.* at 97. As the title of the chapter indicates, these defenses have traditionally been recognized as justification for conduct that would otherwise [**31] be criminal. *Id.* As such an instruction informs the jury that the charged conduct was excusable under the law, the accused must admit to having committed the charged conduct in the first place. However, when a person accused of assault denies even touching the victim, as appellant so testified, she has engaged in no conduct which needs justifying. She has essentially denied that the alleged criminal act ever took place. Therefore, trial counsel's performance was not deficient for not having requested an instruction on self-defense as such a defense was not raised by the evidence. And, as noted above, argument of counsel is not evidence.

In *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002), the Court of Criminal Appeals observed that, [HN22] under normal circumstances, "the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decisionmaking [sic] as to overcome the presumption that counsel's conduct was reasonable and professional." (footnote omitted). This proposition was reiterated by the Court in *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex. Crim. App. 2003). [**32] In her brief, appellant states: "Rylander is inapplicable because trial counsel's actions speak louder than his words in his own defense could, anyway, in the designated in-

stances of ineffectiveness." Appellant appears to miss the entire point of *Bone* and *Rylander* in that her trial counsel's alleged deficiencies of performance are neither professionally deficient nor prejudicial *per se*. Under such circumstances, both *Bone* and *Rylander* agree that "trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Rylander*, 101 S.W.3d at 111; *Bone*, 77 S.W.3d at 836.

[*730] The somewhat unique procedural history of the instant case makes affording to trial counsel the opportunity to respond to appellant's particular complaints compelling in that appellant had already been adjudicated guilty by a jury in municipal court on the identical charge, albeit with different trial counsel. We have no way of knowing if present trial counsel discussed the strategy and presentation with municipal court trial counsel so as to refine or entirely change trial strategy for the *de novo* trial in [**33] county court. Obviously, all this is pure speculation as present trial counsel has not been afforded the opportunity to provide reasons for the alleged deficient acts and omissions. As has been often noted, [HN23] no Texas court defines the right to effective assistance of counsel as the right to error-free counsel. See *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990); *Mercado v. State*, 615 S.W.2d 225, 228 (Tex. Crim. App. 1981); *Ex parte Burns*, 601 S.W.2d 370, 372 (Tex. Crim. App. 1980). From the state of the record before us, appellant has failed in her burden to show trial counsel's performance fell below an objective standard of reasonableness. See *Rylander*, 101 S.W.3d at 110. Issue seven is overruled. n5

n5 For a compelling example of the importance of providing an evidentiary basis for an ineffective assistance claim, see *Ex parte Varelas*, 45 S.W.3d 627 (Tex. Crim. App. 2001). Varelas's conviction for capital murder and death sentence were affirmed on direct review by the Court of Criminal Appeals in the face of, *inter alia*, an ineffective assistance challenge because of "an otherwise silent record." *Id.* at 629, 632. However, Varelas's post-conviction habeas corpus application was accompanied by an affidavit from his trial counsel admitting the omissions at trial were not the result of trial strategy. *Id.* at 632. The Court found trial counsel's affidavit admitted to deficient performance and later found prejudice as a result of the deficient performance. *Id.* at 632, 636. The Court granted Varelas relief and ordered a new trial for him. *Id.* at 636.

[**34]

Appellant's concluding issue argues "the evidence was factually insufficient to support the jury's verdict that appellant was guilty of simple assault beyond a reasonable doubt, and judgment should be reversed." [HN24] In a factual sufficiency review, we review all of the evidence in a neutral light, and we will set the verdict aside only if the evidence is so weak that the verdict is clearly wrong and manifestly unjust, or the contrary evidence is so strong that the standard of proof beyond a reasonable doubt could not have been met. *Ross v. State*, 133 S.W.3d 618, 620 (Tex. Crim. App. 2004). n6 Even in a neutral light, evidence in support of the verdict came in the form of testimony from the victim, [M.E.P.], and the victim's brother, [D.L.L.]. Additionally, one student eye-witness testified that she observed appellant "push [M.E.P.] over the table. She reached over the table and pushed her So, [M.E.P.] was standing on this side; and when she [appellant] pushed her [M.E.P.], she pushed her into the wall. Her head hit the wall." Another student eye-witness testified that "[appellant] proceeded to turn around and shove [M.E.P.] into the wall, and [M. [**35] E.P.] hit the ground." When asked if he observed appellant being provoked into pushing [M.E.P.], this student stated he did not.

n6 See also *Escamilla v. State*, 143 S.W.3d 814, 817 (Tex. Crim. App. 2004); *Zuniga v. State*, 144 S.W.3d 477, 481-82 (Tex. Crim. App. 2004); *Vodochodsky v. State*, 2004 Tex. Crim. App. LEXIS 663, No. 74129, 2004 WL 840121, at *6 (Tex. Crim. App. April 21, 2004)(not yet released for publication).

In addition to the denial by appellant that any offensive contact by her took place, the defense also elicited the following description of events from another student eye-witness present at the school when the incident occurred:

[*731] Q. [Trial Counsel]: Could you see [M.E.P.]?

A. [Student]: I saw her. She had come and was across the table. When I stopped what I was doing and I walked towards there and people were going towards there because there was obviously something going on. Just heard a lot of loud noises and some movement and I'm short. But, I mean, there were people [**36] moving over there and I looked in and I saw him, [D.L.L.], come around the table and he was still hollering at this point and just - - it was more like just hearing loud noises. It's like one of those things something flashes in your head and something's really wrong and [M.E.P.] had come in and she was like where he had been across the table from Mrs. Modica. And I saw - - I saw him like, I don't know,

lunge maybe. His shoulder like went into her, and he was obviously reaching for her.

Q. You saw that?

A. That's all I could see on - - on his part that he was - - I don't want to say throwing himself into her but he lunged at her, I guess, with his shoulder.

....

Q. Where was [M.E.P.] when this actually took place?

A. She was across the table like - - you know, sitting - - standing kind of across the table from like where she would be sitting now, where Mrs. Modica is and [M.E.P.] was kind of across the table and she was reaching across the table.

Q. Okay. Did you see - - well, as a result of [D.L.L.]'s actions, what happened?

A. I saw him lunge into her and she kind of knocked sideways and I saw [M.E.P.] grabbing at her and then there was a whole lot of people [**37] around.

Q. In the room or just out - -

A. And she was - - coming towards - - I mean, in that room there were already people and then it was - - I mean, people were coming, you know, to see what was happening because you could hear a scuffle and you could hear the loudness.

Q. Okay. Now - -

A. And I went back to my station after that. I was packing up.

Q. Okay. Were you the only one who started to pack up?

A. I don't think so because it made everybody really nervous.

Q. Okay. Did you see Mrs. Modica do anything to [D.L.L.] - -

A. No.

Q. - - physically?

A. No, sir.

Q. Okay. Did you see Mrs. Modica do anything to [M.E.P.]?

A. Not - - not what I could see. She - - she couldn't have got to her. I mean, I guess she could have reached across the table maybe but I didn't see any of that. After I saw the main - - what I thought was the main scuffle of it, I thought "I'm getting my stuff and I'm leaving," but I didn't see - - she was - - I don't know. She was - - it's like

she was reaching or digging for something. You could see that, but that's all I could tell she was doing.

Q. Okay. Did you see [M.E.P.] physically being pushed back into a wall?

A. Oh, no, sir.

This student [**38] also stated that shortly after the "scuffle," she observed [M.E.P.] "running towards the front door," and [M.E.P.] was not being assisted, carried, or aided by anyone. There is no question but that the record contains testimony in support of both appellant's and the State's theory of prosecution. Viewing all the evidence in a neutral light, as we must, we simply cannot say that the State's evidence is so weak that [*732] the jury's verdict is clearly wrong and manifestly unjust. *Ross*, 133 S.W.3d at 620. Nor can we say that evidence favorable to appellant is so strong that the State's evidence could not have met the standard for criminal conviction - - proven beyond a reasonable doubt. *Id.* The

evidence is factually sufficient to support the jury's verdict. Issue eight is overruled. In connection with our resolution of issue one, we reform the judgment of the trial court, substituting the properly-worded offense "Assault," for the improperly worded term "City Appeal - Other," wherever necessary. See *Tex. R. App. P. 43.2(b)*; *Cobb v. State*, 95 S.W.3d 664, 668 (Tex. App.--Houston [1st Dist.] 2002, no pet.) [HN25] ("An appellate court [**39] has the power to correct and reform a trial court judgment to make the record speak the truth when it has the necessary data and information to do so[.]")(quoting *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.--Houston [1st Dist.] 2001, no pet.)). As so reformed, the judgment of the trial court is affirmed.

AFFIRMED AS REFORMED.

STEVE MCKEITHEN

Chief Justice

Citation #5
2005 Tex. AG LEXIS 3748

LEXSEE

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS

Opinion No. GA-0336

2005 Tex. AG LEXIS 3748

June 28, 2005

CORE TERMS: juror, jury wheel, summon, jury duty, volunteer, summoning, jury selection, venire, clerk, constable, jury service, utilize, pool, selecting, pick-up, summoned, impartial, peace, sufficient number, proper officer, jury list, electronic, envelope, select, See Act, distinctive group, matter of law, issue a writ, systematically, supplemental

SYLLABUS:

[*1]

Whether a justice of the peace may establish a standing pool of qualified volunteers to serve for jury duty (RQ-0306-GA)

REQUESTBY:

The Honorable Mark E. Price
San Jacinto County Criminal District Attorney
1 State Highway 150, Room 21
Coldspring, Texas 77331

OPINIONBY:

GREG ABBOTT, Attorney General of Texas; BARRY R. MCBEE, First Assistant Attorney General; DON R. WILLETT, Deputy Attorney General for Legal Counsel; NANCY S. FULLER, Chair, Opinion Committee; William A. Hill, Assistant Attorney General, Opinion Committee

OPINION:

You ask generally about procedures for summoning a jury for justice court, particularly whether a justice of the peace may establish a standing pool of qualified volunteers to serve for jury duty. n1

n1 See Letter from Honorable Mark E. Price, San Jacinto County Criminal District Attorney, to Honorable Greg Abbott, Texas Attorney General (Dec. 22, 2004)(on file with Opinion Committee, *also available at* <http://www.oag.state.tx.us>) [hereinafter Request Letter].

You inform us that San Jacinto County's population is [*2] about 20,000 persons. Request Letter, *supra* note 1, at 1. The county is served by two district courts, a constitutional county court, and four justice of the peace precincts with jurisdiction over Class C misdemeanors. *See id.*; *see also* TEX. CONST. art. V, § 16. Each jury in a justice court consists of six persons. TEX. GOV'T CODE ANN. § 62.301 (Vernon 2005). You state that many of the county's citizens have not heeded justice courts' jury summonses, as illustrated by recent experience when only four of seventy-five citizens summoned for prospective jury duty responded. n2 Request Letter, *supra* note 1, at 1. You ask what alternatives a justice may utilize to guarantee sufficient numbers of citizens for jury duty. n3 *Id.* at 2. In particular, you ask about alternatives under articles 45.027 and 45.028 of the Code of Criminal Procedure and whether a standing pool of citizens qualified for jury duty could be established by advertising for volunteers "to make up for non-responses." *Id.* at 1.

n2 The difficulty of obtaining a sufficient response to jury summons is not unique to San Jacinto County. See Tim Eaton, *12 Fined for Jury No-show; 73 Who Didn't Appear Again May Face Fines of \$ 1,000*, *Deputy Visit*, Corpus Christi Caller-Times, Feb. 28, 2004, at B1.

[*3]

n3 Senate Bill 1704, passed by the Seventy-ninth Legislature and signed by the Governor, appears designed to encourage jury service. See Act of May 27, 2005, 79th Leg., R.S., S.B. 1704 (to be codified at TEX. GOV'T CODE ANN. § § 61.001, .0015, 62.0141, .0142). When Senate Bill 1704 becomes effective, it will (1) establish a minimum payment of \$ 40 for each day of service after the juror's first day; (2) authorize a penalty for knowingly providing false information on a request for an exemption or to be excused from jury duty; and (3) authorize the clerk to grant a postponement of jury service. This Act takes effect September 1, 2005, except that the amendment to section 61.001 and the addition of section 61.0015 will take effect January 1, 2006.

The statutory provisions for summoning prospective jurors for justice courts are located primarily in chapter 62 of the Government Code and in chapter 45 of the Code of Criminal Procedure. Articles 45.027 and 45.028 of the Code [*4] of Criminal Procedure specifically concern the summoning of a jury for criminal trials in justice and municipal courts. TEX. CODE GRIM. PROC. ANN. arts. 45.027, .028 (Vernon Supp. 2004-05). Article 45.027 provides that when the accused in a justice court does not waive a jury, the justice "shall issue a writ commanding the proper officer to summon a venire from which six qualified persons shall be selected to serve as jurors in the case." *Id.* art. 45.027(a). Jurors "so summoned shall remain in attendance as jurors in all cases that may come up for hearing until discharged by the court." *Id.* art. 45.027(b). A justice may fine persons who were summoned for jury duty but who failed to attend not more than \$ 100 for contempt. *Id.* art. 45.027(c). Under article 45.028, when "a sufficient number of jurors are not in attendance," a justice "shall order the proper officer to summon a sufficient number of qualified persons to form the jury." *Id.* art. 45.028. Chapter 45 does not specify procedures for selecting prospective jurors, although the provisions in articles 45.027 and 45.028 have been called the "pick-up" method of summoning jurors. See *Cantu v. Samples*, 581 S.W.2d 195, 196 [*5] (Tex. Civ. App. -- San Antonio 1979, no writ). As this office once noted, the pick-up method has been the historic practice in justice courts:

Since 1876 it has been the statutory duty of a justice of the peace to order the sheriff or constable to summon a number of legally qualified jurors to attend as a jury whenever there are any jury cases pending for trial The sheriff or constable is sworn to select none but impartial, sensible, and sober men having the qualifications of jurors under the law, and to do it without bias or favor toward any party.

Tex. Att'y Gen Op. No. H-1204 (1978) at 1 (citations omitted).

In 1991, however, the legislature authorized justice courts to utilize methods of jury selection available to county and district courts in chapter 62 of the Government Code, such as the jury wheel method. See Act of Mar. 13, 1991, 72d Leg., R.S., ch. 7, 1991 Tex. Gen. Laws 9, 9-11. The jury wheel method begins with a process known as reconstituting the jury wheel. To reconstitute a jury wheel, the names of eligible jurors are derived from voter registration lists from all precincts in the county and from a list the Department of Public Safety provides of [*6] the names of citizens of the county with a valid driver's license or personal identification card. See TEX. GOV'T CODE ANN. § 62.001 (Vernon 2005). At least ten days before the first day of the term of court, the district clerk and sheriff or any county constable draw names of prospective justice court jurors from the wheel in the presence and direction of the district judge. *Id.* 9 62.004(a)-(b). The names are recorded "on as many lists as the judge in whose presence the names are drawn considers necessary to ensure an adequate number of jurors for the term." *Id.* § 62.004(c). This procedure may be repeated at any time during the term of court if it appears that the jury lists already drawn will be depleted before the end of the term. *Id.* § 62.004(f).

The lists are certified and placed in consecutively numbered envelopes. *Id.* § 62.006(a)-(b). The justice examines the envelopes and returns them to the clerk's office. *Id.* § 62.007(a)-(d). A justice requiring a jury for a particular week notifies the district clerk of that fact, and the clerk opens the next consecutively numbered envelope. *Id.* § 62.012(a). The clerk then [*7] delivers the list to the sheriff or constable. *Id.* 9 62.012(b)(2). The sheriff or constable notifies the

prospective jurors to appear for jury service either by oral or written summons. *Id.* § 62.013(a)-(b)(1)-(2). The summons must include the time, place, and purpose of the appearance, as well as the penalty for failure to appear as required. *Id.* § 62.013(d). The code provides for a penalty as follows:

In addition to any criminal penalty prescribed by law, a person summoned for jury service who does not comply with the summons as required by law is subject to a contempt action punishable by a fine of not less than \$ 100 nor more than \$ 1,000.

Id. § 62.0141.

On the day when prospective jurors appear for service in justice court, the justice selects from the names on the jury list a sufficient number of qualified jurors to serve on the jury panel. *Id.* § 62.015(a). If the prospective jurors whose names are on the jury list are not present in sufficient numbers, the justice "shall order" the sheriff or constable to summon additional jurors. *Id.* § 62.015(b). The names of additional prospective jurors "shall be drawn from the jury wheel." *Id.*

Chapter 62 [*8] contains additional provisions for jury selection available for courts in certain counties. For example, in counties having two district courts (such as San Jacinto), the district judges may at their discretion utilize the jury wheel to establish a general interchangeable juror panel. *Id.* § 62.017. With district judge approval, the general jury panel may be used interchangeably with justice, county, and district courts. *Id.* § 62.017(e). When there is a deficiency of jurors, the district judge with control of the general panel may order additional names drawn from the jury wheel. *Id.* § 62.017(f).

Also, on recommendation of a majority of the district and criminal district judges of a county, the commissioners court may adopt a plan for jury selection by electronic or mechanical equipment instead of by jury wheel. *Id.* § 62.011(a). The plan so adopted must specify that the source of names of prospective jurors is the same as for the jury wheel method. *Id.* § 62.011(b)(2). Additionally, the plan must "provide a fair, impartial, and objective method of selecting names of persons for jury service with the aid of electronic or mechanical equipment." *Id.* § 62.011(b)(3). [*9]

In 1991, when the legislature authorized justice courts to utilize the jury wheel and other jury selection methods previously unavailable to justice courts, it left articles 45.027 and 45.028 of the Code of Criminal Procedure intact. Harmonizing chapter 62 of the Government Code and articles 45.027 and 45.028 of the Code of Criminal Procedure, we conclude that a justice court conducting a criminal trial may utilize either the appropriate jury selection method in chapter 62 of the Government Code or the pick-up method of summoning a jury in chapter 45 of the Code of Criminal Procedure. Of course, chapter 45 does not apply to jury trials in non-criminal matters. See TEX. CODE CRIM. PROC. ANN. art. 45.027(a) (Vernon Supp. 2004-05) (authorizing a venire summons "if the accused does not waive a trial by jury") (emphasis added).

You have not elaborated about how the justice's proposed volunteer juror system might work. However, any system for selecting a jury from a pool of volunteers would be incompatible with the jury wheel method in chapter 62 of the Government Code, which requires that the names of prospective jurors and supplemental [*10] jurors be drawn from the jury wheel. See TEX. CODE CRIM. PROC. ANN. art. 34.02(a) (Vernon 1989) (in a jury wheel county, supplemental jurors in a criminal case must be selected from the jury wheel). If the county has opted to use electronic or mechanical means of jury selection under section 62.011 of the Government Code, selection of the venire must comply with the plan adopted by the commissioners court. TEX. GOV'T CODE ANN. § 62.011(a) (Vernon 2005). The plan must "provide a fair, impartial, and objective method of selecting names of persons for jury service." *Id.* § 62.011(b)(3). The Court of Criminal Appeals has construed this language in the statute prior to codification as requiring a plan that provides a "random and impartial selection process." *Martinez v. State*, 507 S.W.2d 223, 227 (Tex. Crim. App.), cert. denied, 419 U.S. 969 (1974) (noting also that the district clerk must be the officer in charge of administering the plan). Although we cannot determine the issue as a matter of law, it is difficult to discern how selection of potential [*11] jurors from a pool of volunteers rather than from the county at large could be considered random.

A justice court empaneling a jury under chapter 45 of the Code of Criminal Procedure may not adopt procedures inconsistent with articles 45.027 and 45.028. TEX. CODE CRIM. PROC. ANN. arts. 45.027, .028 (Vernon Supp. 2004-05). These articles provide that the justice "issue a writ commanding the proper officer to summon a venire" and order the officer to summon additional jurors if necessary. *Id.* Articles 45.027 and 45.028 do not expressly confine the sheriff or constable's discretion to a particular process for summoning prospective jurors. *Id.* However, the pick-up jury method itself has been criticized because in practice it often "leads to the formation of groups of professional jurors who gather

around the courthouse with the hope of being called for jury duty; that the sheriff selects his talesmen from these groups because of their proximity and convenience." Robert W. Stayton & Thomas N. Watkins, Jr., *The "Pick-Up" Jury*, 19 Tex. L. Rev. 142, 152 (1941). See also *Henson v. Wyrick*, 634 F.2d 1080, 1083 (8th Cir. 1980), [*12] *cert. denied*, 450 U.S. 958 (1981) (noting that many federal and "state courts have also expressed concern over the unbridled discretion of officials in the selection of bystander jurors"). Moreover, institutionalizing a volunteer system may raise constitutional concerns. Due process requires that the source of a jury "reflect a cross section of the population suitable in character and intelligence for jury duty." *Shelby v. State*, 479 S.W.2d 31, 40 (Tex. Crim. App. 1972). Although a jury list need not perfectly reflect the composition of the community, see *Swain v. Alabama*, 380 U.S. 202 (1965), nevertheless the method of jury selection must not systematically exclude a "distinctive group" of the community, resulting in underrepresentation in the venires. See *Pondexter v. State*, 942 S.W.2d 577, 580 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 825 (1997). While we cannot say that a system for selecting potential jurors relying on volunteers would be unconstitutional as a matter of law, such a system must guard against such a challenge. [*13]

SUMMARY

Chapter 62 of the Government Code provides broadly for summoning juries for trial in a justice court. Articles 45.027 and 45.028 of the Code of Criminal Procedure additionally provide for summoning a jury for a criminal trial in a justice court. For the trial of a criminal matter, a justice court may utilize the procedures in either chapter 62 of the Government Code or articles 45.027 and 45.028 of the Code of Criminal Procedure. While articles 45.027 and 45.028 do not prohibit utilizing a pool of volunteers for empaneling a venire, such a method must guard against a due process challenge that it systematically excludes a distinctive group in the community from the venire.

Citation #6
2005 Tex. AG LEXIS 2312

LEXSEE

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS

GA-0313

2005 Tex. AG LEXIS 2312

March 21, 2005

CORE TERMS: collection, fine, collection agent, peace, time, delinquent, authorize, vendor, contracted, private attorney, collected, license, driver's, community service, renewal, dispose, political subdivision, provide information, delinquent payment, satisfy a judgment, failed to pay, court-ordered, defaulting, unpaid, capias, statutorily authorized, amount in controversy, authority to enter, restitution, discharged

SYLLABUS:

[*1]

Whether a county commissioners court may compel a justice of the peace to use a vendor under contract with the county to collect court fines, fees, and costs (RQ-0276-GA)

REQUESTBY:

The Honorable Jeri Yenne
Brazoria County Criminal District Attorney
111 East Locust, Suite 408A
Angleton, Texas 77515

OPINIONBY:

GREG ABBOTT, Attorney General of Texas; BARRY R. MCBEE, First Assistant Attorney General; DON R. WILLETT, Deputy Attorney General for Legal Counsel; NANCY S. FULLER, Chair, Opinion Committee; Kymberly K. Oltrogge, Assistant Attorney General, Opinion Committee

OPINION:

You ask whether a county commissioners court may compel a justice of the peace to use a vendor under contract with the county to collect court fines, fees, and costs. n1 You indicate that the Brazoria County Commissioners Court has contracted with a private attorney to collect unpaid fines, fees, and court costs under articles 103.003 and 103.0031 of the Code of Criminal Procedure, which pertain to the collection of fines, fees, court costs, and restitution for which a public officer has issued a written bill. See TEX. CODE CRIM. PROC. ANN. arts. 103.003, .0031 (Vernon Supp. 2004-05); [*2] see also *id.* art. 103.001 (describing payable costs); Request Letter, *supra* note 1, at 1.

n1 See Letter from Honorable Jeri Yenne, Brazoria County Criminal District Attorney, to Honorable Greg Abbott, Texas Attorney General, at 1 (Sept. 20, 2004)(on file with the Opinion Committee, also available at <http://www.oag.state.tx.us>) [hereinafter Request Letter].

I. Code of Criminal Procedure articles 103.003 and 103.0031

Article 103.003(a) authorizes "district and county attorneys, clerks of district and county courts, sheriffs, constables, and justices of the peace" to collect monies for which an officer has produced a written bill. TEX. CODE CRIM.

PROC. ANN. art. 103.003 (Vernon Supp. 2004-05); *see also id.* art. 103.001 (defining payable costs). Subsection (c) indicates that the commissioners court has authority to contract for the collection of the fines, [*3] fees, court costs, and restitution: "This article does not limit the authority of a commissioners court to contract with a private vendor or private attorney" to provide "collection services under Article 103.0031." *Id.* art. 103.003(c).

Article 103.0031(a) expressly authorizes a county commissioners court to "enter into a contract with a private attorney or a public or private vendor for the provision of collection services for . . . (1) debts and accounts receivable such as unpaid fines, fees, court costs, forfeited bonds, and restitution ordered paid by: (A) a court serving the county . . ." *Id.* art. 103.0031(a)(1)(A). Under subsection (b), a commissioners court that enters into a collection contract "may authorize the addition of a collection fee in the amount of 30 percent on each item described in Subsection (a) that is more than 60 days past due and has been referred to the attorney or vendor for collection," although a defendant whom the court of original jurisdiction has determined is indigent is not liable for the collection fee. *Id.* art. 103.0031(b),(d); *see also id.* art. 103.0031(f) (instructing when an item subject to collection services and to the additional [*4] collection fee is 60 days past due). "The collection fee does not apply to a case that has been dismissed by a court of competent jurisdiction or to any amount that has been satisfied through time-served credit or community service." *Id.* art. 103.0031(b). The county may use the 30% collection fee only to compensate the attorney or vendor (the "collection agent") who earns the fee. *See id.* art. 103.0031(g).

II. Facts

According to your letter, Brazoria County has contracted with a private attorney under article 103.0031(a) to collect delinquent court costs and fees. *See Request Letter, supra* note 1, at 1. The attorney collects a 30% collection fee, as article 103.0031(b) authorizes the attorney to do. *See id.*; *see also* TEX. CODE CRIM. PROC. ANN. art. 103.0031(b) (Vernon Supp. 2004-05).

You further indicate that Brazoria County has contracted with the Texas Department of Public Safety (the "Department") under Transportation Code section 706.002. *See Request Letter, supra* note 1, at 1; *see* TEX. TRANSP. CODE ANN. § 706.002 [*5] (Vernon Supp. 2004-05). Section 706.002 authorizes a political subdivision, such as a county, to contract with the Department

to provide information necessary for the Department to deny renewal of the driver's license of a person who fails to appear for a complaint or citation or fails to pay or satisfy a judgment ordering payment of a fine and cost in the manner ordered by the court in a matter involving any offense that a court has jurisdiction of under Chapter 4, Code of Criminal Procedure.

TEX. TRANSP. CODE ANN. § 706.002(a) (Vernon Supp. 2004-05); *see also id.* § 706.001(2)-(3), (7) (defining the terms "department," "driver's license," and "political subdivision"). The term "complaint" for purposes of chapter 706 is defined to mean "notice of an offense," *id.* § 706.001(1), "for which maximum possible punishment is by fine only or" for a parking offense, TEX. CODE CRIM. PROC. ANN. art. 27.14(d) (Vernon Supp. 2004-05). *See also id.* art. 45.019 (setting out complaint requisites). A citation is defined for purposes of chapter 706 to include only citations for traffic-law violations. [*6] *See* TEX. TRANSP. CODE ANN. § 706.003(a) (Vernon Supp. 2004-05). Upon receiving the necessary information from a political subdivision that has contracted with the Department under section 706.002, the Department may deny renewal of a driver's license to the person who failed to appear or to pay or satisfy a judgment. *See id.* § 706.004(a). A person who fails to appear for a complaint or citation must pay a \$ 30 administrative fee "for each complaint or citation reported to the department under" a chapter 706 contract, payable when (1) the court enters judgment; (2) the court dismisses the underlying offense; or (3) "bond or other security is posted to reinstate the charge for which the warrant was issued." *Id.* § 706.006(a). Similarly, a "person who fails to pay or satisfy a judgment ordering the payment of a fine and cost . . . shall be required to pay an administrative fee of \$ 30." *Id.* § 706.006(b). The \$ 30 fee, which is remitted to the officer who collects the fine, is split between the local government's general fund, the Texas Comptroller, and the Department. *See id.* § 706.007(a), (d)-(e).

The Department has contracted [*7] with a private vendor, OmniBase Services of Texas, to collect and store information regarding violators who fail to satisfy a fine and court costs. *See Request Letter, supra* note 1, at 1. The Department can obtain the information from OmniBase "to deny the renewal of a violator's driver's license." *Id.*

III. Analysis

You ask first whether a person who has failed to pay court-ordered fines, fees, or costs must pay both the 30% fee under Code of Criminal Procedure article 103.0031(g) and the \$ 30 fee under Transportation Code section 706.002. Request Letter, *supra* note 1, at 2. You characterize both contracts as collection contracts. *See id.* In other words, you ask, is a county "allowed to have more than one collection contract" and if so, "is each collection entity allowed to charge a collection fee, 30% by one and \$ 30.00 by the other." *Id.* We assume you limit this question to judgments in matters covered by section 706.002 of the Transportation Code.

A contract under section 706.002 is not a contract to collect delinquent [*8] fines, fees, or court costs. Rather, it is a contract to provide information regarding persons who fail to pay court-ordered judgments so that the Department can deny renewals of their drivers' licenses. *See* TEX. TRANSP. CODE ANN. § 706.002(a) (Vernon Supp. 2004-05). Because the county's contract with the Department is not a collection contract and was not entered under Code of Criminal Procedure article 103.0031, the county has not entered two collection contracts. A county is expressly authorized to enter a contract both (1) for the collection of fines, fees, and costs under article 103.0031 of the Code of Criminal Procedure, and (2) to provide information to the Department under section 706.002 of the Transportation Code.

Additionally, both statutes authorize the collection of a fee, and the fees are cumulative. Article 103.0031(b) expressly permits a county to add a 30% fee to delinquent fines, fees, and costs collected by the collection agent under contract with the county. *See* TEX. CODE CRIM. PROC. ANN. art. 103.0031(b) [*9] (Vernon Supp. 2004-05). Section 706.006 expressly permits imposing a \$ 30 administrative fee on a person who fails to appear or fails to pay a fine and cost in certain criminal matters. *See* TEX. TRANSP. CODE ANN. § 706.006(b) (Vernon Supp. 2004-05). We thus conclude that a defendant in such a criminal matter whose delinquent payment is collected under a contract entered in accordance with article 103.0031 may be charged both fees: a fee equal to 30% of the delinquent payment for the services of the collection agent, and a fee of \$ 30 to provide the information regarding the delinquent payment to the Department. *See infra* at p. 6 (discussing calculation of the 30% collection fee where both the collection fee and the \$ 30 administrative fee are due).

You next ask whether a commissioners court that has entered a contract with a collection agent under article 103.0031 of the Code of Criminal Procedure may compel justices of the peace to use the agent. *See* Request Letter, *supra* note 1, at 2. Under article 103.003(a), a justice of the peace "may collect money payable under this title," [*10] which appears to recognize a justice's authority to receive fines and fees or to dispose of fines and fees using the statutory means provided in chapter 45 of the Code of Criminal Procedure. TEX. CODE WM. PROC. ANN. art. 103.003(a) (Vernon Supp. 2004-05); *see also id.* arts. 45.045, .046, .047, .049 (Vernon Supp. 2004-05); *infra* (describing permissible means by which a justice may collect or otherwise dispose of a fine). Yet, subsection (c) stipulates that article 103.003 "does not limit" a commissioners court's authority "to contract with a private vendor or private attorney" to provide collection services. *Id.* art. 103.003(c).

Justices of the peace are constitutional officers created by article V, section 18 of the Texas Constitution. *See* TEX. CONST. art. V, § 18. Article V, section 19 sets out the jurisdiction of a justice of the peace: "Justice of the peace courts shall have original jurisdiction in criminal matters of misdemeanor cases punishable by fine only, exclusive jurisdiction in civil matters where the amount in controversy is two hundred dollars or less, and such other jurisdiction as may be provided by law" *Id.* art. V, § 19. In a criminal action [*11] in which the defendant is convicted, the justice must issue a judgment that the defendant pay a fine and costs to the state. TEX. CODE CRIM. PROC. ANN. art. 45.041(a) (Vernon Supp. 2004-05). The justice may order the defendant to pay:

- (A) the entire fine and costs when sentence is pronounced;
- (B) the entire fine and costs at some later date; or
- (C) a specified portion of the fine and costs at designated intervals.

Id. § 45.041(b)(1). We are concerned here with a defendant who fails to pay the fine and costs, or a portion thereof, by the date specified in the judgment.

A court has inherent authority to enforce a final judgment, *see Kutch v. Del Mar College*, 831 S.W.2d 506, 510 (Tex. App. -- Corpus Christi 1992, no writ), and several statutes in Code of Criminal Procedure chapter 45 provide a justice with means for collecting or disposing of delinquent fines and fees. For example, a justice court may order a *capias pro fine* for the arrest of an adult defendant who has defaulted on the court's judgment. TEX. CODE CRIM. PROC. ANN. art. 45.045(a) [*12] (Vernon Supp. 2004-05); *see also* BLACK'S LAW DICTIONARY 200 (7th ed. 1999) (defining "*capias pro fine*" as "a writ for the arrest of a person who had not paid an imposed fine"). Or the justice may order the defaulting defendant confined in jail until the judgment is "discharged by law," and may order the fine and costs "collected by execution against the defendant's property." TEX. CODE CRIM. PROC. ANN. arts. 45.046(a), .047 (Vernon Supp. 2004-05); *see also id.* art. 45.048 (stating when a fine and costs are discharged by law). In the alternative, a justice may require a defaulting defendant "to discharge all or part" of a fine or costs "by performing community service." *Id.* art. 45.049(a). Finally, a justice may hold a defaulting defendant in contempt of court in certain circumstances. *See id.* art. 45.050.

We are to harmonize statutes to the extent it is possible to do so. *See* TEX. GOV'T CODE ANN. § 311.025(b) (Vernon 2005). In this situation, we note that a collection agent may collect a fee in the amount of 30% only on fines, fees, and court costs that are "more than 60 days [*13] past due" and that have been "referred" to the collection agent. TEX. CODE CRIM. PROC. ANN. art. 103.0031(b) (Vernon Supp. 2004-05). As a practical matter, even though a collection agent may collect a debt that is less than 60 days past due, the agent will not do so because he or she is not authorized to collect a fee. On the other hand, a justice of the peace has authority to enforce a judgment that is not timely satisfied from the moment the payment is late. *See id.* arts. 45.045(a), .046(a), .049. In those counties that have contracted with a collection agent, a fine or cost that is more than 60 days late may be collected by a collection agent, but the justice of the peace's authority to collect or otherwise dispose of the fine using the means the justice is statutorily authorized to use, by, for example, allowing the defendant to satisfy all or part of the fine through time-credit or community service or by determining the defendant is indigent, is not thereby abrogated. *See id.* art. 103.0031(b), (d) (indicating that the collection fee may not be collected if the court has made certain findings or ordered all or part of [*14] the fine satisfied through time served or community service); *see also id.* arts. 45.045(a), .046(a), .049 (authorizing a justice court to discharge a delinquent fine through *capias pro fine*, time-served credit, or community service). In other words, the commissioners court may not, by entering a contract with a collection agent, force a justice court to refrain from taking those actions the court is statutorily authorized to take with respect to the overdue fines and costs.

You next ask about the proper remedy in the event that a justice of the peace, or any other elected official who is authorized to collect fees under article 103.003(a), "refuses to forward their delinquent costs or fees to the collection entity under the contract." Request Letter, *supra* note 1, at 2. We presume you ask about fines or costs that are at least 60 days delinquent.

Article 103.0031(b) authorizes imposing a 30% collection fee only on items that "have been referred to" the collection agent. TEX. CODE CRIM. PROC. ANN. art. 103.0031(b) (Vernon Supp. 2004-05). The article does not indicate, however, how the items are to be referred. The commissioners' [*15] court has authority to enter a contract that binds the justice courts (although the commissioners court may not thereby abrogate the justice's authority), and Brazoria County has entered a contract that obligates the county to refer "all delinquent accounts" to the collection agent "by electronic or magnetic medium." Contract for Court Fees and Fines Collection Services II, attached to Request Letter, *supra* note 1. The justices of the peace are subject to the contract, but the contract itself does not appear to impose specific duties on the justices.

The remedies we list are premised on an assumption that a particular justice's actions violate the law, but we do not here consider whether any justice's conduct rises to that level. Assuming that a justice is violating the law, chapter 103 of the Code of Criminal Procedure does not specify a remedy, nor does chapter 27 of the Government Code, which provides generally for justice courts. *See* TEX. CODE CRIM. PROC. ANN. ch. 103 (Vernon Supp. 2004-05); TEX. GOV'T CODE ANN. ch. 27 (Vernon 2004). An action for writ of mandamus may be brought in a statutory county court to compel a justice of the peace to comply with the law if the [*16] amount in controversy is within the county court's jurisdiction. *See* TEX. GOV'T CODE ANN. § 25.0004(a) (Vernon 2004) (providing statutory county courts with jurisdiction over writs of mandamus); *Meridien Hotels, Inc. v. LHO Fin. P'ship I*, 97 S.W.3d 731, 736 (Tex. App. -- Dallas 2003, no pet.) (construing Government Code section 25.0004(a)). A justice of the peace who, in an official capacity, intentionally or knowingly violates the law may, in certain circumstances, be prosecuted for abuse of official capacity under Penal Code section 39.02. *See* TEX. PEN. CODE ANN. § 39.02 (Vernon 2003); Tex. Att'y Gen. Op. No. DM-396 (1996) at 8. A justice also may be removed from office if the justice's wrongful actions constitute official misconduct. *See* TEX. LOC. GOV'T CODE ANN. § § 87.011(3), .012(14), .013(a)(2) (Vernon 1999); Tex. Att'y Gen. Op. No.

DM-396 (1996) at 9. A justice of the peace is subject to the Code of Judicial Conduct and may be disciplined by the State Commission on Judicial Conduct. [*17] See TEX. CONST. art. V, § 1-a(6); Tex. Att'y Gen. Op. No. DM-396 (1996) at 9. Imposing these remedies depends on the facts in a particular situation, and we do not consider here whether any particular justice may be subject to any of these remedies.

You also ask that we respond to two questions raised by local justices of the peace. See Request Letter, *supra* note 1, at 2; Memorandum from Justices of the Peace attached to Request Letter. Positing a scenario in which "an original warrant is issued on September 1, 2004 for a total dollar amount of \$ 300.00," the justices ask:

[1.] After 60 days from issuance of the original warrant, can a Justice of the Peace office forward the warrant to a collection firm adding 30% (\$ 90.00) to the original cost of the warrant and to Omni adding \$ 30.00 to the now \$ 390.00 warrant at the same time bringing the total due on the warrant to \$ 420.00?

[2.] Can [the] Commissioners court of a county enter into an agreement with a collection firm to collect warrants in a Justice of the Peace office against the will of the Justice of the Peace?

Memorandum from Justices of the Peace attached to Request Letter, *supra* note 1.

With respect [*18] to the justices' first question, article 103.0031(b) permits a commissioners court to authorize a collection agent to add a 30% collection fee "on each item described in Subsection (a)," including unpaid fines, fees, and court costs, "that is more than 60 days past due and has been referred to the" collection agent. TEX. CODE CRIM. PROC. ANN. art. 103.0031(b) (Vernon Supp. 2004-05); see *id.* art. 103.0031(a) (listing items for which a county may engage a collection agent). Under section 706.006 of the Transportation Code, a \$ 30 administrative fee is assessed when either a defendant (a) fails to appear for a complaint or citation or (b) fails to pay or satisfy a court judgment. See TEX. TRANSP. CODE ANN. § 706.006(a)-(b) (Vernon Supp. 2004-05). Whether a collection agent may collect a 30% collection fee on the \$ 30 administrative fee, as well as on the other fines, fees, and costs depends on whether the administrative fee is 60 days past due. For example, the \$ 30 administrative fee is 60 days past due simultaneously with fines, fees, and costs [*19] assessed in an action in which the defendant failed to appear, since all were assessed at the same time. If the \$ 30 administrative fee is 60 days past due, the collection agent may collect a 30% fee on the administrative fee, so that the total due is \$ 429: $(\$ 300 + \$ 30) \times 30\% = \$ 429$. On the other hand, if the \$ 30 administrative fee accrued when the defendant failed to pay or satisfy a court judgment, the court judgment is 60 days past due before the administrative fee is 60 days past due. In this circumstance, the agent may not collect a 30% fee on the \$ 30 if it is not yet 60 days past due, and the total due of the defendant is \$ 420: $(\$ 300 \times 30\%) + \$ 30 = \$ 420$. The total due in any particular circumstance will depend, therefore, on the facts.

With respect to the justices' second question, the county has authority to enter a contract with a collection agent under article 103.0031 even if the justice court is against the contract. See TEX. CODE CRIM. PROC. ANN. art. 103.0031(a) (Vernon Supp. 2004-05). Moreover, the collection agent may collect fines and costs that are over 60 days late even though the justice of the peace with original jurisdiction of the case disapproves [*20] of the contract.

SUMMARY

A defendant in a matter described in section 706.002 of the Transportation Code who has failed to pay court-ordered fines or costs must pay both (1) a 30% fee if the county has contracted with a collection agent under Code of Criminal Procedure article 103.0031 (g) and (2) a \$ 30 fee if the county has entered a contract under Transportation Code section 706.002.

Under articles 103.003 and 103.0031 of the Code of Criminal Procedure, a county commissioners court may contract with a private collection agent to collect delinquent fines and court costs that were imposed by a justice court. The commissioners court may not thereby abrogate the justice court's authority to collect or otherwise dispose of the fines and costs, however.

Whether a collection agent may collect a 30% collection fee under article 103.0031(b) of the Code of Criminal Procedure on the \$ 30 administrative fee levied under section 706.006 of the Transportation Code will depend on whether the \$ 30 fee is 60 days [*21] past due.

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TEXAS COURT OF CRIMINAL APPEALS

TEXAS MUNICIPAL COURTS EDUCATION CENTER

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TELEPHONE (512) 320-8274
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FAX (512) 435-6118

Strategic Voir Dire

Presented by

W. Clay Abbott
DWI Resource Prosecutor
Texas County and District Attorneys Association
Austin

**13th Annual Municipal
Prosecutors Conference**

**Strategic Voir
Dire**

W. Clay Abbott
DWI Resource Prosecutor
TDCAA

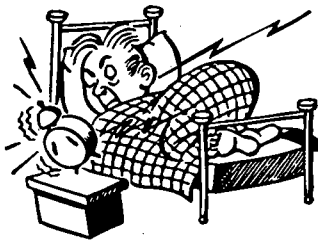
**Imitation is the Greatest
Form of Flattery**

- Teacher
- Salesman
- Trial Attorney
- Preacher

To speak the Truth

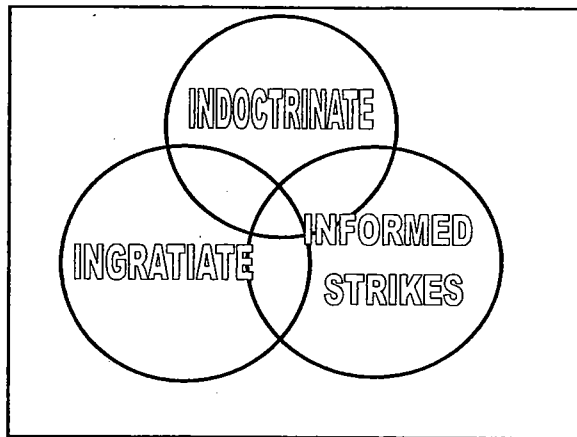
**You never get a
second chance
to make a first
impression!**

Morning of a Typical Juror



ALL Jurors are Individuals

- | | |
|--------------------------|--------------------------|
| ■ What is greatest Fear? | ■ What is greatest need? |
| – Public Speaking | – To get it right |
| – Revealing Secrets | |
| – Being Wrong | |
| – The Unknown | |



LECTURE

■ Advantages

- Fast
- Control
- Minimizes harmful communication

■ Drawbacks

- Boring
- one-way
- no feedback

Close-ended Questions

■ Advantages

- Best persuasion
- some control
- group learning
- less embarrassing

■ Drawbacks

- Slower
- Does not reveal real opinions
- lets dissenters hide
- Pushy

Open-ended Questions

■ Advantages

- Gets real opinions
- exposes "flakes"
- makes jury feel included
- testimonials

■ Drawbacks

- loss of control
- long and inefficient
- can get "bad" answers
- embarrassing

LOOPING

Problems

- The longer selection goes on the more jurors want to serve.
- Prepare jurors with correct vocabulary.
- Be nice to problem jurors.
- Don't lose control.
- Juror testimony is worlds best evidence.

Who to Strike?

■ Get rid of:

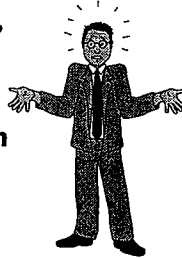
- Flakes
- What ifs
- Anyone smarter than you are
- Obnoxious consensus breakers
- Who your instincts tell you to

■ Think Twice:

- Profiling
- Similarity to Defendant
- Religion
- Weak jurors
- The Silent Majority

Theory of the case.....Don't go to Court without one

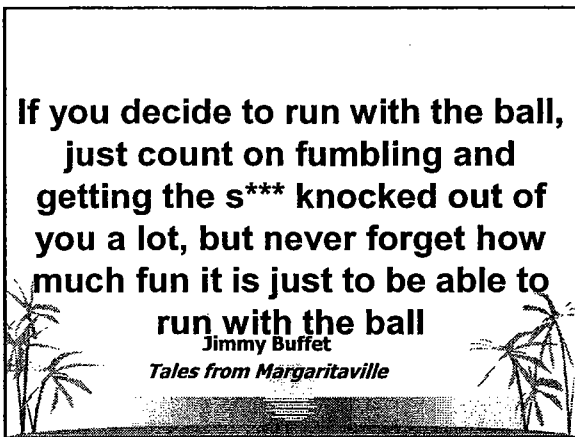
- Why should the Jury care?
- Why should the jury convict?
- Why does what happens in this case matter?
- What is the "real" issue in this case?



Summary

- Be yourself
Be confident (you have the right to be there)
Remember the Courtroom is a stage.





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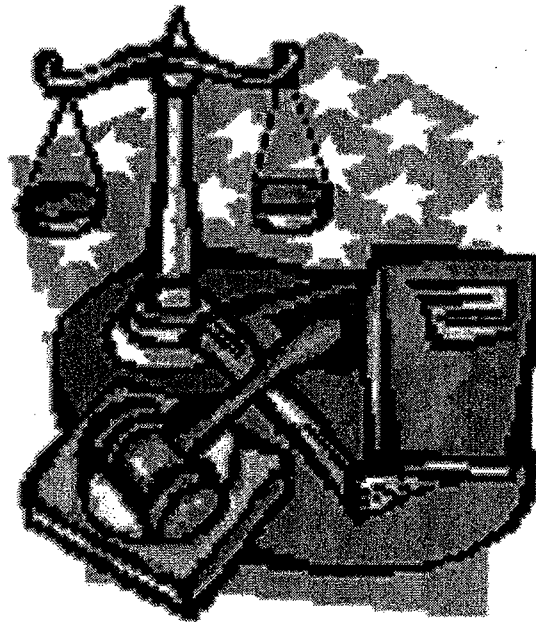
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Warrants for Code Inspection

Presented by

Bonnie Goldstein
Municipal Judge
Cockrell Hill and Dallas

WARRANTS FOR CODE INSPECTIONS



Prepared and Presented by

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In 1990, Bonnie began her legal career and over the years has practiced in numerous areas such as in education law, state and local government, government contracts and construction litigation. Bonnie recently opened her law office practicing in the areas of state and local government law and immigration. Since 1994, Bonnie has served as the Assistant City Attorney for the Town of Flower Mound and the City of McKinney, Texas, among others. She is currently the City Attorney for the City of Princeton and the City of Italy, the prosecutor for the City of Balch Springs and assists the City of Jacksboro with special development, code enforcement and land use issues. She routinely represents and advises local governments on a variety of issues, including contracts, procurement, construction, employment, code enforcement, land use, planning and zoning issues, variances, and municipal court.

Bonnie received her Bachelor of Arts degree at Hood College, Frederick Maryland in 1984, and her law degree in 1990 from George Washington University, the National Law Center, in Washington, D.C. Bonnie has authored and presented papers to various groups, including the GCAT, Texas Municipal League, the North Central Texas Council of Governments and Police Training Academy and the Texas Municipal Courts Education Center. Bonnie is fluent in Spanish and was named Legal Counselor to the Mexican Consulate in Houston on March 20, 1998. In February of 2003 she was appointed the Presiding Judge for the City of Cockrell Hill and in August of 2004 she became an Associate Judge for the City of Dallas.

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GENERAL LEGAL OVERVIEW

I. INTRODUCTION

The right to be free from unreasonable searches and seizures is fundamental to our constitutional principles. Administrative search warrants, conducted by municipal inspectors, constitute significant intrusion upon individual privacy interest protected by the Fourth Amendment. This presentation is designed to outline the statutory authority for administrative search warrants, judicial interpretation and constitutional limitations upon that authority. Practical examples and guidance will be provided to assist you in avoiding constitutional pitfalls and challenges associated with such warrants and subsequent proceedings.

II. WHO CAN ENFORCE MUNICIPAL ORDINANCES¹

Generally, a person cannot claim to be a code enforcement officer or use the title "code enforcement officer" without first holding a certificate of registration or code enforcement officer in training certificate issued by the Texas Department of Health.² However, an exemption exists if the person is required to be licensed or registered under another Texas law and engages in code enforcement under that title or registration.³ A code enforcement officer is defined as an agent of the State of Texas or a political subdivision thereof who engages in code enforcement.⁴ In turn, "code enforcement" is defined as the inspection of public and private premises for the purpose of: identifying environmental hazards including fire or health hazards, nuisance violations, unsafe building conditions, and violations of any fire, health, or building regulation, statute, or ordinance and improving and rehabilitating those premises with regards to those hazards.⁵

In order to receive a certificate of registration, an applicant must: (1) have at least one year of full time experience in the field of code enforcement; (2) pass the examination conducted by the Texas Department of Health or the Department's designee; (3) pay the application, registration, and examination fees; and (4) meet all requirements prescribed by the Act and all Board Rules.⁶ Once issued, a certificate of registration is valid for one year and may be renewed annually on payment of the required renewal fee and completion of the annual continuing education requirements.⁷ An applicant for a certificate of registration who has less than one year of full-time experience in the field of code enforcement may make an application for a certificate of registration and, on successful completion of the code enforcement examination conducted by the Department of Health and payment of the required fees, the individual is entitled to receive a code enforcement officer in training certificate which is valid for one year after the date of issuance.⁸ An individual who possesses a code enforcement officer in training certificate may engage in code enforcement under the supervision of a registered code enforcement officer.⁹

Neither the State of Texas nor any political subdivision thereof, is required to employ a person registered as a code enforcement officer simply because it engages in code enforcement.¹⁰ For example, there is nothing particular about the enforcement of a tree preservation ordinance or high weeds and grass that would require the person to be a certified code enforcement officer. Any city employee, such as a police officer enforcing the ordinance may issue notice of violations, as opposed to issuing code citations, that if ignored or not remedied, could be used as a basis to generate a complaint in municipal court. These notice of violations would be treated much the same as a citizen complaint versus a peace officer citation upon which a warrant could

issue. To my knowledge, there is no requirement that citations - or notice of violations - be issued by a certified code enforcement officer.¹¹ However, a person commits a class C misdemeanor offense if he or she claims to be a code enforcement officer or uses a title that contains the words "code enforcement officer" without holding the required certification.¹²

III. WARRANTS – INVESTIGATIVE OPTIONS

A. PARAMETERS OF RIGHT TO PRIVACY: WARRANTLESS SEARCHES

1. Fourth Amendment to the United States Constitution provides that:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Art. I, Section 9 of the Texas Constitution similarly states:

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

3. Reasonableness has two elements:

- a. must be supported by probable cause; and
- b. search must be made under the authority of a search or arrest warrant, or conducted under circumstances which dispense with the warrant requirements.

4. Probable Cause

- a. Probable cause exists where

- (1) facts and circumstances;
- (2) within knowledge of arresting officer;
- (3) and of which he has reasonably trustworthy information;
- (4) which would warrant a reasonable and prudent man;
- (5) in believing that a particular person has committed or is committing a crime.¹³

- b. Is also defined as
 - (1) reasonable ground of suspicion;
 - (2) supported by circumstances sufficiently strong in themselves;
 - (3) to warrant a cautious man to believe;
 - (4) that the person accused is guilty of the offense for which he is charged.¹⁴
- 5. Search. A search is defined as an intrusion into an area covered by a reasonable expectation of privacy. Private areas are generally held to include houses, offices, rooms, cars, lockers, purses or a person's body. *Areas such as public streets and walkways, public areas or common areas, a person's physical characteristics, open fields and woods are not reasonably considered private.*
- 6. Scope of search. If officers obtain a warrant for a house, under the concept of "curtilage," they are entitled to search all outbuildings, vehicles and structures considered within the immediate area of the house.
- 7. Two Questions Should be Asked:
 - a. Is the search itself lawful; and
 - b. If lawful, is the search carried out in an objectively reasonable manner?
- 8. Exceptions to Search Warrant Requirement:
 - a. Exigent Circumstances. Where officer is faced with an emergency or believes evidence may be destroyed, he or she may conduct a warrantless search or take precautionary measures to prevent the destruction of evidence.
 - b. Consent. The person consenting must have actual authority to consent *i.e.*, . . . car owner and not passenger must give consent for search.
 - c. Plain View. If an officer is in a place where he or she has a right to be, and if the officer sees or finds something connected to a crime, then the officer may seize the evidence. This exception is based upon the idea that if anyone could have seen the evidence, then

there is no violation of any privacy interests by the officer seeing that same evidence.

9. Specific Inquiries:

- a. What right do you have to go on to private property or down a private road to determine an offense?
 - (1) Plain View Doctrine:
 - (a) Can go everywhere that the general public can go.
 - (b) Can't peek through fence but can stand on back of truck and take pictures of violation.
 - (c) Can't enter a fenced back yard.
- b. If you see it from the street but the violation is on private property, can the officer go on to the property to obtain the evidence?
 - (1) no deviation from usual path¹⁵

B. CODE-RELATED WARRANTS

1. Historical Background

- a. Prior to 1967, it was generally thought permissible to allow warrantless administrative searches for purposes of conducting routine health and safety inspections to ensure compliance with city codes sought to be enforced.¹⁶ Permissible warrantless searches included area inspections as well as particular structures.
- b. In 1967, the United States Supreme Court in *Camara*¹⁷ balanced the individual right to privacy and the fundamental prohibition of unreasonable searches against the very real need to protect the public health and safety from violations of minimum standards for fire, health and housing codes. The Court held that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."¹⁸ The USSC held that such an inspection must be reasonable and based upon probable cause to pass constitutional muster. *Camara* was decided in the context of criminal charges being filed for refusing to permit the inspections without warrant.¹⁹
- c. In a companion case, the Supreme Court reviewed a challenge to criminal conviction for the failure to permit the inspection of a

locked commercial warehouse without a warrant or probable cause to believe a violation of the fire code existed.²⁰ The Court, while holding that administrative entry, without consent, upon the portions of commercial premises not open to the public may only be compelled through prosecution or the warrant procedure, distinguished between accepted regulatory techniques, such as licensing programs, which require inspections prior to operating a business or marketing a product.

1. General Rule: Absent exceptional circumstances, a warrant is required for administrative searches conducted by health officers.
2. Exceptions:

- Regulatory Searches:

Courts have recognized that the Fourth Amendment requirements may not apply to licensed or pervasively regulated businesses, such as liquor industry, pharmacies, nursing homes, hospitals, clinics and massage parlors.²¹ A fact question may remain as to whether a particular industry is pervasively regulated.

In *Pollard v. Cockrell*²² the court addressed a challenge to the constitutionality of a city massage parlor ordinance, which authorized in part, warrantless administrative searches on a periodic basis to ensure the safety of the structure and adequacy of plumbing, ventilation, heating and illumination. The court held that the provision was not facially unconstitutional, did not authorize unreasonable searches and the court could not presume that the administrative search provisions would be unreasonably applied.

In another Texas case, city residents brought an action challenging the constitutionality of a city ordinance governing the keeping of animals on residential premises that provided for inspections of areas where animals were kept, and the making of an application constituted consent to enter and inspect any such premises except dwelling places.²³ The Court in upholding the reasonableness of the ordinance noted that the citizens never applied for a permit, no inspection had been conducted and no impoundment of the animals had been attempted; therefore, the Court did not opine on whether the ordinance would be enforced in an unconstitutional manner.

- Voluntary Consent to Search

An exception to the administrative search warrant requirement exists for voluntary consent to search. The consent must be reasonably close in time to the search to be constitutionally permissible.

In *Dearmore v. City of Garland*²⁴, the court held that the City's ordinance went too far in requiring owner consent to permit warrantless administrative searches of unoccupied rental properties in order to obtain a rental permit. The court determined that any consent under the circumstances was involuntary as the alternatives presented to the owner under the ordinance were consent in advance to warrantless administrative searches or face criminal penalties or denial of a rental permit. The court found that there was no reason that the City, with a "modicum of effort", seek and obtain an administrative search warrant to inspect any property that may pose a danger to the public.

In *Jean Pierre, Inc. v. State*,²⁵ where a bakery proprietor's consent to search was deemed tacit or implied, it was nonetheless deemed to be valid and the inspection conducted lawful. Samples and photographs taken as a result of the lawful search were admissible.

Open Fields

The open fields exception to the Fourth Amendment, allowing the warrantless search and seizure of evidence visible to an official from a location where they are lawfully allowed or from where it is observable by the general public.

3. Fourth Amendment Seizure – the *Freeman* case

Under an ordinance adopted in accordance to Chapter 214 of the Texas Local Government Code, after a hearing and an opportunity to be heard, a municipality may order that the owner demolish a structure or upon the failure to do so, the municipality may take the appropriate action. In 1999, the Fifth Circuit had an opportunity to review and rule upon an ordinance adopted under Chapter 214 in *Freeman v. City of Dallas*²⁶, a case involving the demolition of substandard structures. The Court, as a threshold determination, acknowledged that the demolition of a structure constituted a "seizure" of property within the purview of the Fourth Amendment. However, the Fourth Amendment does not state that there shall be no seizure without a warrant; rather, the Fourth Amendment prohibition is couched in terms that there shall be no "unreasonable" searches or seizures. The next inquiry for the Court was whether the seizure was "unreasonable."

To determine the reasonableness of the seizure the Court examined the procedures under state law and the City of Dallas' ordinances. That process provided for "reasonable notice to and time limits upon landowners' actions, multiple hearing possibilities, flexible remedies, and judicial review in state court . . ."²⁷ The Court determined that the

process, along with the defined standards in the municipal code for finding that a structure is a nuisance, offered greater protection against unreasonable actions than an application for a warrant before a judge (which is usually done without notice to the landowner or the opportunity to participate).²⁸

5. Statute: Warrants for Fire, Health and Code Inspections²⁹

a. may be issued to the fire marshal, health officer or code enforcement officer:

(1) for the purpose of allowing the inspection of any specified premises;

(2) to determine the presence of a fire or health hazard or unsafe building condition or a violation of any fire, health or building regulation, statute, or ordinance.³⁰

b. may only be issued upon the presentation of evidence of probable cause to believe that such a condition is present, on the premises sought to be inspected.³¹

c. Probable cause may be based upon

(1) age and general condition of the premises;

(2) previous violations or hazards at same location;

(3) type of premises;

(4) purposes for which premises are used; and

(5) presence of hazards or violations in and the general condition of premises near the location sought to be inspected.³²

d. A City may designate one code enforcement official for the purpose of being issued a search warrant.³³

6. Administrative Warrants

a. A home rule city can enact an ordinance providing for administrative search warrants to ensure compliance with enforcement of city codes enacted to protect the health, safety, and welfare of its inhabitants.

- b. Such administrative search warrants may be issued only upon sworn affidavit supported by probable cause and may authorize inspection of premises to determine the presence of any code violations.
- c. Such an ordinance is in compliance with Article 18.05 of the Code of Criminal Procedure.
- d. The Attorney General wrote that the issuance of an administrative search warrant by a home rule city to be a reasonable exercise of its general police powers to protect the public health, safety and welfare.³⁴
- e. An administrative search warrant differs from an evidentiary search warrant, because the former can only be issued for the purpose of allowing an inspection of specific premises to determine the presence of hazardous conditions prohibited by law.
- f. Differs from a criminal search warrant which may be issued only upon a finding of probable cause supported by affidavit that a criminal offense has been committed and that certain specified property is therefore subject to seizure. A criminal search warrant may also order the arrest of the suspected offender.

1. Practice Pointers

. Challenges to Evidence:

- . Administrative search warrants, under Texas law, are search only, not seizure warrants. Any evidence obtained is subject to an admissibility challenge.
- . Failure to object to the introduction of evidence may result in a finding that it is constitutional and legal for failure to preserve error.

. Consent or Open Fields

- . Consent to search as it relates to the time of the search may be questioned as to whether it is reasonable or negates consent.
- . Authority to consent: Tenant versus Landlord
- . Location challenged as one where the person was lawfully allowed to go or whether it was observable by the general public.

- . There is no seizure authority under Article 18.05 for administrative search warrants. Any seizure must be consistent with other constitutional safeguards or exceptions, such as the plain view doctrine.³⁵
 - . May photographs/video be taken without a seizure warrant?
 - . May samples be taken without a seizure warrant?
- . There is no guidance as to time frame on execution of warrants or filing of the return. To avoid a possible challenge it is recommended that the time frame of 3 days be utilized consistent with provisions applicable to search and seizure warrants. Similarly, for purposes of reasonableness, it is prudent to adhere to the general filing requirements of the warrant return.

FORMS

In Re:

[Address]

[Owner's Name]

Abatement of Junked Vehicles

§
§
§
§
§
§

MUNICIPAL COURT

[] COUNTY, TEXAS

ADMINISTRATIVE DETERMINATION AND ORDER

On or about _____, 200__, came onto be heard, before the Municipal Court for the _____, an administrative proceeding for the abatement of specified identified junked vehicles as determined by the _____ Code Enforcement officers. Upon presentation of the evidence, and hearing of argument, the Court makes the following findings and orders:

1. On or about _____, Code Enforcement Officers conducted an inspection of the premises at _____, being Lot __, Block __, _____ Addition, within the corporate city limits of the _____, relative to complaints that junked vehicles were being stored on the property. The City determined such junked vehicles constituted a public nuisance as defined by Section _____ of the Code of Ordinances and should be abated.
2. _____ is the owner of the property located at _____ and is the responsible party for the keeping of junked vehicles on the premises.
3. On-going inspections conducted to date have determined that the junked vehicles continue to be stored on the property in violation of City ordinance, to wit: Section _____ of Chapter _____. Specifically, on or about _____, 200__, officers entered upon the property for the purpose of identifying junked vehicles. The inspection revealed a multitude of junked vehicles located on the property, identified as follows:

[Identify Vehicle by License Plate Number, Vehicle type, make, model, color and/or VIN]
4. On or about _____, 200__, Mr. _____ was notified via certified mail, return receipt requested, and regular mail, of the nuisance, and that said nuisance must be abated and removed not later than 10 days from the date on which notice was mailed.
5. On or about _____ 200__, Mr. _____ was sent notification of hearing before the Municipal Court, by certified mail return receipt requested and regular mail, to consider the possible removal of junked vehicles and used vehicle components from the property, in accordance with Section _____ of Chapter _____ of the Code of Ordinances.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-referenced vehicles are junked vehicles as defined by Section _____ of the Code of Ordinances; and

It is further ORDERED that the above-referenced junked vehicles be abated and removed from the property; and

It is further ORDERED that the above-referenced junked vehicles shall not be reconstructed or made operable after removal; and

It is further ORDERED that the City provide the requisite notice identifying the vehicle or part of the vehicle to the Department of Public Safety not later than the fifth day after the date of removal, requesting that the Department immediately cancel the certificate of title issued for said vehicle; and

It is further ORDERED that the City may dispose of the junked vehicles, or parts thereof, to a scrap yard, motor vehicle demolisher or a suitable site operated by the City or County.

SO ORDERED.

Dated this _____ day of _____, 200__.

Judge of the Municipal Court

THE STATE OF TEXAS

§
§
§
§

A PROPERTY LOCATED AT:
[property address]

COUNTY OF _____

_____ COUNTY, TEXAS

JUDICIAL WARRANT

The State of Texas, to any peace officer of _____ County, State of Texas:

WHEREAS, the Affiant whose name appears on the attached affidavit is the [Affiant's title] for the [Department name], City of _____, _____ County, Texas, and did heretofore this day submit said Affidavit to me (which said Affidavit is by this reference incorporated herein for all purposes), and whereas I find that the verified facts stated by Affiant in said Affidavit show that the Affiant has probable cause for the belief [he/she] expresses therein and establishes the existence of proper grounds for the issuance of this Warrant.

NOW THEREFORE, you are commanded to enter upon [Address], _____ County, Texas and seize the structure located on this property by demolition.

NOW THEREFORE, you are ordered to execute this Warrant.

ISSUED THIS THE _____ day of _____, A.D., 200__, at _____ o'clock ____m.
to certify which witness my hand this day.

Magistrate, _____ County, Texas

THE STATE OF TEXAS

§
§
§
§

A PROPERTY LOCATED AT:
[property address]

COUNTY OF _____

_____ COUNTY, TEXAS

RETURN OF WARRANT

The undersigned Affiant, being a peace officer of _____ County, State of Texas, on oath certifies that the foregoing warrant came to hand on the day it was issued and that it was executed on the _____ day of _____, 200__, by seizing the structure located at [Address], _____, _____ County, Texas by demolition.

[Affiant], [Title]

SUBSCRIBED AND SWORN TO BEFORE ME, on the _____ day of _____, A.D., 200__ at _____ o'clock ____m. to certify which witness my hand and official seal.

Notary Public in and for the State of Texas

My Commission Expires:

THE STATE OF TEXAS

§
§
§
§

A PROPERTY LOCATED AT:
[property address]

COUNTY OF _____

_____ COUNTY, TEXAS

AFFIDAVIT OF INSPECTION

BEFORE ME, the undersigned authority, this day personally appeared the undersigned affiant, a person whose identity is known to me. After I administered an oath to him, upon his oath, he said:

1. My name is [affiant]. I am a [title] for the [Department name], City of _____, _____ County, Texas.
2. On [Date], I reinspected the property located at [address] and found that the structure had not been demolished and no repairs had been made.
3. I affirm that this information is true and correct on this _____ day of _____, A.D., 200__.

[Affiant], [Title]

Before me, [Name] subscribed to the foregoing instrument, and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.

SUBSCRIBED AND SWORN TO BEFORE ME, on the _____ day of _____, A.D., 200__ at _____ o'clock ____m. to certify which witness my hand and official seal.

Notary Public in and for the State of Texas

My Commission Expires:

THE STATE OF TEXAS

§
§
§
§
§

A SINGLE FAMILY RESIDENCE
LOCATED AT:

COUNTY OF _____

_____,
_____ COUNTY, TEXAS

ADMINISTRATIVE SEARCH WARRANT

THE STATE OF TEXAS to the Sheriff or any Peace Officer of _____ County, or
the State of Texas, and/or Code Enforcement Official of the City of _____.

GREETINGS:

WHEREAS, the Affiant, whose signature is affixed to the Affidavit attached hereto
(which said Affidavit is by this reference incorporated herein for all purposes), is a person duly
authorized by law to make inspections of premises for the purpose of enforcing health, fire, or
building regulations, statutes or ordinances, and did heretofore this day subscribe and swear to
said Affidavit before me.

WHEREAS, I find that the verified facts stated by Affiant in said Affidavit show that
Affiant has probable cause for the belief he expresses therein and establishes the existence of
proper grounds for the issuance of this Warrant;

NOW, THEREFORE, you are hereby commanded to enter the location set forth in the
Affidavit as the location of the single family dwelling premises located at _____,
_____, _____ County, Texas, said premises being described as
_____ and search and inspect said premises to determine the existence of any
violation of health, fire or building regulations, ordinances, or statutes.

WITNESS my signature on this the _____ day of _____, A.D. 20____ at
_____ o'clock ____ .m.

MAGISTRATE, _____ COUNTY, TEXAS

RETURN

THE STATE OF TEXAS

§
§
§
§
§

A SINGLE FAMILY RESIDENCE
LOCATED AT:

COUNTY OF _____

_____,
_____ COUNTY, TEXAS

The undersigned Affiant, being a Peace Officer/Code Enforcement Official under the laws of Texas and being fully sworn, under oath certifies that it was executed on the _____ day of _____, 20____, by making the search directed therein at the said premises to determine the existence of any violation of health, fire, or building regulations, ordinances or statutes.

AFFIANT

SUBSCRIBED AND SWORN to before me, the undersigned authority, on this the _____ day of _____, 20____.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

PROBABLE CAUSE AFFIDAVIT

CAME UNTO me this day, _____, a person known to me and upon oath swears as follows:

"My name is _____. I am over the age of 18, have personal knowledge of the facts asserted below, and am competent to testify to those facts:

- give description of property, property owner and how you came by that information;
- give chronology of events;
- give reasons you believe inspection required;
- state what you are looking for and where you believe it may be found.

Affiant

SUBSCRIBED AND SWORN TO BEFORE ME, on the _____ day of _____, 20 __, to certify which witness my hand and official seal.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

(Print or Type Name)

My Commission Expires:

RELEASE BY PROPERTY OWNER FOR NUISANCE ABATEMENT

The undersigned, being the owner or owners of the real estate located in the City of _____, Texas, described as follows:

ADDRESS: _____

LEGAL DESCRIPTION: _____

PROPERTY TAX NO.: _____

Hereby recognize that there is situated on such real estate a nuisance, to wit: **{*substandard structure; stagnant water in swimming pool*}**, as that term is defined by applicable ordinances of the City of _____, Texas, and hereby request that the City of _____ abate such nuisance by **[*demolishing the structure and cleaning and grading the surface*]**. I understand that I am entitled to a public hearing wherein I may present proof of compliance with City ordinances. By my signature below I hereby waive my right to the public hearing and admit that the **[*structure, swimming pool*]** constitutes a nuisance and constitutes a danger to the public health, safety and welfare.

And in consideration therefore, I/we hereby release the City of _____, its agents, servants and employees from any and all liability that arises or may arise from the abatement of the nuisance, including **[*any damage to other structure, vegetation, trees; any damage resulting from the pool floating out of the ground due to hydrostatic pressure*]**.

The City of _____ agrees to abate the nuisance **[*demolishing the structure, cleaning and grading the surface; by draining all water from the swimming pool.*]**

It is further agreed that the City shall have a lien on the above referenced property to recoup the total cost of the abatement, including any administrative charges and any other charges incurred by the City in abating the nuisance.

EXECUTED this ____ day of _____, 200__.

OWNER

ADDRESS

SIGNATURE OF PROPERTY OWNER

SIGNATURE OF PROPERTY OWNER

STATE OF TEXAS

COUNTY OF _____

This instrument was acknowledged before me on this ____ day of _____, 200____,
by _____ as owner(s) of the property.

NOTARY PUBLIC, STATE OF TEXAS

CITY OF _____

BY _____

STATE OF TEXAS

COUNTY OF _____

This instrument was acknowledged before me on this ____ day of _____,
200____, by _____ of the City of _____, a Texas
municipal corporation, on behalf of said municipal corporation.

NOTARY PUBLIC, STATE OF TEXAS

PROCEDURE FOR CODE ENFORCEMENT VIOLATIONS

I. INSPECTION OF PREMISE FOR VIOLATION BASED UPON:

- . RECEIPT OF COMPLAINT - CITIZEN
 - . MAINTAIN CONTACT INFORMATION OF COMPLAINANT
 - . MAINTAIN ANY WRITTEN COMPLAINT RECEIVED
 - . INFORMATION ON COMPLAINANT MAY BE KEPT CONFIDENTIAL – CHECK WITH CITY SECRETARY IF REQUEST FOR INFORMATION MADE BEFORE RELEASE
- . PERSONAL OBSERVATION – POLICE REPORT
 - . MAINTAIN LOG/NOTES OF OBSERVATION OR REPORT BY POLICE OFFICER
 - . MAY TAKE PHOTOGRAPH OF VIOLATION
 - . KEEP NOTES OF ANY CONTACT (PERSONAL OR TELEPHONIC) WITH OWNER OR PERSON WITH CARE, CUSTODY OR CONTROL, INCLUDING STATEMENTS RELATIVE TO THE VIOLATION

II. INSPECTION OF INTERIOR OF STRUCTURE

- . INITIAL REQUEST OF CONSENT TO SEARCH
- . ADMINISTRATIVE SEARCH WARRANTS
 - . PREPARE PROBABLE CAUSE AFFIDAVIT
 - . OBTAIN ADMINISTRATIVE SEARCH WARRANT FROM JUDGE
 - . MAY ONLY BE ISSUED TO CODE ENFORCEMENT OFFICER, FIRE MARSHAL OR HEALTH OFFICER

III. DETERMINE ALL ORDINANCES VIOLATED – VERIFY IN CODE OF ORDINANCES OR WITH ACTUAL ORDINANCE

- . IF UNSURE, CHECK WITH CITY SECRETARY ON LATEST ORDINANCE
- . CONFIRM WHO IS HELD RESPONSIBLE UNDER THE ORDINANCE
- . CONFIRM SPECIFICS OF VIOLATION
- . CONFIRM NOTIFICATION REQUIREMENTS BECAUSE THEY MAY VARY WITH SPECIFIC ORDINANCES

IV. NOTIFICATION OF VIOLATION

- . INFORMAL: VERBAL, DOOR HANGER OR OTHER APPROVED METHOD – KEEP RECORDS OF TYPE OF CONTACT.

FORMAL

- WRITTEN NOTICE OF VIOLATION AND NOTICE TO ABATE – NOT CITATION/NOTICE OF VIOLATION FOR COURT

- 0. TIME TO ABATE WILL BE CONSISTENT WITH ORDINANCE
- 0. INCLUDE ALL REQUIRED STATEMENTS CONSISTENT WITH ORDINANCE

- NOTICE MUST BE CLEAR AS TO VIOLATION AND ABATEMENT REQUIREMENT

- ONE YEAR ANNIVERSARY NOTICE IF APPLICABLE

V. REINSPECTION AFTER TIME HAS ELAPSED AS STATED IN NOTICE OF VIOLATION

- IF CORRECTED, MAKE NOTATION IN FILE OF DATE AND CONDITION OF VIOLATION

- IF NOT CORRECTED:

- CITATION/NOTICE OF VIOLATION FOR APPEARANCE IN COURT MAY BE ISSUED AND SENT BY CERTIFIED MAIL
- TAKE PHOTOGRAPH OF VIOLATION AS OF DATE OF OFFENSE
- ABATEMENT PROCEEDINGS COMMENCED – IF NO HEARING REQUIRED
 - 0. DISCRETIONARY TO CLEAN UP PROPERTY
 - 0. MAY BE BASED UPON BUDGETARY CONSTRAINTS
- APPROPRIATE ABATEMENT HEARINGS CONDUCTED – *SEE # VII.*

VI. REINSPECTION AFTER CITATION/NOTICE OF VIOLATION ISSUED – IF NO CORRECTION, SUPERVISOR SHOULD BE INVOLVED

- DAILY CITATIONS MAY BE ISSUED
- JUNKED VEHICLES – CIVIL ABATEMENT HEARING SHOULD BE INITIATED.
- SUPERVISOR TO DIRECT WHETHER TO INCLUDE CITY MANAGER, PROSECUTOR OR CITY ATTORNEY IN STRATEGY FOR ABATEMENT OF NUISANCE

VII. PROSECUTION

- IDENTIFY ALL POTENTIAL WITNESSES
- HAVE PHOTOGRAPHS PROPERLY IDENTIFIED

- . BE FAMILIAR WITH ORDINANCE AND NOTICE REQUIREMENTS TO BE ABLE TO CLEARLY ARTICULATE THE VIOLATION AND ORDINANCE REQUIREMENTS
- . HAVE COPY OF ORDINANCE/CODE AS PART OF FILE
- . CONFER WITH PROSECUTOR RELATIVE TO DETAILS OF OFFENSE

VIII. ABATEMENT PROCEEDINGS

- . ENSURE ALL NOTIFICATION REQUIREMENTS HAVE BEEN SATISFIED AND DOCUMENTATION EXISTS FOR SUCH NOTICE.
 - . INCLUDE HEARING DATE ON NOTICE
 - 0. AFTER CONTACTING COURT OR CITY SECRETARY TO ARRANGE FOR HEARING DATE ON REGULARLY SCHEDULED COURT DATE OR COUNCIL MEETING
 - 0. CONFIRM THAT ALL NECESSARY CITY PARTICIPANTS ARE AWARE OF HEARING DATE AND TIME
- . PREPARE FOR HEARING
 - . INCLUDE NOTICES
 - . DETAILS OF VIOLATION – PHOTOGRAPHS
 - . COPIES OF ORDINANCE
- . ENSURE PROPER AUTHORITY TO ENFORCE ORDINANCE IS INVOLVED IN PROCESS

ENDNOTES

¹ Art. 4447bb is repealed effective June 1, 2003 and regulations associated with code enforcement may be found in Chapter 1952 of the Texas Occupations Code and in 25 TAC 130.

² Tex. Occupations Code, §1952.101 (2003).

³ Tex. Occupations Code, §1952.002 (2003).

⁴ Tex. Occupations Code, §1952.001(3) (2003).

⁵ Tex. Occupations Code, §1952.001(2)(2003).

⁶ Tex. Occupations Code, §1952.102 (2003).

⁷ Tex. Occupations Code, §1952.105 (2003) and 25 TAC §130.20.

⁸ Tex. Occupations Code, §1952.103 (2003).

⁹ *Id.*

¹⁰ Tex. Occupations Code, §1952.003

¹¹ As an aside, TML has never supported the idea that code enforcement officers could issue citations upon which warrants could issue. Warrants for code citations should not be issued on failure to appear on the citation; rather, warrants should be issued based upon failure to appear on court summons.

¹² Tex. Occupations Code, §1952.201 (2003).

¹³ *Lewis v. State*, 598 S.W.2d 280 (Tex. Cr. App., 1980).

¹⁴ *Thomas v. State*, 288 S.W.2d 791 (Tex. Cr. App., 1956).

¹⁵ *Nored v. State*, 875 S.W.2d 392 (Tex. App. -- Dallas 1994, petition for discretionary review ref'd).

¹⁶ *Frank v. Maryland*, 359 U.S. 360 (1959); *Eaton v. Price*, 364 U.S. 263 (____) (overruled to the extent permits warrantless administrative searches by *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967)).

¹⁷ *Camara*, 387 U.S. 523, *infra*.

¹⁸ *Id.* at 528-29.

¹⁹ See also *See v. Seattle*, 387 U.S. 541 (1967) (constitutional challenge to regulatory techniques such as licensing programs which require inspections prior to operating business or marketing product must be resolved on a case by case basis – distinguishing business premises from private homes).

²⁰ *See v. Seattle*, 387 U.S. 541 (1967).

²¹ Zelin, Judy E., *Propriety of state and local government health officer's warrantless search – post camara cases*, 53 A.L.R. 4th 1168.

²² 578 F.2d 1002 (5th Cir. 1978).

²³ *Harkey v. de Wetter*, 443 F.2d 828 (5th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971).

²⁴ 400 F.Supp. 894 (N.D. Tex. 2005).

²⁵ 635 S.W.2d 548 (Tex. Crim. App. 1982).

²⁶ *Freeman v. City of Dallas*, 186 F.3d 601 (5th Cir. 1999), *rehearing en banc granted*, 200 F.3d 884 (5th Cir. 2000), *on rehearing*, 242 F.3d 642 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 47 (2001).

²⁷ *Freeman*, 242 F.3d at 653.

²⁸ Four judges dissented. Three found only a warrant requirement, while the fourth (who wrote the dissent) thought that the process provided by the City was insufficient in and of itself.

²⁹ Tex. Code Crim. Proc. art. 18.05. See *State v. Haley*, 811 S.W.2d 597 (Tex. Cr. App., 1991); *Haley v. State*, 811 S.W.2d 600 (Tex. Cr. App., 1991).

³⁰ Tex. Code Crim. Proc. § 18.05(a).

³¹ Tex. Code Crim. Proc. § 18.05(b).

³² Tex. Code Crim. Proc. § 18.05(c).

³³ Tex. Code Crim. Proc. 18.05(d).

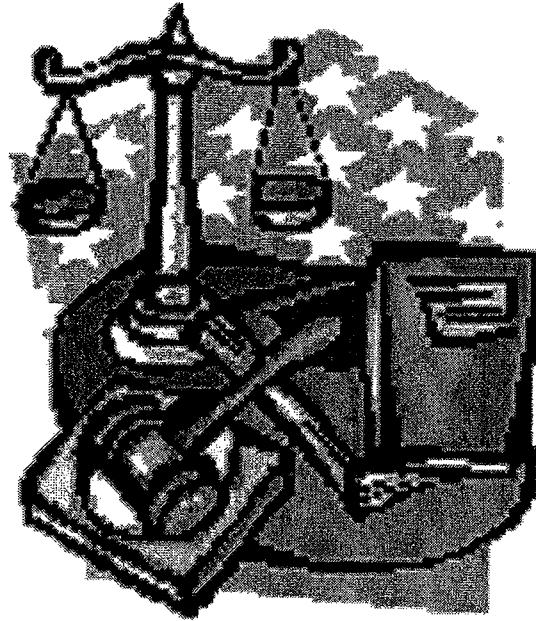
³⁴ MW-228 (1980).

³⁵ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)(evidence of criminal activity discovered during course of valid administrative search warrant may be seized under 'plain view' doctrine.



CASE STUDIES

Warrants for Code Inspections



Prepared and Presented by

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CASE STUDY I

NUISANCES

You are being asked to develop a plan to address violations of the City's ordinances at 216 Nuisance Lane, which problems the City has been attempting to address since 2000. Mr. Wil Ubee is the admitted owner of the property, although the property is believed to be unoccupied as of at least January of 2001. The lot is heavily wooded. The property has several junked vehicles, large amounts of trash and debris and a substandard structure. The City wanted to remove the trash and debris first so that vehicle identification numbers and tags may be obtained. The City has attempted to contact the owner by certified mail, regular mail and public notice, without success. The status of enforcement and existing problems are as follows:

There are three primary violations to be addressed:

1. **High Weeds and Grass/Trash and Debris**

The owners were notified to abate the nuisance by certified mail on June 28, 2001, and publication, on August 1st and 2nd, 2001. The certified letter was returned with a "unclaimed" statement. No response was received and no action to abate the nuisance has been taken.

The City has conferred with contractors regarding removal of the trash and debris; however, trees might need to be removed in order to accomplish the removal of the trash and debris consisting of refrigerators, hot water heaters and other used household appliances, tar paper, shingles, lumber, scrap metal, and barrels. The trash is between three (3) to five (5) feet deep. In addition, the City is concerned about potential environmental hazards on the site, including a concern that the owners may have dug pits in the ground and buried trash. The site is approximately 200' from Pure Water Supply.

2. **Junked Vehicles**

No notice has been given relative to the abatement of junked vehicles. Some vehicles have no motor, no tires, no license plate and no VIN; therefore, a question exists as to whether they may be classified as debris as opposed to a vehicle. It is difficult, if not impossible to inspect the vehicles due to the obstructions caused by the high weeds and debris.

3. **Substandard Structure**

No notice has been given to date. An exterior visual inspection has been conducted. The detached garage has a collapsing roof; the house is unsecured, a window is broken with no glass and another is covered by plastic. The roof of the house is collapsing and deteriorating; the gutter in the front of the house is loose and hanging down.

No action has been taken by the owner to abate any of the nuisances to date. The City staff, in discussing the removal of the trash and debris with contractors on September 2, 2001, determined that the removal would destroy, or effectively destroy, several trees. On October 6, 2001, Weedy Elm, arborist for the City, identified one (1) specimen tree, 100 years old and twenty (20) protected trees on the property. The trees have been tagged for future reference.

APPENDIX A
Code of Ordinances

Chapter 3: Building and Construction, Section 6.00 Dangerous Building Code

Section 6.02 Purpose and Scope

- (a) **Purpose.** It is the purpose of this code to provide a just, equitable and practicable method, to be cumulative with and in addition to, any other remedy provided by the Building Code, Housing Code or otherwise available at law, whereby buildings or structures which from any cause endanger the life, limb, health, morals, property, safety or welfare of the general public or their occupants may be required to be repaired, vacated or demolished. The purpose of this code is not to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited by the terms of this code.
- (b) **Scope.** The provisions of this code shall apply to all dangerous buildings, as herein defined, which are now in existence or which may hereafter become dangerous in this jurisdiction.

Section 6.03 Definitions

- (c) **Dangerous Building.** For the purpose of this code, any building or structure which has any or all of the conditions or defects hereinafter described shall be deemed to be a dangerous building, provided that such conditions or defects exist to the extent that the life, health, property or safety of the public or its occupants are endangered:
 - (1) Whenever any door, aisle, passageway, stairway or other means of exit is not of sufficient width or size or is not so arranged as to provide safe and adequate means of exit in case of fire or panic.
 - (2) Whenever the walking surface of any aisle, passageway, stairway or other means of exit is so warped, worn, loose, torn or otherwise unsafe as to not provide safe and adequate means of exit in case of fire or panic.
 - (3) Whenever the stress in any materials, member or portion thereof, due to all dead and live loads, is more than one and one half times the working stress or stresses allowed in the Building Code for new buildings of similar structure, purpose or location.
 - (5) Whenever any portion or member or appurtenance thereof is likely to fail, or to become detached or dislodged, or to collapse and thereby injure persons or damage property.
 - (6) Whenever any portion of a building, or any member, appurtenance or ornamentation on the exterior thereof is not of sufficient strength or stability, or is not so anchored, attached or fastened in place so as to be capable of resisting a wind pressure of one half of that specified in the Building Code for new buildings

of similar structure, purpose or location without exceeding the working stresses permitted in the Building Code for such buildings.

- (7) Whenever any portion thereof has wracked, warped, buckled, or settled to such an extent that walls or other structural portions have materially less resistance to winds or earthquakes than is required in the case of similar new construction.
- (8) Whenever the building or structure, or any portion thereof, because of (i) dilapidation, deterioration or decay; (ii) faulty construction; (iii) the removal, movement or instability of any portion of the ground necessary for the purpose of supporting such building; (iv) the deterioration, decay or inadequacy of its foundation; or (v) any other cause, is likely to partially or completely collapse.
- (9) Whenever, for any reason, the building or structure, or any portion thereof, is manifestly unsafe for the purpose for which it is being used.
- (10) Whenever the exterior walls or other vertical structural members list, lean or buckle to such an extent that a plumb line passing through the center of gravity does not fall inside the middle one third of the base.
- (11) Whenever the building or structure, exclusive of the foundation, shows thirty three percent (33%) or more damage or deterioration of its supporting member or members, or fifty percent (50%) damage or deterioration of its nonsupporting members, enclosing or outside walls or coverings.
- (12) Whenever the building or structure has been so damaged by fire, wind, earthquake or flood, or has become so dilapidated or deteriorated as to become (i) an attractive nuisance to children; (ii) a harbor for vagrants, criminals or immoral persons; or as to (iii) enable persons to resort thereto for the purpose of committing unlawful or immoral acts.
- (13) Whenever any building or structure has been constructed, exists or is maintained in violation of any specific requirement or prohibition applicable to such building or structure provided by the building regulations of this City, as specified in the Building Code or Housing Code, or of any law or ordinance of this state or City relating to the condition, location or structure of buildings.
- (15) Whenever a building or structure, used or intended to be used for dwelling purposes, because of inadequate maintenance, dilapidation, decay, damage, faulty construction or arrangement, inadequate light, air or sanitation facilities, or otherwise, is determined by the health officer to be unsanitary, unfit for human habitation or in such a condition that is likely to cause sickness or disease.
- (17) Whenever any building or structure is in such a condition as to constitute a public nuisance known to the common law or in equity jurisprudence.
- (18) Whenever any portion of a building or structure remains on a site after the demolition or destruction of the building or structure or whenever any building or

structure is abandoned for a period in excess of six months so as to constitute an attractive nuisance or hazard to the public.

Chapter 7, Offenses and Nuisances, Chapter 13.00, Property Maintenance Standards

Section 13.01 of Chapter 7 Title and Scope

"(2) Purpose

The purpose of these standards are:

- A. To protect the health, safety, and welfare of the citizens of the City of Any Where by establishing minimum standards applicable to property and structures."

Section 13.04 of Chapter 7 Minimum Property Standards

"An owner and/or occupant commits an offense under this section if he/she fails to:

4. Repair and protect the exterior surfaces of a structure which show signs of deterioration by an application of paint or other protective coating including by not limited to the use of siding; or
5. Maintain all carports, awnings, patio covers, garages and garage doors, sheds, storage buildings, out buildings, and other accessory buildings or structures in a structurally sound condition, and free of deterioration; or
8. Replace all broken glass on the exterior of homes and accessory structures."

Section 13.05 of Chapter 7 Declared a Public Nuisance

"The presence of any of the offenses or conditions described in the above subsection 13.04 within the corporate limits of the City of Any Where in violation of this section is hereby declared to be a public nuisance."

Chapter 6, Health and Sanitation, Section 1.00, Tall Weeds and Grass, Stagnant Water and Unsanitary and Unsightly Matter

Section 1.02.

"(a) It shall be unlawful for any person owning, claiming, occupying or having supervision or control of any real property, occupied or unoccupied, within the corporate limits of the City, to permit weeds, brush, vegetative growth or any objectionable or unsightly matter to grow to a greater height than twelve inches (12"). All vegetation, not regularly cultivated, and which exceeds twelve inches (12") in height, shall be presumed to be objectionable and unsightly matter."

Section 1.04.

"(a) It shall be unlawful for any person owning, claiming, occupying or having supervision or control of any real property, occupied or unoccupied, within the corporate limits of the City, to permit or allow any stagnant or unwholesome water, refuse, rubbish, trash, debris, filth, carrion, weeds, brush, junk, garbage, impure or unwholesome matter of any kind or other objectionable or unsightly matter of whatever kind to remain upon any such real property or within any public easement on or across such real property or upon any adjacent public street or alley right-of-way between the property line of such real property and where the paved surface of the street or alley begins.

For the purpose of Chapter 6 of the Code of Ordinances the terms used herein shall be interpreted to read as follows:

Junk shall mean all worn out, worthless or discarded material, including, but not limited to, any of the following materials, or parts of said materials or any combination thereof: new or used iron, steel or nonferrous metallic scrap, brass or waste materials; used and/or inoperative household appliances, household electrical or plumbing fixtures, floor coverings and/or window coverings not currently in use; used lumber, brick, cement block, wire, tubing and pipe, tubs, drums, barrels, and/or roofing materials not currently in use; air conditioning and heating equipment not currently in use; used vehicle components and parts not currently in use; used furniture other than that designed for outdoor use or that which would normally be considered as antique furniture; used and/or inoperative residential lawn care equipment and machinery not currently in use; used pallets, windows or doors not currently in use; new or used sheet metal, structural steel and/or chain not currently in use; used and/or inoperable vending machines, radios and/or televisions not currently in use; and any other type of used and/or inoperable machinery or equipment not currently in use.

Trash and Debris shall mean all manner of refuse including, but not limited to: mounds of dirt, piles of leaves, grass and weed clippings, paper trash, useless fragments of building material, rubble, furniture other than furniture designed for outside use, useless household items and appliances, items of salvage, such as scrap metal and wood, old barrels, old tires, objects that hold water for an extended time, tree and brush trimmings, and other miscellaneous waste or rejected matter.

Refuse shall mean a heterogeneous accumulation of worn out, used, broken, rejected or worthless materials, including but not limited to, garbage, rubbish, paper or litter, and other decayable or nondecayable matter.

Rubbish shall mean junk, trash, debris, rubble, stone, useless fragments of building materials, and other miscellaneous, useless waste or rejected matter."

Chapter 7, Offenses and Nuisances, Section 12.00, Special Parking Regulations

Section 12.04.

(A) Parking in residential districts shall comply with the following provisions:

4. No junked vehicle, as defined in Chapter 7, Section 8.00, of this Code, shall be parked or stored in violation of Chapter 7, Section 8.00 [specifically, visible from the public right-of-way and not screened from ordinary public view]. Any such vehicle shall be subject to the procedures set forth in Section 8.00 of this Chapter.

* * *

5. For purposes of this section, “screened from ordinary public view” means completely out of view from private or public property, or public right-of-way from average grade of the surrounding property, including but not limited to recreational vehicles that exceed the screening fence in height, fences constructed that persons can see through into the area surrounded by the fence or areas that can be viewed from neighboring properties from average grade.

Section 12.05 of Chapter 7 Declared a Public Nuisance

The presence of any vehicles within the corporate limits of the City of Any Where in violation of this section is hereby declared to be a public nuisance.

Chapter 7, Offenses and Nuisances, Section 8.00, Junked Vehicles

Section 8.01 of Chapter 7 Definitions

“Junked Vehicle” means a motor vehicle that is self-propelled and:

1. does not have lawfully attached to it;
 - (a) an unexpired license plate; or
 - (b) a valid motor vehicle inspection certificate;
2. is wrecked, dismantled or partially dismantled or discarded; or
3. is inoperable and has remained inoperable for more than:
 - (a) 72 consecutive hours, if the vehicle is on public property; or
 - (b) 30 consecutive days, if the vehicle is on private property.

AFFIDAVIT TO ENTER UPON AND EXAMINE PREMISES

THE STATE OF TEXAS

§
§
§
§
§

PREMISES LOCATED AT:
216 Nuisance Lane

COUNTY OF BUT HERE

ANY WHERE,
BUT HERE COUNTY, TEXAS

CAME UNTO me this day, _____, a person known to me and upon oath swears as follows:

"My name is Rodger Ramjet, I am over the age of 18, have personal knowledge of the facts asserted below, or upon information and belief have obtained said knowledge, and am competent to testify to those facts:

There is situated a certain premises unoccupied and under the control of Wil Ubee, listed as the owner according to the most current tax rolls, located at: **LOT 1, BLOCK B, NORTH PURE LAKE ADDITION**, also known as **216 Nuisance Lane** in the City of Any Where, But Here County, Texas; situated on said premises, a building being a single story single family dwelling and curtilage including a detached garage. I further have good reason to believe and do believe that there exists at said location violations of the health, building and fire regulations as set forth in the Code of Ordinances of the City of Any Where, as set forth in Appendix A, attached hereto and incorporated herein by reference as if fully set forth herein based upon the following facts, to wit:

1. On May 28, 1999, Code Enforcement Officer, Irma Freshman, received a call from an adjacent property owner of four (4) lots surrounding said premises. The complainant said the occupant, Lousy Tenant, of 216 Nuisance Lane had been dumping on his property. The complainant explained that the man had been told repeatedly not to dump on complainant's property. Complainant also complained that he had a police officer present during one such meeting. Complainant wanted to file a complaint and prosecute. He was transferred to the police department. No further action was taken at that time.
2. On June 5, 1999, Laura Greentree, Environmental Services Director, received a complaint from a new property owner in the area. Complainant said that they were the new owners of the four (4) lots surrounding said premises, previously owned by original complainant. The complainant said that Lousy Tenant, occupant of 216 Nuisance Lane, had dumped lots of trash/junk, had abandoned several junk vehicles and was storing a boat and trailer without their permission on their property/properties. Also the septic system of the residence at 216 Nuisance Lane was substandard and unfit for habitation, and that the residence premises had "dump like conditions."
3. On Thursday, June 7, 1999, Laura Greentree, Environmental Services Director, Code Enforcement Officer, Irma Freshman, and myself, along with Police Officer Baton, conducted an inspection of the premises at 216 Nuisance Lane and the surrounding lots. As the team drove up and parked at the site a man, who later identified himself as Lousy Tenant, was witnessed adding some brush to huge pile of brush, that Mr. Tenant later admitted was not on his property. Mr. Tenant gave us permission to enter his property at 216 Nuisance Lane to inspect the condition and verbally admitted to the team that he had control and authority to grant permission to the premises at 216 Nuisance Lane.
4. The backyard was inspected first and is on the southeast side of the property. The backyard contained an incredible amount of trash and debris, including used appliances, shingles, tar paper, lumber, scrap metal, barrels, and several junk vehicles. A retaining wall had been built along the rear property line to contain the trash and the trash appeared to be between three (3) and five (5) feet deep. The rear portion of the house was mostly obscured from view by overgrown vines and

weeds but appeared to be in a severe state of dilapidation. No clear path could be made through the backyard to the front of the property. Two (2) of the four surrounding lots are on the south/east side of the property and were inspected while walking to the front of the property at 216 Nuisance Lane. Found on these adjacent two (2) lots was the aforementioned huge pile of brush, a boat on a trailer, an abandoned utility trailer with trash, an abandoned/junked vehicle, and miscellaneous trash and debris, including several barrels, scrap metal and lumber. Mr. Tenant admitted the boat and trailer were his and were not stored on his property. The team then inspected the remaining two (2) of the four (4) lots located to the north/west of 216 Nuisance Lane. Found were six (6) abandoned/junked vehicles, an abandoned tent trailer, two (2) utility trailers, a jet ski, and miscellaneous trash and debris, including scrap metal, tires, boxes, a bicycle, lawn mowers, auto parts, and used building materials. After completion of the inspection for that area, attention was turned to the front yard of the property at 216 Nuisance Lane. Visible in that area were four (4) junked vehicles and miscellaneous trash and debris, including an old rusted propane tank, car transmission, tires, shingles, scrap metal, and used building materials. The front of the house was partially obscured from view by overgrown vines and weeds but appeared to be in a serious state of dilapidation, as evidenced by sagging and collapsing eaves along the front and sides of the house. The valleys, hips, and ridges of the roof appeared to be collapsing, weather worn, and rotting. The means of egress from the house appeared to be blocked by refrigerator. A window of the house was missing and was blocked by a piece of plastic. The roof of the detached garage was collapsed and dilapidated. At that time the team attempted to further enter the front yard and approach the front of the house, assuming that we still had Mr. Tenant's permission to inspect the property. At that time, Lousy Tenant stated that if there was no legal reason for us to be on his property that we must leave. The team obeyed Mr. Tenant's request and left his property. A photo inventory was taken of all areas the team was allowed to inspect.

5. On Thursday, January 27, 2000, Laura Greentree, Environmental Services Director, Bull Dozer, Code Enforcement Officer, and myself, along with police officer Baton, conducted an inspection of the property at 216 Nuisance Lane. The premise appeared to be unoccupied, and according to Police Officer Baton, Mr. Tenant had not occupied the premises for several months. The inspection was conducted from the street right-of-way of Nuisance Lane and from adjacent properties. The inspection revealed the backyard contained an incredible amount of trash and debris, including used appliances, shingles, tar paper, lumber, scrap metal, barrels, and several junk vehicles. The detached garage on the property had a collapsing roof. The inspection of the house revealed the north doorway blocked by a refrigerator. Garbage and rubbish surrounded the house. The house had an unsecured window with no glass, and one window covered by plastic. The roof of the house was collapsing and deteriorating. The gutter along the front of the house was loose and hanging down. A photo inventory was taken of the house and surrounding property.
6. On September 2, 2000, certified and regular mail notification was sent to Wil Ubee of Rt. 21 Box 31 Sunshine, TX 76009, regarding high weeds and grass, trash and debris, deteriorating fencing and zoning violation. Mr. Ubee is the current owner of Lot 1, Block B, North Pure Lake Addition, also known as 216 Nuisance Lane, according to the most recent But Here County Tax Roll. The notification was returned with "unclaimed" statements. On September 2, 2000, certified and regular mail notices were sent to Lousy R. Tenant of 216 Nuisance Lane, Any Where, TX 75011-5577 regarding high weeds and grass, trash and debris, deteriorating fencing and zoning violation. Mr. Tenant is the current owner of Lot 2, Block B, North Pure Lake Addition, according to the most recent But Here County Tax Roll. The certified notification was returned with a "refused" statement.
7. On October 11th and 12th, 1999, legal notice was posted in the City's official newspapers *The But Here Record Chronicle* and *The Truth-Teller Tribune*. The legal notice was addressed to

Mr. Wil Ubee requesting compliance for the violations of high weeds and grass, trash and debris, deteriorating fencing, and zoning violation.

8. After proper notification according to Section 1 of Chapter 6 of the Code of Ordinances of the City of Any Where, we commenced the preparation for the City to go upon the property and do or cause to be done the work necessary to gain compliance. On Friday, October 23, 2000, Laura Greentree, Environmental Services Director, and myself met with contractors from three (3) different companies at 216 Nuisance Lane to discuss accepting bids for the removal of trash and debris from the aforementioned property. At the time of inspection, the contractors had questions regarding the density of the trees and whether or not some trees could be removed during the clean up process. It was apparent that the removal of the debris would destroy several trees.
9. On November 6, 2000, Laura Greentree Environmental Services Director, and myself met with Mighty Elm, Arborist for the City of Any Where, at 216 Nuisance Lane. The purpose of the visit was to get Mr. Elm's professional help to identify specimen and protected trees located on the property. Mr. Elm identified one (1) specimen tree and sixteen (16) protected trees on the property. Several other trees on the property were identified as neither protected or species, they were identified as Catalpa trees.
10. Because of the extensive cleanup involved with this property, a Decision Package was approved by City Council in the amount of \$28,500 for the demolition of these structures and trash and debris removal.
11. On February 19, 2001, Code Enforcement Officer Bull Dozer and myself entered upon said premises for the purpose of identifying junk vehicles located on the property. The inspection revealed a total of seven (7) junk vehicles on the property with the identification as follows: White Corvair Monza, vehicle identification number (VIN) 40877U162414; Green Sunbeam Texas Plates CAT-979; White Ford Pick Up VIN F26YZK84325; White Ford Pick Up VIN F25BKY45108; White Ford Truck VIN 6Z42Y186761; Red MGB Tourer Texas Plates HZP-429; Blue Ford Van Texas Plates FIZ-3364. The license plate for this latter vehicle came back as 1986 Chevrolet Pick Up. All vehicles inspected on this property were in violation of State Law and City of Any Where Code of Ordinances, regarding junk vehicles.
12. All conditions relative to the house and curtilage identified herein were currently existing as of the date of the last inspection on February 19, 2001, and continue to exist as public nuisances and in violation of the City's ordinances relative to trash and debris, high weeds and grass, junked vehicles and substandard structures, as set forth in Appendix A.

WHEREFORE, I respectfully request that a search warrant be issued allowing the inspection of said premises to determine the presence of health building and fire violations as set forth in the Code of Ordinances of the City of Any Where, as set forth in Appendix A, and allowing simultaneously with the inspection of the interior of the main structure for record keeping, the video recording, taking of still photographs, and gathering of all other documentary evidence deemed necessary by and through this search warrant.

Rodger Ramjet

SUBSCRIBED AND SWORN TO BEFORE ME, on the _____ day of _____,
2001, to certify which witness my hand and official seal,

Notary Public in and for the State of Texas

ADMINISTRATIVE SEARCH WARRANT

THE STATE OF TEXAS

§
§

PREMISES LOCATED AT:
216 NUISANCE LANE

COUNTY OF BUT HERE

§
§

ANY WHERE,
BUT HERE COUNTY, TEXAS

THE STATE OF TEXAS to the Sheriff or any Peace Officer of But Here County, or the State of Texas, and/or Code Enforcement Official of the City of Any Where.

GREETINGS:

WHEREAS, the Affiant, whose signature is affixed to the Affidavit attached hereto (which said Affidavit is by this reference incorporated herein for all purposes), is a person duly authorized by law to make inspections of premises for the purpose of enforcing health, fire, or building regulations, statutes or ordinances, and did heretofore this day subscribe and swear to said Affidavit before me.

WHEREAS, I find that the verified facts stated by Affiant in said Affidavit show that Affiant has probable cause for the belief he expresses therein and establishes the existence of proper grounds for the issuance of this Warrant;

NOW THEREFORE, you are hereby commanded to enter the location set forth in the Affidavit as the location of the single family dwelling, accessory structure and surrounding curtilage located at 216 Nuisance Lane, Any Where, But Here, Texas, said premises being described as Lot 1, Block B, North Pure Lake Addition and search and inspect said premises to determine the existence of any violation of health, fire, or building regulations, ordinances or statutes, and allowing, simultaneously with the inspection of the interior of the main structure for record keeping, the video recording, taking of still photographs and gathering of all other documentary evidence deemed necessary by and through this search warrant.

WITNESS my signature on this the _____ day of _____, A.D. 2001 at
_____ o'clock _____ m.

MAGISTRATE, BUT HERE COUNTY, TEXAS

LEGAL NOTICE

In accordance with the provisions of Section 8.00 of Chapter 7, of the Code of Ordinances of the City of Any Where, Texas, Section 13.04 of Chapter 7, of the Code of Ordinances, of the City of Any Where, Texas, Section 1.02 and Section 1.04 of Chapter 6, of the Code of Ordinances, of the City of Any Where, Texas, NOTICE IS HEREBY GIVEN TO OWNERS: Wil Ubee, 216 Nuisance Lane, Any Where, TX 75022, that real property located at 2216 Lazy River Drive (Lot 1, Block B, North Pure Lake Addition) Any Where, Texas is considered in violation of said Ordinances with Junked Vehicles, Deteriorating Fencing, Trash and Debris, and High Weeds and Grass. Action must be taken to abate these violations within ten (10) days from the second publication, or after the hearing, the City may go onto said property and cause work to be performed to gain compliance with the above stated provisions. Expenses for said work shall be assessed and collected in conformance with state law, as amended.

Section 1.00 of Chapter 6 of the City's Code of Ordinances allows for a one-time notice each year to property owners in violation of Section 1.00 of Chapter 6 of the City of Any Where Code of Ordinances.

Rodger Ramjet
Code Enforcement Officer
City of Any Where

TO RUN: To be determined

FAX: 972-555-1212

CONTACT: Rodger Ramjet

Any questions or problems, please call Rodger Ramjet at 972-555-1213. Bill to Environmental Services Department.

In Re:	§	MUNICIPAL COURT NO. 5
	§	
216 Nuisance Lane	§	CITY OF ANY WHERE
Mr. Lousy Tenant	§	
	§	
Abatement of Junked Vehicles	§	BUT HERE COUNTY, TEXAS

ADMINISTRATIVE DETERMINATION AND ORDER

On or about November 9, 2001, came onto be heard, before the Municipal Court No. 5, for the City of Any Where, an administrative proceeding for the abatement of specified identified junked vehicles as determined by the City of Any Where Code Enforcement officers. Upon presentation of the evidence, and hearing of argument, the Court makes the following findings and orders:

1. On or about June 7, 1999, Code Enforcement Officers conducted an inspection of the premises at 216 Nuisance Lane, being Lot 2, Block B, North Pure Lake Addition, within the City of Any Where, relative to complaints that junked vehicles were being stored on the property. The City determined such junked vehicles constituted a public nuisance as defined by Section 8.02 of the City Code of Ordinances and should be abated.
2. Mr. Lousy Tenant is the owner of the property located at 216 Nuisance Lane and is the responsible party for the keeping of junked vehicles on the premises.
3. On-going inspections since that date have determined that the junked vehicles continue to be stored on the property in violation of City ordinance, to wit: Section 8.03 of Chapter 7. Specifically, on or about February 19, 2001, officers entered upon the property for the purpose of identifying junked vehicles. The inspection revealed a multitude of junked vehicles located on the property, identified as follows:

White Corvair Monza, VIN 40877U162414;
 Green Sunbeam Texas Plates CAT-979;
 White Ford Pick Up VIN F26YZK84325;
 White Ford Pick Up VIN F25BKY45108;
 White Ford Truck VIN 6Z42Y186761;
 Red MGB Tourer Texas Plates HZP-429;
 Blue Ford Van Texas Plates FIZ-3364

4. On or about October 15, 2001, Mr. Tenant was notified via certified mail, return receipt requested, and regular mail, of the nuisance, and that said nuisance must be abated and removed not later than 10 days from the date on which notice was mailed.
5. On or about October 26, 2001, Mr. Tenant was sent notification of hearing before the Municipal Court, by certified mail return receipt requested and regular mail, to consider the possible removal of junked vehicles and used vehicle components from the property, in accordance with Section 8.02 of Chapter 7 of the Code of Ordinances.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-referenced vehicles are junked vehicles as defined by Section 8.02 of the City Code of Ordinances; and

It is further ORDERED that the above-referenced junked vehicles be abated and removed from the property; and

It is further ORDERED that the above-referenced junked vehicles shall not be reconstructed or made operable after removal; and

It is further ORDERED that the City provide the requisite notice identifying the vehicle or part of the vehicle to the Department of Public Safety not later than the fifth day after the date of removal, requesting that the Department immediately cancel the certificate of title issued for said vehicle; and

It is further ORDERED that the City may dispose of the junked vehicles, or parts thereof, to a scrap yard, motor vehicle demolisher or a suitable site operated by the City or County.

SO ORDERED.

Dated this ____ day of _____, 2001.

Judge of the Municipal Court No. 5

CASE STUDY II

SUBSTANDARD STRUCTURE CHAPER 214

The structure at 6000 Mockingbird Lane was abandoned by the owner/occupant and has remained unoccupied for almost two years. There are no active utilities on the property. The carport/garage is full of trash/insects and one junked vehicle was left in the rear yard. The owner has mowed the grass but the trash/debris pile still remains in the rear yard as of July 6, 2001. The City has created a Building and Standards Commission to hear Chapter 214 matters. Please advise on the process you would take to initiate and advance these proceedings. What other options does the City have to address the nuisance conditions?

AGENDA ITEM 01-08

SUBJECT: Residence at 6000 Mockingbird Lane

NAME OF OWNER'S: Bobby Jo Nuisance, PO Box 666, Nowheresville, Texas

NAME/ADDRESS OF INTERESTED PARTIES: Bobby Jo Nuisance

DATE NOTICE OF HEARING LETTER MAILED:

MAY 18, 2001 TO OWNER BY CERTIFIED MAIL

JUNE 19, 2001 TO OWNER BY CERTIFIED MAIL

LEGAL DESCRIPTION OF THE PROPERTY:

H L DAVIS, BLOCK 17, LOT 29B
TAX #R-2002-017-029F-1

GENERAL DESCRIPTION OF STRUCTURE: ONE STORY, WOOD FRAMED STRUCTURE

ZONING DISTRICT: "RS-60" RESIDENTIAL SINGLE FAMILY

DATE STRUCTURE WAS TAGGED: FEBRUARY 28, 2001

CAUSE FOR STRUCTURE TO BE DEMOLISHED: TO BE DETERMINED

SUPPORT DOCUMENTATION:

PICTURES OF PROPERTY

STAFF RECOMMENDATION:

SEE COMMENTS BELOW

COMMENTS:

STRUCTURE WAS ABANDONED BY OWNER/OCCUPANT AND HAS REMAINED UNOCCUPIED FOR ALMOST TWO YEARS. THE CARPORT/GARAGE AREA IS FULL OF TRASH/INSECTS, AND 1 JUNK VEHICLE WAS LEFT IN REAR YARD. OWNER HAS MOWED GRASS, BUT TRASH/DEBRIS PILE STILL REMAINS IN REAR YARD AS OF JULY 06, 2001. THREE DAYS PAST DUE DATE ON ORDER #01-08A, WHICH PASSED JUNE 11, 2001. STAFF RECOMMENDS REPAIRS AS PER ATTACHED INSPECTOR'S REPORT. FAILURE OF THE OWNER TO TAKE THE ORDERED ACTION MAY RESULT IN THE CITY TAKING THE SUBSEQUENT ACTION AND FILING A LIEN AGAINST THE PROPERTY.

ORDER NO. 01-08A

AN ORDER OF THE CITY OF NOWHERESVILLE BUILDING AND STANDARDS COMMISSION WITH REGARD TO THE ABATEMENT OF THE SUBSTANDARD AND DANGEROUS STRUCTURES LOCATED AT 6000 MOCKINGBIRD LANE, NOWHERESVILLE, TEXAS

WHEREAS, the Building and Standards Commission for the City of Nowheresville conducted a public hearing on June 11, 2001, wherein the structures located at 6000 Mockingbird Lane, Texas, ("Property") was agenda item number 01-08. Legal description being: H.L. Davis, Block 17, Lot 29B.

WHEREAS, based upon the evidence presented, the Building and Standards Commission finds that the Property is in violation of the ordinance; and

WHEREAS, the Building and Standards Commission finds that the main structure is dilapidated, substandard and/or unfit for human habitation, constitutes a hazard to the health, safety and welfare of the citizen and likely to endanger persons and property; and

THEREFORE, IT IS HEREBY ORDERED BY THE BUILDING AND STANDARDS COMMISSION CITY OF NOWHERESVILLE THAT:

- a. The owner must allow entry to city staff no later than Thursday, June 21, 2001 to inspect the interior of the property. The grass must be cut no later than the close of business on Friday, June 15, 2001. The cars, debris, tires, and other hazards to the community be removed no later than Sunday, June 24, 2001. This property be brought back to the Commission for review at the next scheduled meeting. Failure to take the ordered actions within the specified time may result in the city taking requisite actions to remove any unsafe or unsanitary conditions and establish a lien on the property. Whatever actions are necessary for the staff to gain entry should be taken and/or to include administrative judicial action.
- b. The City Secretary shall file a copy of this order with the City within 10 days of the date of this order and publish in a newspaper of general circulation the street address/legal description of the Property, the date of the hearing, a brief statement of the results of this order and provide notice that a copy of this order and the minutes of the meeting may be reviewed and/or obtained during regular business hours in the office of the City Secretary.

ORDERED THIS 11th DAY OF JUNE, 2001

J.Q. CITIZEN, Chairman

WILLIE WONKA, Secretary

APPROVED AS TO FORM AND LEGALITY:

I.M. WRIGHT, City Attorney

BUILDING AND STANDARDS COMMISSION

June 11, 2001

MEMBERS PRESENT:

J. Q. Citizen, Chairman
Pablo Ruin, Co-Chairman
Wala Paluga
Dr. Mack Truck
Burr Cham

STAFF PRESENT:

Lenny Creed, Chief Bldg. Official
Bull Dozer, Code Services Manager
Willie Wonka, Secretary
I. M. Wright, Legal

The meeting was called to order at 4:05 p.m. by J. Q. Citizen, Chairman, who explained the purpose and authority of the Building and Standards Commission.

The minutes of the last meeting were read. Wala Paluga made amendments to the minutes of the last meeting. Wala Paluga moved to approve the minutes as amended. Second was made by Burr Cham. The minutes were approved.

* * *

Fifth on the Agenda was Item #01-08, 6000 Mockingbird Lane. Staff presentation was made by Bull Dozer. She advised the Commission that this property has a history of ongoing code violations for the past year and a half. Staff has been unable to gain access to this property for a complete inspection and would like for the Commission to order an inspection within 10 days, so we can get this item on the July agenda.

Betty Jo Nuisance, 405 N. 33rd St., Nowheresville, sister of the owner, advised the Commission that Billie Nuisance mother of Bobby Jo Nuisance and owner of this property, passed away about three weeks ago. Mr. Nuisance is currently out of City and will return this coming Thursday, and he has the key to the structure. She also wants an attorney present when the property is inspected. Wala Paluga asked would there be any problem for Mr. Nuisance to meet with city staff when he returns to City, so a property inspection can be done. Ms. Nuisance answered no.

J. Q. Citizen added that the Commission did not have an inspection report from the Building Official, so at this time the Commission could not order demolition of this property. Ms. Dozer advised that the staff was asking for the Commission to have their order include an inspection for the staff within 10 days of this day. Pablo Ruin made note of the numerous books, boxes, refrigerator, and tires that were visible on the property, which is a fire hazard. Also, the automobiles that have obviously set there some time is creating an environmental impact because they are not being maintained. I. M. Wright, Legal, advised that the Commission can order on this property regarding the public health and safety with respect to the lot in general. That it would be to the best interest of staff, because Mr. Nuisance will not let staff in to do an inspection, to get a Administrative Search Warrant signed by a judge.

Ms. Dozer asked for noted current addresses for Bobby Jo Nuisance. Ms. Nuisance wanted to add to the record that Roger Ramjet, Code Enforcement Officer, has come to the property several times and spoken with her in regards to the property and what needed to be done

to comply with it (city codes). That is why they have done what they have done to the property, and they were told it was fine. Ms. Dozer added that the vehicles are all registered to Bobby Jo Nuisance, and none of those are registered in Bobby Jo Nuisances' mother's name according to staff records. Lenny Creed said that per our legal staff, the Commission can not order them to let staff in the house within 10 days, but the Commission can order all the vehicles and all the debris that has been there for two years to be removed immediately and brought into compliance. Mr. Creed asked the Commission to keep in mind the citizens that live around this property and continue today to call about rodents and all other insects generated from this property. Ms. Dozer further added that we sent a letter to Mr. Nuisance dated March 15, 2000, asking to get in the house to do an inspection and the staff has had no cooperation whatsoever from Mr. Nuisance to maintain the property or to respond to us.

Pablo Ruin moved that the Commission adopt the report of city staff as its findings and the additional findings presented during the meeting. The owner must allow entry to city staff no later than Thursday, June 21, 2001 to inspect the interior of the property. The grass must be cut no later than the close of business on Friday, June 15, 2001. The cars, debris, tires, and other hazards to the community be removed no later than Sunday, June 24, 2001. This property be brought back to the Commission for review at the next scheduled meeting. Failure to take the ordered action in the specified time may result in the city taking a requisite action to remove any unsafe or unsanitary conditions on the property and establish a lien on the property. And whatever actions are necessary for the staff to gain entry should be taken to include administrative judicial action. Second was made by Wala Paluga. Motion carried unanimously.

Pablo Ruin moved to adjourn the meeting. Second was made by Wala Paluga. The meeting adjourned at 5:50pm.

J. Q. Citizen, Chairman

ORDER NO. 01-08B

AN ORDER OF THE CITY OF NOWHERESVILLE BUILDING AND STANDARDS COMMISSION WITH REGARD TO THE ABATEMENT OF THE SUBSTANDARD AND DANGEROUS STRUCTURES LOCATED AT 6000 MOCKINGBIRD LANE, NOWHERESVILLE, TEXAS

WHEREAS, the Building and Standards Commission for the City of Nowheresville conducted a public hearing on July 09, 2001, wherein the structures located at 6000 Mockingbird Lane, Texas, ("Property") was agenda item number 01-08. Legal description being: H.L. Davis, Block 17, Lot 29B.

WHEREAS, based upon the evidence presented, the Building and Standards Commission finds that the Property is in violation of the ordinance; and

WHEREAS, the Building and Standards Commission finds that the main structure is dilapidated, substandard and/or unfit for human habitation, constitutes a hazard to the health, safety and welfare of the citizen and likely to endanger persons and property; and

THEREFORE, IT IS HEREBY ORDERED BY THE BUILDING AND STANDARDS COMMISSION CITY OF NOWHERESVILLE THAT:

1. The owner of the property must eliminate all unhealthy and unsafe conditions within thirty days of this order including the car and other debris on the property. The owner must repair the structures pursuant to all applicable codes and ordinances or remove or demolish the structures and have the lot cleaned and graded with proper drainage within thirty days of this order. Failure to take the ordered actions within the specified time may result in the city taking requisite actions to demolish the structures, clean and grade the lot, and establish a lien on the property.
2. The City Secretary shall file a copy of this order with the City within 10 days of the date of this order and publish in a newspaper of general circulation the street address/legal description of the Property, the date of the hearing, a brief statement of the results of this order and provide notice that a copy of this order and the minutes of the meeting may be reviewed and/or obtained during regular business hours in the office of the City Secretary.

ORDERED THIS 09TH DAY OF JULY, 2001

J.Q. CITIZEN, Chairman

WILLIE WONKA, Secretary

APPROVED AS TO FORM AND LEGALITY:

I.M. WRIGHT, City Attorney

BUILDING AND STANDARDS COMMISSION

December 10, 2001

MEMBERS PRESENT:

J. Q. Citizen, Chairman
Wala Paluga
Dr. Mack Truck
Tina Paine
Burr Cham
Jan Jones

STAFF PRESENT:

Bull Dozer, Code Services Manager
Lenny Creed, Chief Building Official
Willie Wonka, Secretary
I. M. Wright, Legal

The meeting was called to order at 4:03 p.m. by J. Q. Citizen, Chairman, who explained the purpose and authority of the Building and Standards Commission.

The minutes of the last meeting were read. Dr. Mack Truck moved to approve the minutes. Second was made by Wala Paluga. The minutes were approved.

* * *

Sixth on the Agenda was Item #01-08, 6000 Mockingbird Lane. J. Q. Citizen advised that the Commission has received a copy of a letter from the lienholder of this property. It states that First Federal Bank, FSB, will not be making an appearance at the December 10, 2001 demolition hearing concerning the above reference property. First Federal Bank, FSB, the servicer for and/or the current lienholder, does not wish to contest the proposed demolition. Staff presentation was made by Bull Dozer. She advised the Commission that this meeting was for the mortgage company to oppose the demolition only.

No one was present for the public hearing of this property.

Wala Paluga moved that the Commission affirms the original motion set previously by this Commission and the procedures be followed by that order. Second was made by Tina Paine. Motion carried unanimously.

* * *

Tina Paine moved to adjourn the meeting. Second was made by Burr Cham. The meeting adjourned at 6:25 p.m.

J. Q. Citizen, Chairman

ORDER NO. 01-08C

AN ORDER OF THE CITY OF NOWHERESVILLE BUILDING AND STANDARDS COMMISSION WITH REGARD TO THE ABATEMENT OF THE SUBSTANDARD AND DANGEROUS STRUCTURES LOCATED AT 6000 MOCKINGBIRD LANE, NOWHERESVILLE, TEXAS

WHEREAS, the Building and Standards Commission for the City of Nowheresville conducted a public hearing on December 10, 2001, wherein the structures located at 6000 Mockingbird Lane, Nowheresville, Texas, ("Property") was agenda item number 01-08. Legal description being: H.L. Davis Addition, Block 17, Lot 29B.

WHEREAS, based upon the evidence presented, the Building and Standards Commission finds that the Property is in violation of the ordinance; and

WHEREAS, the Building and Standards Commission finds that the main structure is dilapidated, substandard and/or unfit for human habitation, constitutes a hazard to the health, safety and welfare of the citizen and likely to endanger persons and property; and

THEREFORE, IT IS HEREBY ORDERED BY THE BUILDING AND STANDARDS COMMISSION CITY OF NOWHERESVILLE THAT:

1. The Commission affirms the original motion set previously by this Commission and the procedures be followed by that order.
2. The City Secretary shall file a copy of this order with the City within 10 days of the date of this order and publish in a newspaper of general circulation the street address/legal description of the Property, the date of the hearing, a brief statement of the results of this order and provide notice that a copy of this order and the minutes of the meeting may be reviewed and/or obtained during regular business hours in the office of the City Secretary.

ORDERED THIS 10TH DAY OF DECEMBER, 2001

J.Q. CITIZEN, Chairman

WILLIE WONKA, Secretary

APPROVED AS TO FORM AND LEGALITY:

I.M. WRIGHT, City Attorney

COMPLAINT

[High Weeds and Grass, Ord. Sec. 20-63]

In the name and by the authority of the State of Texas:

I, the undersigned affiant, do solemnly swear that I have good reason to believe and do believe that Bobby Jo Nuisance hereinafter called the Defendant, on or about the 31st day of December, 2000, and before the making and filing of this complaint, as a person [*owning, claiming, occupying or having supervision or control*] of real property, occupied or unoccupied, within the corporate city limits, to wit: 6000 Mockingbird Lane, Nowheresville, Ainthere County, Texas, did then and there permit weeds, brush or objectionable or unsightly matter, to wit: [*grass*], to grow to a height greater than 12 inches (12") upon such real property within 150 feet of any property line which abuts street rights-of-way, alleys, utility easements, subdivided additions, developed property or any buildings or other structures.

Against the Peace and Dignity of the State.

Affiant

COMPLAINT

[Unsightly Matter, Ord. Sec. 20-62A.]

In the name and by the authority of the State of Texas

I, the undersigned affiant, do solemnly swear that I have good reason to believe and do believe that Bobby Jo Nuisance hereinafter called the Defendant, on or about the 31st day of December, 2000, and before the making and filing of this complaint, as a person [*owning, claiming, occupying or having supervision or control*] of real property, occupied or unoccupied, within the corporate city limits, to wit: 6000 Mockingbird Lane, Nowheresville, Aintthere, Texas did then and there permit or allow [*any stagnant or unwholesome water, sinks, refuse, filth, carrion, weeds, rubbish, brush and refuse, trash, debris, junk, garbage, impure or unwholesome matter of any kind, or objectionable or unsightly matter of whatever nature*], to wit: bottles, paper, appliances, to accumulate or remain upon any such real property [*or within any public easement on or across such real property or upon any adjacent public street or alley right-of-way between the property line of such real property and where the paved surface of the street or alley begins*]

Against the Peace and Dignity of the State.

Affiant

CASE STUDY III

ZONING AND SUBSTANDARD STRUCTURE

The property is located at 1776 Washington Blvd, Delaware, Texas 20001. The violations of the use and maintenance of this property have been on-going since the Necio's purchase of the property at a tax foreclosure suit in 1993. In 1999 an inspection was done of the property and the violations and substandard conditions noted and submitted to Mr. Necio at that time. A copy of the 1999 report is attached hereto as Exhibit A.

Most recently, since March of 2005, Sgt. Fortutious has worked diligently to obtain voluntary compliance from the then owner, Ms. Necio. However, such voluntary compliance has not been sufficient, and had included demolition of the structure. In addition to the zoning violation, there was no certificate of occupancy issued for change of use and no building permit issued for the change in occupancy, also violations of the Zoning Ordinance.

- I. The property is zoned Thoroughfare Commercial, which allows use as a hotel or motel, which was the last permitted use of this property. In recent years, the property was being used for a wrecking yard, auto salvage, junk yard or outside reclamation which is only allowed in Manufacturing-Industrial, contrary to the current zoning.

II. ZONING VIOLATIONS – See Zoning Ordinance

A. PROPERTY ZONED THOROUGHFARE COMMERCIAL 10-600

- i. ALLOWED USE: HOTEL OR MOTEL – Article 9
- ii. LAST PERMITTED USE: HOTEL OR MOTEL

B. CURRENT USE – NOT ALLOWED:

- i. ARTICLE 9: Wrecking yard, Auto Salvage, Junk Yard or Outside Reclamation only allowed in Manufacturing-Industrial –MI - Zoning District

C. NO CERTIFICATE OF OCCUPANCY FOR USE: ARTICLE 20

- i. Required for Change in Use Sec. 20-100.C

D. NO BUILDING PERMIT – ARTICLE 21

- i. Required for change in occupancy of a building – 21-100.A.

The structure, however, has been deemed substandard by the building official, and unfit for human habitation, for failing to comply with the minimum standards as outlined in Section 151.18 of the City Code of Ordinances, since 1999. Such substandard conditions, which have done nothing but worsen over the last several years, include but are not limited to:

- a. Tree grown into eve of house caused damage to shingles, flashing and fascia;
- b. Crack in brick mortar bed and brick pulling away from wall at both corners of building on south wall; cause is possible foundation failure;
- c. Hole in roof decking probably causing rain to enter building and damage interior;
- d. Exterior water damage and possible termite infiltration;

- e. Second story has extensive weather damage to the inside and outside of the structure.

See Exhibit A, 1999 Report and photographs taken March 2005 and November 2005. Additionally, there is no water or sewer to the property, in violation of the International Building Code and Fire Code. Chapter 151 of the Code of Ordinances – Public Nuisance as defined in Sec. 151.17.

Trash and Debris: Title V, Chapter 93, Section 93.02:of the Code of Ordinances.

- i. It is an offense to permit the accumulation of junk, garbage, trash, rubbish, refuse or other objectionable, unsightly or unsanitary matter on property.
- ii. Duty to Remove: Section 93.05

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P1013400.JPG



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TEXAS COURT OF CRIMINAL APPEALS

TEXAS MUNICIPAL COURTS EDUCATION CENTER

1609 SHOAL CREEK BLVD., SUITE 302 AUSTIN, TEXAS 78701
TELEPHONE (512) 320-8274
1-800-252-3718
FAX (512) 435-6118

Establishing a Juvenile Case Manager Program

Presented by

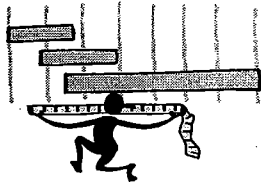
Deanna Burnett
Presiding Judge
Carrollton

and

Susan Keller
Assistant City Attorney
Carrollton

Category	Year 2004
Juv Courts	45,000
Mun Court Traffic	105,000
Mun Court Non-Traffic	205,000

Evolution of Law Pertaining to Juveniles in Municipal Court and Case Manager Concept



Evolution continued

- 1989 - Traffic Only
- 1991 - Added 1st and 2nd Fine Only Misdemeanors
- 1995 - Definition of "Fine Only"
 - Municipal Courts Truancy
 - Contempt -- Delinquent conduct
- 1999 - Contempt expanded
- 2001 - Case Manager and Truancy Case Manager
 - Jurisdiction -- 3rd, 4th etc.
- 2003 - Juvenile Case Manager
 - JNA
- 2005 - Court Cost - JCM



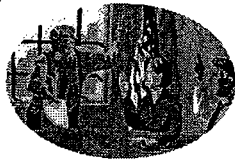
Current State of the Law

§45.056 and §102.0174 CCP



§45.056 CCP

- Requires city Ordinance
- May jointly employ



§45.056(c) CCP

"to assist the Court in administering the Court's juvenile docket and in supervising it's Court Orders in Juvenile cases."



§45.056(e) CCP

"juvenile case manager shall work primarily on cases brought under... Education Code."



[§102.0174 CCP]

Court costs to fund salary and benefits only

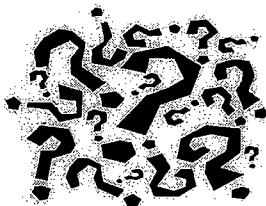


[§102.0174 CCP]

Waiver of fee for financial hardship



[What Is A Juvenile Case Manager
And What Do They Do?]



**No Requirement JCM Be A
Full-Time Employee**



Administering Juvenile Docket

- Clerical functions
 - Docketing cases
 - Sending required letters



Administering continued

- Judicial Assistance
 - Provide information – Programs, Community Service
 - Monitor Compliance



[Assist Juveniles and Parents]

- Explain Court Orders
- Answer Questions
- Provide Contact Information



[Assist Prosecutors]

- Inform Prosecutor when case can be filed in Juvenile Court
- Work with Deferred Disposition defaults
- Provide information regarding programs and Community Service



[Prosecutor and JCM in Carrollton]



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Identifying & Managing Abusive Discovery

Presented by

Candace Chappell
Senior Prosecutor & City Attorney II
Irving

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FAX (512) 435-6118

Youthful Drivers

Presented by

Ryan Kellus Turner
General Counsel
Texas Municipal Courts Education Center
Austin

**The Young and
the Restless
Youthful Drivers
&
Your Court**

Traffic Law Milestones

- 1985 – Mandatory Seat Belt Laws
- 1997 – “Zero Tolerance” Law for drivers under 21 yoa (.0000 BAC)

Traffic Law Milestones

- 2001 – Open Container Law
- 2001 – “Graduated License” Law
- 2001 – Increased seat belt violation penalties

Traffic Law Milestones

- 2003 – DSC & Deferred denied to holders of CDLs.
- 2003 – Driver Improvement Program (points)

2005 Milestones

- Effective 9/1/2005
- Wireless communication use prohibited for new DL holders under 18 yoa.

2005 Milestones

- Effective 9/1/2005
- DSC Required if under 25.
- DPS exam for holders of Provisional License.

Common Thread?

- Most target operation of a Motor Vehicle by ____.

WHY?

Young Driver Stats

- The number one cause of death for 15-20 year olds in the U.S. is ____.

Young Driver Stats

- This age group only makes up 7% of Licensed Drivers
- 14% of Fatalities
- 20% of reported collisions

Young Driver Stats

- Number of young drivers ages 16-20 killed in 2004

(NHTSA, 2005)

Young Driver Stats

- 53% of teen driver deaths occur ____.

Young Driver Stats

- 27% of the fatal teen collisions in the U.S. in 2003 were _____ related.

Young Driver Stats

- 41% of teen motor vehicle deaths in 2003 occurred between the hours of _____ m. and _____ m.

(IIHS, 2004)

Young Driver Stats

- **Staying up late puts teen drivers at high risk for automobile collisions due to drowsiness.**

Young Driver Stats

- Teens are more likely than any other age group to be involved in a single vehicle crash.
- 65% of teen passenger deaths occur with a ____ driving.

Young Driver Stats

- Nearly two-thirds of teen passenger vehicle occupants killed were _____.

Young Driver Stats

- **Based on current population trends, there will be 23% more 16-20 year old drivers on the road in 2010 than there are today - - -**

2 Minute Drill
Small Group
Exercise

- How are Youthful Drivers different?

Teen Drivers Gone
Wild!

- Short video from NBC's **DATELINE** program - July 2005.

What's all this got to do with me and my court?

You Can Make
a Difference!

How? The Obvious

- Fine them
- Order DSC

How? Creative Alternatives

- Educate
 - Offenders
 - Parents
 - Our Communities
 - “Canned Speeches” – 2006 project of TMCEC (sign up for a copy)

More Alternatives

- Rehabilitate
 - Deferred Disposition (b) (10) “any reasonable condition”
 - www.ipromiseprogram.com
 - www.reportmyteen.com (Addison, TX.)
- Brainstorm Drill (Ideas from Audience)

In Conclusion

- The stakes are high
- Your role is critical
 - Prevention of injury & loss of life
- “A fine is not always fine”
- Speak out (with ethics and law in mind)
- Read articles in appendix
- Check out MTSI

Questions?

The End

Appendix

1. Acceptance of and engagement in risky driving behaviors by teenagers

Sarkar & Andreas, Adolescence (Winter 2004):

http://www.findarticles.com/p/articles/mi_m2248/is_156_39/ai_n9487159

2. Teen Drivers Fact Sheet, Nation Center for Injury Prevention and Control (2004):

<http://www.cdc.gov/ncipc/factsheets/teenmvh.htm>

3. Peter Nelson "Technological assistance aims to reduce dangerous driving by teens" *The Sensor* (Spring 2005) (Center for Transportation Studies, University of Minnesota):

<http://www.its.umn.edu/sensor/2005/spring/teens.html>

4. Teens and Driving, National Safety Council (June 2004):

<http://www.nsc.org/nsm/pdf/Teenagers-NSM.pdf>

5. "Teen Driving Safety Tips" CARFAX Safe Teen Drivers Program: The real facts parents need to better coach teen drivers:

http://www.carfax.com/teen_driving/Teen_Safety_Tips.cfm

Acceptance of and engagement in risky driving behaviors by teenagers

Sheila Sarkar

INTRODUCTION

In the United States, teenagers drive less than other age groups except for the very oldest group, yet their number of accidents and fatalities is disproportionately high. The accident rate per mile for 16- to 19-year-olds is four times higher than among older drivers. The newest drivers are at the highest risk; the crash rate per mile is three times higher for 16-year-olds than for 18- to 19-year olds. The California Highway Patrol (2000) reported that in California 37,532 teenage drivers (between the ages of 16-19) were involved in accidents in the year 2000. Out of those, 22,862 were the fault of the teenage driver. Over 20% of all traffic deaths in the United States occurred when a teenager was driving; for teenage passenger fatalities 63% occurred when they were riding with another teenager (Insurance Institute for Highway Safety, 2001).

Adolescent drivers tend to engage in numerous risky behaviors including speeding which has been found to significantly correlate with a greater risk for accidents (Elander, West, & French, 1993). They are more likely to exhibit and report greater risk-taking such as following too closely, unsafe accelerations, and rapid lane changes (Jonah, 1986; 1990; Preusser, Ferguson, & Williams, 1988).

Teenagers' perceptions of their own skills and those of the drivers around them contribute to their risky behavior. Drivers who believe they are highly skilled are less likely to properly evaluate a risky situation. Young drivers in particular are much more likely to overestimate their skills (Finn & Bragg, 1986; Gregersen & Bjurulf, 1996).

It was also found that drivers of all ages who participate in one type of reckless driving were more likely to engage in other types (Evans & Wasielewski, 1982). Faster driving and tendency to commit traffic violations were correlated with increased crash risk (Elander, West, & French, 1993).

Lack of driving experience has been viewed as a major contributing factor in adolescent driving problems. However, Gregersen and Bjurulf (1996) examined a model in which other factors were shown to influence driver behavior, such as attitudes of others. Teenagers who socialize with others who display risky behaviors are more likely to engage in that type of behavior (Gerra et al., 1999; Jessor, Turbin, & Costa, 1997; West & Hall, 1997).

Gender Issues

Gender differences also play an important role in driving practices. Young males are more likely to overestimate their driving ability (Gregarson & Bjurulf, 1996), and this overconfidence has been shown to be correlated with increased risk-taking behavior involvement in accidents and violations (Elander, West, & French, 1993).

In the California Highway Patrol (2000) report, 317 males between the ages of 16-19 died in car crashes in California as compared to 155 females; 64% of the males were at fault, and 62% of the females. The Insurance Institute for Highway Safety (2001) reported that in the year 2000 in the United States, two out of every three teenagers killed in car accidents were male.

The Current Study

This study examined two groups of drivers: one that is just learning the rules of the road, and the other a group of newly licensed drivers who have already been caught breaking these rules--most within the first 12 months of obtaining a license. It is hoped that understanding how these teenagers think about driving, their assessment of risks, and to whom they are being exposed as passengers can contribute to a reduction in traffic accidents and violations.

METHOD

Participants

The first group consisted of 1,430 student-drivers enrolled in driver training programs throughout Southern California. These sources are designed to enable them to obtain the needed education and experience and get their driver's licenses. In California, teenagers under the age of 18 cannot get a

license unless they have attended a driver training course. Participation in the survey was voluntary and not a required part of the course. The group consisted of 662 males and 721 females (47 failed to report gender), and the average age was 15.6 ($SD = .79$). Only 7.9% (113) of the participants had their learners permit (which enables student drivers to actually get behind the wheel when accompanied by a licensed adult driver). No ethnic identity questions were asked, however, a broad range of locations within Southern California was included. Southern California contains a wide range of ethnic minority groups and a very large Hispanic population. No information could be obtained concerning those persons who chose not to participate.

The second group consisted of 880 teen drivers who had received a moving violation and were attending traffic school. This type of traffic school is available to persons who have received a traffic citation and is different from the courses offered for student drivers. The classes are designed to re-educate participants in basic traffic safety and traffic laws, and once the course is completed, the traffic violation is removed from the driver's record. This group consisted of 552 males, 291 females (37 did not report gender). The average age was 16.8 ($SD = .83$), and they had had their license for an average of 12.7 months ($SD = 9.2$) when they received their violations. Required traffic school hours are assigned by the court based on the severity of the infraction; on average the participants were ordered to complete 9.6 hours ($SD = 4.7$).

Questionnaire

For both groups, attitudes concerning driving behaviors were covered in a series of questions. Participants were asked to rate six negative driving issues as to how dangerous they perceived them to be: speeding, drunk driving, sleepy driving, distracted driving, slow driving, and angry driving. Rating scores were on a 5-point Likert type scale, which ranged from least dangerous (1) to most dangerous (5). Participants were also asked to list what speed they felt was too slow on a freeway, and what they considered speeding on a freeway.

Exposure to risky driving was measured by a self-report of riding in a vehicle in which the driver was engaging in the following activities: drunk driving, drag racing, reckless driving, and taking illegal drugs prior to driving. Because the last item was introduced late in the survey, responses were not included in the analysis. Participants were asked if they had ever ridden in a car in which the driver was engaging in these activities, and with whom (friend, sibling, parent, or other). Traffic violators were asked if they themselves had engaged in the risky behavior. They were also asked about the level of concern they had for various drivers in their lives, what driving habits those drivers exhibited, and what mildly aggressive driving reactions (yelling, rude gestures, honking) were acceptable. Questions concerning acceptable cell phone usage while driving were also included.

Procedure

The survey was briefly described to participants in both groups and asked to complete it prior to a seminar on driving behavior. Participants were given the option not to complete the survey if they felt uncomfortable with it at any time. Approximately 60% of the students completed the survey.

RESULTS: STUDENT DRIVERS

In terms of rating of dangerous driving behaviors, drunk driving was considered the greatest danger, with sleepy driving, speeding, angry driving, distracted driving, and slow driving following in order (see Table 1).

For personal exposure, 21.8% said they had been in a car with a drunk driver, 24.3% had ridden with someone who was drag racing, and 40.9% had ridden with a reckless driver.

Those participants who reported more mildly aggressive behaviors by their parents (yelling, rude gestures, honking/flashing lights) viewed such behaviors as more acceptable ($r = .306$; $p < .000$).

Exposure to Drunk Driving

Analysis revealed that participants who reported being in a car with a drunk driver were more likely to have also ridden with a driver who was drag racing, [$\chi^2(1) = 117.58$, $p < .001$, or driving recklessly, [$\chi^2(1) = 117.28$, $p < .001$. A comparison of means revealed that those participants exposed to drunk driving rated the behavior as less risky, $t = 3.97$, $p < .001$, than did those participants who had not been exposed to a drunk driver. Participants who been exposed to drunk driving also reported less seatbelt use, [$\chi^2(1) = 5.97$, $p < .05$, than did other participants (see Table 2).

Exposure to Drug Racing

Participants who had ridden with a person who was drag racing rated many of the items as significantly less dangerous than did participants who reported never riding with a drag racer—speeding, drunk driving, sleepy driving, distracted driving, and angry driving (see Table 2). Participants who had been exposed to a drag racing driver also reported less seatbelt use, [$\chi^2(1) = 10.26$, $p < .05$.

Exposure to Reckless Driving

A chi-square analysis revealed that those who reported riding with a reckless driver were also more likely to report riding with a drunk driver, [chi square] (1) = 117.26, $p < .001$, as well as a drag racing driver, [chi square] (1) = 124.55, $p < .001$. Those who reported riding with a reckless driver were less likely to report using their seatbelt, [chi square] (1) = 22.2, $p < .001$. There was also a significant difference in the level of speed that was considered speeding between the two groups, with those who reported exposure to reckless driving listing a higher speeding level (see Table 2).

Cell Phone Use

In terms of safe cell phone use, only 14% believed it was never acceptable to use a cell phone while driving.

Gender

Males were more likely to report higher levels of confidence in their future ability to drive than did females, [chi square] (2) = 68.02, $p < .001$, as well as a greater exposure to drag racing, [chi square] (1) = 11.54, $p < .001$. Females were more likely to have ridden with a drunk driver, [chi square] (1) = 5.58, $p < .05$. Significant gender differences were also found in terms of considering a risky behavior as dangerous. Out of the six reported dangerous behaviors they were asked to rate, four of them showed significant gender differences (speeding, drunk driving, distracted driving, slow driving), with females rating the behavior as more dangerous in each case (see Table 3).

There was also a significant difference between genders in terms of what driving speed was considered speeding ($t = -3.121$; $p < .01$). Females considered a lower speed of driving as speeding ($M = 85.77$ mph, $SD = 17.93$) than that reported by males ($M = 91.52$ mph, $SD = 31.39$).

RESULTS; TRAFFIC VIOLATORS

Participants in the second study were taking the traffic safety course because of a range of traffic violations, but the most common was speeding (56%). These violators reported an average of 22.5 mph ($SD = 11.21$) over the posted speed limit when they were pulled over. The next highest number of violations were reported as failure to stop at a stop sign (11%), failure to stop at a red light (8%), reckless driving (4.3%), and drag racing (4.2%). Of the remaining participants, 24% selected "other"; these write-in traffic violations included crossing a double yellow line on a freeway, driving without a license, unsafe lane changes, and hit and run. The average length of time these drivers had had their licenses was 12.7 months.

For dangerous driving behaviors, drunk driving was rated the most dangerous, with sleepy driving, distracted driving, angry driving, speeding, and slow driving following in order (see Table 1).

In terms of personal exposure, 38.5% said they had been in a car with a drunk driver; 44.2% had ridden with someone who was drag racing; 53.6% had ridden with a reckless driver; and 35.2% had been in a vehicle where the driver had used drugs prior to getting behind the wheel.

For their own reported behavior, 17% of the participants reported driving while drunk, 20.9% of them reported drag racing, 27.2% said they had driven recklessly, and 17.8% said they had taken illegal drugs while driving.

Those participants who reported more mildly aggressive behaviors by their parents (yelling, rude gestures, honking/flashing lights) also viewed such behaviors as more acceptable, $r = .340$, $p < .000$.

Exposure to Drunk Driving

Those who had been in a vehicle with a drunk driver were significantly more likely to have been exposed to drag racing, [chi square] (1) = 85.22, $p < .001$, reckless driving, [chi square] (1) = 95.84, $p < .001$, and riding with a driver under the influence of drugs, [chi square] (1) = 264.19, $p < .001$, than did those who had not been directly exposed to drunk driving. In terms of their own behavior, they were more likely to have engaged in reckless driving, [chi square] (1) = 5.62, $p < .05$, and to have reported using drugs while driving, [chi square] (1) = 7.27, $p < .01$. Participants who reported exposure to drunk driving also had a significantly higher level of exposure to what they considered speeding than did those who did not report such exposure; they were also less likely to rate drunk driving as a risky behavior than did those who had not been exposed to it (see Table 4).

Exposure to Drag Racing

Participants who reported exposure to drag racing also reported exposure to reckless driving, [chi square] (1) = 101.75, $p < .001$, drunk driving, [chi square] (1) = 85.22, $p < .001$, and had ridden with a driver who was under the influence of drugs, [chi square] (1) = 61.78, $p < .001$. They were also more

likely to have engaged in reckless driving themselves, $[\chi^2(1) = 11.76, p < .001]$. These participants also reported a higher level of what they considered "speeding" than those drivers who had not been exposed to drag racing. Those without reported exposure to drag racing rated drunk driving as a more dangerous behavior than did those who had been exposed to drag racing (see Table 4).

Exposure to Reckless Driving

Participants who reported exposure to reckless driving were more likely to have been exposed to drunk driving, $[\chi^2(1) = 95.84, p < .001]$, drag racing, $[\chi^2(1) = 101.78, p < .001]$, and ridden with drivers who were under the influence of illegal drugs, $[\chi^2(1) = 104.84, p < .001]$. They were also more likely to have engaged in drag racing as a driver $[\chi^2(1) = 7.91, p < .01]$. Drivers who did not report exposure to reckless driving rated drunk driving and sleepy driving as more risky than did those who had been exposed to reckless driving (see Table 4).

Cell Phone Use

Concerning the safety of cell phone use on the road, 27.6% believed it was acceptable while driving after 100 hours of driving experience, while 25.2% believed it was acceptable after 300 hours. Only 22% believed it was never acceptable to use a cell phone while driving.

Gender

As in the findings for student drivers, males reported a higher confidence level in their driving than did females, $[\chi^2(1) = 40.46, p < .001]$. In terms of traffic offenses, males were more likely to have been pulled over for drag racing, $[\chi^2(1) = 15.51, p < .001]$, and reckless driving, $[\chi^2(1) = 7.07, p < .01]$, than were females. Females in this sample were more likely to have been pulled over for speeding, $[\chi^2(1) = 7.42, p < .01]$.

There were reported gender differences in terms of all four self-reported driving behaviors. Males were more likely to have driven while drunk, $[\chi^2(1) = 24.12, p < .001]$, and used drugs while driving, $[\chi^2(1) = 5.5, p < .05]$, than were females. Females rated three of the six risky driving behaviors as being significantly more dangerous than did males: drunk driving, sleepy driving, and angry driving (see Table 3).

Differences Between Non-Drivers and Traffic Violators

In the rating of dangerous behaviors, significant differences were found between the non-drivers and the teens attending traffic school on four of the six ranked behaviors. Student drivers rated speeding, drunk driving, angry driving, and sleepy driving as significantly more risky than did the teens who had received traffic citations (see Table 1).

Traffic violators were significantly more likely to have been exposed to risky driving behavior than were the student drivers. This was true for exposure to drunk driving ($t = -8.922; p < .000$), drag racing ($t = -150.593; p < .001$), and reckless driving ($t = -6.50; p < .000$).

DISCUSSION

Participants in both samples reported exposure to many types of negative driving behaviors, from friends, parents, and siblings. When participants were exposed to greater levels of negative influences, they were less likely to view such behaviors negatively, rating them less dangerous. Finn & Bragg (1986) found that drivers, particularly younger ones, are more likely to engage in risky driving when they perceive such driving as non-risky. This mind-set can start from as young as 13 and 14 years of age. Williams (1998) found that negative behavior patterns in persons as young as high school freshmen were related to subsequent risky driving once they became high school seniors. Thus, it is important to understand how early these beliefs begin in order to develop ways to counter the negative exposure they face in everyday life.

When student drivers view such risky behavior in people they view in a positive light, they begin to see such behavior as acceptable, and based on findings in the literature, they will be more likely to engage in such behavior once they are driving regularly (Finn & Bragg 1986). For the traffic violators, exposure to risky driving was found to be associated with their own levels of reported risky driving. This supports the concept that student drivers are influenced by what they actually experience on the road, as much if not more, than what they are currently taught in driving classes. Driver's education classes emphasize the importance of observing the speed limit, yet both groups rated speeding fairly low as a risky behavior.

The grouping of dangerous behaviors was also of importance. Participants exposed to one negative driving behavior were more likely to have been exposed to others. This indicates that risky driving behaviors are strongly connected, and that overall acceptance of one behavior increases the likelihood of participating in others. West, Elander, & French (1993) found that mild social deviance, in this case not viewing a risky behavior as such, is associated with a greater likelihood of traffic accident risk. Addressing the risk-assessment skills of younger pre-drivers may give them a better understanding of

what they will face in actual driving later on.

Examining the attitudes of these current and future drivers is important in determining what can be done to decrease their risk-taking behaviors on the road. The current study expanded upon previous research in that it indicates that student drivers who were exposed to a greater number of risk taking in the drivers around them, were less likely to consider such risks as dangerous. West & Hall (1997) found that drivers who were more accepting of risky driving behaviors were more likely to engage in dangerous driving and were involved in more accidents. This was supported in the findings on self-behavior of the teenage traffic violator drivers.

In terms of those participants who had received traffic violations, previous research indicates that such behavior early in a driving history can lead to an increase in at-fault crashes later on (Cooper, 1997; Elliott et al., 2000). The most prevalent traffic violation for the group under study was speeding. Cooper (1997) found that drivers who had received speeding violations were more likely to be involved in crashes later on.

Although California does have a graduated driver-licensing program for the first year of driving (which limits the driving hours and passengers), penalties for driving violations received during this period are not increased. As previous studies have shown, teenage drivers are more dangerous than other drivers, yet their perceived risk of being caught engaging in dangerous driving may not be sufficient to deter them from such behavior. As evidenced in the current study, these drivers and student drivers are already showing poor risk perception and acceptance skills, and currently they are not being convinced to think otherwise. The high rate of dangerous driving by teenage drivers, and the high rate of recidivism, indicates that a strong deterrent is needed. Perhaps stiffer penalties for violations for this population would serve as such a deterrent. Freedom is very important to teenagers, and if they know they will lose their driving freedom, they may act more responsibly. Restrictions or suspension of driving privileges for a period of time might discourage risky driving. An additional approach would be to make parents, family members, and others more aware that their driving habits are being observed by their children.

Simply addressing traffic safety in a short-term drivers' class when students are 15 or older does not appear to be enough to curtail reckless driving behavior. A more rigorous program for children in the early teenage years about driving safety and risk assessment, combined with inclusion of parents in a take-home plan, would be a start toward increasing the safety of these new drivers and those on the roads with them.

Concerns and Limitations

Self-report surveys allow researchers to examine the thinking and perceptions of a sample population, as well as previous behaviors. However, whenever dealing with self-reports it is important to consider that participants may not provide totally honest responses. It was hoped that allowing participants the option of not completing the survey as well as assuring anonymity and confidentiality would help elicit factual data.

Another concern is that the worst traffic offenders could not be included in this sample. There are limits to the types of violations for which the courts allow school attendance to negate recording of the offense. This could account for the finding in this study that females received more tickets for speeding than did males, which contradicts previous findings. The reason may be that the speeding by males was too far over the limit to allow them to attend the school. Future studies should examine both those teens who have not received a violation, as well as those whose violations were so serious as to disallow attendance at traffic school.

Table 1. Rating of Risky Driving Behaviors

	M	SD	t	p
Rate risk of speeding				
Student drivers	3.85	1.08	-6.99	.000
Traffic violators	3.47	1.25		
Rate risk of drunk driving				
Student drivers	4.79	.61	-4.27	.000
Traffic violators	4.66	.77		
Rate risk of sleepy driving				
Student drivers	4.19	.86	-2.60	.01
Traffic violators	4.08	.95		

Rate risk of distracted driving

Student drivers	3.71	.93	-1.39	.17
-----------------	------	-----	-------	-----

Traffic violators	3.65	.94		
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Rate risk of slow driving

Student drivers	2.65	1.18	1.43	.15
-----------------	------	------	------	-----

Traffic violators	2.73	1.30		
-------------------	------	------	--	--

Rate risk of angry driving

Student drivers	3.69	1.09	-2.58	.01
-----------------	------	------	-------	-----

Traffic violators	3.56	1.10		
-------------------	------	------	--	--

Table 2. Student Drivers' Exposure to Risky Driving and Outcomes

	M	SD	t	p
--	---	----	---	---

Exposure to Drunk Driving (DD)

Rate risk of drunk driving

DD yes	4.67	.69	3.97	.000
--------	------	-----	------	------

DD no	4.83	.58		
-------	------	-----	--	--

Exposure to distracted driving

DD yes	6.29	4.95	-4.84	.000
--------	------	------	-------	------

DD no	4.67	4.23		
-------	------	------	--	--

Exposure to Drag Racing (DR)

Rate risk of speeding

DR yes	3.73	1.16	2.10	.036
--------	------	------	------	------

DR no	3.88	1.05		
-------	------	------	--	--

Rate risk of drunk driving

DR yes	4.66	.77	3.79	.000
--------	------	-----	------	------

DR no	4.83	.54		
-------	------	-----	--	--

Rate risk of sleepy driving

DR yes	4.04	.98	3.29	.001
--------	------	-----	------	------

DR no	4.24	.81		
-------	------	-----	--	--

Rate risk of distracted driving

DR yes	3.61	1.00	1.96	.05
--------	------	------	------	-----

DR no	3.74	.91		
-------	------	-----	--	--

Rate risk of angry driving

DR yes	3.54	1.13	2.81	.005
--------	------	------	------	------

DR no	3.74	1.08		
-------	------	------	--	--

Exposure to distracted driving

DR yes	6.49	4.97	-6.02	.000
--------	------	------	-------	------

DR no	4.55	4.17		
-------	------	------	--	--

Exposure to Reckless Driving (RD)

How fast is "speeding" (mph)

RD yes	90.92	23.06	-2.31	.021
--------	-------	-------	-------	------

RD no	86.61	28.00		
Exposure to distracted driving				
RD yes	6.27	4.97	-7.98	.000
RD no	4.14	3.80		

Table 3. Gender Differences Within Groups

	Student Drivers		
	M	SD	p
Confidence in driving skill			
Males	2.17	.59	.00
Females	1.91	.56	
Exposure to drunk driving			
Males	.19	.39	.018
Females	.24	.43	
Exposure to drag racing			
Males	.28	.45	.001
Females	.20	.40	
Self-drunk driving			
Males			
Females			
Self-drag racing			
Males			
Females			
Rate risk of speeding			
Males	3.71	1.12	.00
Females	4.00	1.01	
Rate risk of drunk driving			
Males	4.75	.67	.011
Females	4.83	.55	
Rate risk of sleepy driving			
Males	4.16	.87	.24
Females	4.22	.83	
Rate risk of distracted driving			
Males	3.62	.97	.002
Females	3.78	.89	
Rate risk of slow driving			
Males	2.55	1.17	.004
Females	2.74	1.19	
Rate risk of angry driving			
Males	3.63	1.12	.074
Females	3.73	1.07	

Self-reckless driving

Males

Females

How fast is "speeding" (mph)

	M	SD	p
Males	91.52	31.39	.001
Females	85.77	17.93	

Ticket-speeding

Males

Females

Ticket-drag racing

Males

Females

Ticket-reckless driving

Males

Females

Self-reported drug use while driving

Males

Females

Traffic Violators

	M	SD	p
Confidence in driving skill			
Males	2.61	.51	.00
Females	2.39	.51	
Exposure to drunk driving			
Males	.37	.48	.30
Females	.41	.49	
Exposure to drag racing			
Males	.54	.50	.00
Females	.30	.50	
Self-drunk driving			
Males	.50	.50	.001
Females	.32	.47	
Self-drag racing			
Males	.55	.50	.00
Females	.30	.46	
Rate risk of speeding			
Males	3.43	1.27	.09
Females	3.59	1.17	
Rate risk of drunk driving			
Males	4.62	.82	.01

Females	4.75	.60	
Rate risk of sleepy driving			
Males	4.03	1.01	.02
Females	4.18	.82	
Rate risk of distracted driving			
Males	3.64	.97	.30
Females	3.71	.88	
Rate risk of slow driving			
Males	2.76	1.35	.27
Females	2.66	1.17	
Rate risk of angry driving			
Males	3.47	1.11	.003
Females	3.71	1.07	
Self-reckless driving			
Males	.61	.49	.00
Females	.36	.48	
How fast is "speeding" (mph)			
Males	96.55	40.63	.00
Females	86.28	17.74	
Ticket-speeding			
Males	.54	.50	.006
Females	.64	.48	
Ticket-drag racing			
Males	.06	.24	.00
Females	.00	.06	
Ticket-reckless driving			
Males	.05	.22	.002
Females	.01	.12	
Self-reported drug use while driving			
Males	.58	.50	.019
Females	.43	.50	

Table 4. Traffic Violators' Exposure to Risky Driving and Outcomes

	M	SD	t	p
Exposure to Drunk Driving (DD)				
Rate risk of drunk driving				
DD yes	4.41	.91	7.12	.000
DD no	4.82	.61		
How fast is "speeding" (mph)				
DD yes	98.72	46.59	-2.71	.007
DD no	89.44	22.36		

Exposure to distracted driving				
DD yes	8.24	4.67	-6.18	.000
DD no	6.16	4.15		

Exposure to Drag Racing (DR)

Rate risk of drunk driving				
DR yes	4.54	.85	3.69	.000
DR no	4.74	.69		

How fast is "speeding" (mph)				
DR yes	97.67	45.58	-2.68	.008
DR no	88.68	22.81		

Exposure to distracted driving				
DR yes	7.68	4.56	-3.29	.001
DR no	6.60	4.29		

Exposure to Reckless Driving (RD)

Rate risk of drunk driving				
RD yes	4.59	.83	2.88	.004
RD no	4.74	.69		

Rate risk of sleepy driving				
RD yes	4.01	.97	2.66	.008
RD no	4.19	.91		

Exposure to distracted driving				
RD yes	8.13	4.62	-7.52	.000
RD no	5.70	3.75		

Exposure to Driver Under Influence of Drugs

Exposure to distracted driving				
Drugs yes	7.75	4.59	-3.69	.000
Drugs no	6.42	4.09		

The authors gratefully acknowledge the assistance of Gosia Kubiak and David Brewer in collecting, transcribing, and coding the data.

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Teen Drivers: Fact Sheet

Overview

Two out of five deaths among U.S. teens are the result of a motor vehicle crash (CDC 2004).

Occurrence and Consequences

- In 2002, more than 5,000 teens ages 16 to 19 died of injuries caused by motor vehicle crashes (CDC 2004).
- The risk of motor vehicle crashes is higher among 16- to 19-year-olds than among any other age group. In fact, per mile driven, teen drivers ages 16 to 19 are four times more likely than older drivers to crash (IIHS 2005).
- In 2003, teenagers accounted for 10 percent of the U.S. population and 13 percent of motor vehicle crash deaths (IIHS 2005).
- The presence of teen passengers increases the crash risk of unsupervised teen drivers; the risk increases with the number of teen passengers (Chen 2000).

Featured Data Resources

- ▶ **WISQARS**
Allows you to form reports on injury mortality and nonfatal injury for a wide range of age groups
- ▶ **Injury Maps**
Allows you to create maps of U.S. injury mortality rates

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Cost

In 2002, the estimated economic cost of police-reported crashes (both fatal and nonfatal) involving drivers ages 15 to 20 was \$40.8 billion (NHTSA 2003).

Groups at Risk

- In 2002, the motor vehicle death rate for male occupants age 16 to 19 was nearly twice that of their female counterparts (23 per 100,000 compared with 12 per 100,000) (CDC 2004a).
- Crash risk is particularly high during the first year that teenagers are eligible to drive (IIHS 2005).

Risk Factors

- Teens are more likely than older drivers to underestimate hazardous situations or dangerous situations or not be able to recognize hazardous situations (Jonah 1987).
- Teens are more likely than older drivers to speed, run red lights, make illegal turns, ride with an intoxicated driver, and drive after using alcohol or drugs (Jonah 1987).
- Among male drivers between 15-20 years of age who were involved in fatal crashes in 2003, 39% were speeding at the time of the crash (NHTSA 2004a).
- Compared with other age groups, teens have the *lowest* rate of seat belt use. In 2003, 18% of high school students reported they rarely or never wear seat belts when riding with someone else (CDC 2004b).
 - Male high school students (22%) were more likely than female students (15%) to rarely or never wear seat belts (CDC 2004b).
 - African-American students (21%) and Hispanic students (20%) were more likely than white students (17%) to rarely or never wear seat belts (CDC 2004b).
- At all levels of blood alcohol concentration (BAC), the risk of involvement in a motor vehicle crash is greater for teens than for older drivers (IIHS 2004).

- In 2003, 25% of drivers ages 15 to 20 who died in motor vehicle crashes had a BAC of 0.08 g/dl or higher (NHTSA 2004).
- In a national survey conducted in 2003, 30% of teens reported that within the previous month, they had ridden with a driver who had been drinking alcohol. One in eight reported having driven after drinking alcohol within the same one-month period (CDC 2004b).
- In 2003, among teen drivers who were killed in motor vehicle crashes after drinking and driving, 74% were unrestrained (NHTSA 2004b).
- In 2003, 54% of teen deaths from motor vehicle crashes occurred on Friday, Saturday, or Sunday; 42% occurred between 9 p.m. and 6 a.m. (IIHS 2005).

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Resource

The Guide to Community Preventive Services

Offers recommendations about motor vehicle injury prevention issued by the Task Force on Community Preventive Services.

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Technological assistance aims to reduce dangerous driving by teens

The tragedy of young, inexperienced drivers losing their lives behind the wheel resonates through families and communities every day. Despite making up less than five percent of licensed drivers, teens account for more than 13 percent of all passenger vehicle fatalities. But once kids leave the driveway, it seems there is little that can be done to regulate their behavior behind the wheel. Or is there?

Recently, new in-vehicle technologies have emerged, aimed at curbing dangerous behaviors such as speeding, driving while intoxicated, and failing to use seat belts. Some of these technologies are commercially available, while others are under development at the University of Minnesota.

With support from the ITS Institute, mechanical engineering graduate student Shawn Brovold is developing an in-vehicle "black box" called the Teen Driver Support System (TDSS) that could help curb unsafe teen driving behavior. Brovold is collaborating with Intelligent Vehicles (IV) Laboratory director Craig Shankwitz, as well as with human factors researchers in the University's HumanFIRST Program.

The project will integrate emerging technologies based on determination of vehicle location and road geometry via the integration of Global Positioning System data and geospatial databases with currently available technologies, including onboard data logging and, optionally, in-vehicle systems to detect alcohol use.

Teen drivers, according to U of M Law School professor Stephen Simon, are a good target for programs of this type because parents are able and willing to help ensure safe driving behavior. Simon, founder and director of the Minnesota Criminal Justice System DWI Task Force, has contributed expertise in traffic safety and legal issues to the project.

Beyond the sphere of parental enforcement, such a monitoring system could potentially be integrated with graduated licensing procedures for beginning drivers.

The system under development will take a three-tiered approach to reducing unsafe teen driving behavior:

- Seat-belt/ignition interlocks and alcohol breath-testing can prevent operation of the vehicle;
- Detection of excessive speed or other unsafe operation can provide feedback during vehicle operation;
- Incidents of speeding or unsafe operation can also be logged for later analysis by parents or licensing officials.

Proactive support for inexperienced drivers

Among the most powerful aspects of the system under development is the capability to correlate a vehicle's speed with its location. Similar devices have been tested extensively in Europe, but Brovold's group is the first to evaluate this technique in the United States, and the first to apply it specifically to teen drivers. Systems which simply monitor and log vehicle speed are of limited use in this context, because local speed limits and road geometries are not known. The combination of speed and location will enable the prototype system to respond to

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Teen drivers experience much higher accident rates than other age groups, due to inexperience and unsafe driving behaviors. (Photo credit: AAA Foundation for Traffic Safety)

unsafe driving or violations of local speed limits.

The ITS Institute's Intelligent Vehicles Laboratory has previously developed onboard systems that use high-accuracy GPS and digital mapping to compute vehicle locations in real time—technology that is central to the SAFEPLow technology-enhanced snowplow and the TechnoBus transit research vehicle.

Building on this experience, the system currently under development uses an onboard computer, based on the compact PC104 platform commonly used for embedded applications, to integrate speed and location data, determined by a GPS system. Speed and location can then be correlated with information about the road on which the vehicle is being operated, such as local speed limits and road geometry, contained in digital maps and databases. Future enhancements to the system may include the ability for the TDSS to interface directly with a vehicle's onboard diagnostic system to collect data such as vehicle speed.

This location awareness makes it possible for the system to not only look at current conditions, but to proactively look "down the road" and evaluate sudden curves or other changes in road geometry—a common cause of run-off-the-road crashes by inexperienced drivers, especially in rural areas. When the system determines that the vehicle speed is too great to safely negotiate an upcoming curve, intersection, or other road feature, it will be able to proactively warn the driver and/or log the incident.

Combining different technologies to create a single integrated system that supports driver capabilities is characteristic of many ITS Institute research projects, says Institute director Max Donath. A significant portion of the Institute's recent work has involved combining new and existing technologies to address specific safety and mobility issues.

—Peter Nelson

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NATIONAL SAFETY MONTH

CRASH-FREE JUNE



TEENAGERS AND DRIVING

Motor vehicle crashes are the number one cause of death for young adults between the ages of 16 and 24. More than 11,000 people aged 15-24 were killed in crashes in 2002, and 5,940 of these were drivers and passengers in vehicles operated by drivers aged 16-20. The dangerous mix of inexperience, distractions, peer pressure, and a tendency to underestimate risk are common factors in the 6.5 million crashes experienced by young adults each year.

- Young drivers are involved in fatal traffic crashes at over twice the rate of the rest of the population.
- 16- to 24-year-old drivers make up only 14% of all drivers, yet they are involved in:
 - 50% of the 100,000 crashes per year caused by drowsiness
 - 28% of all collisions
- Drivers under age 25 have the highest violation rates in all of the following categories: speeding, driving while alcohol or drug impaired, ignoring traffic control devices, improper passing, not yielding right-of-way, and illegal turning.

Safe driving requires more than just learning the necessary skills. Young drivers need to adopt — and parents need to encourage — safe attitudes and responsible behaviors.

SAFETY TIPS

- **Young drivers:**
 - **Take control as a passenger as well as a driver.** Encourage your friends to use good judgment. Don't ride with drivers that take dangerous risks.
 - **You are the only one who controls your behavior.** You can't control driving conditions like weather, light, the road, traffic, or other drivers, but **you can** control how you prepare for and react to them.
 - **Consider consequences.** You are responsible for the choices you make. When you make a decision, remember that you are the one who will face the consequences.
 - **When your friends pressure you, concentrate on driving.** Your friends will most likely stop pressuring you once they see that you are not responding.
 - **Call for a ride** for your friends if they're acting unruly or if they're using alcohol or drugs.
- **Parents:**
 - **Set a good example.** Reinforce good driving behaviors by using them.
 - **Get involved.** Teach good driving behaviors. Supervise your teen's driving and impose restrictions on where and when they drive.
 - **Practice.** Let your teen drive when you're in the car together. Let them get their driving practice with you, not their friends.
 - **Talk to your teen** about peer pressure, underage drinking, and drug use.





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The real facts parents need to better coach teen drivers

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Thursday, October 20, 2005

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Teen Driving Safety Tips

There are many aspects to vehicle safety. Select a category to read safety tips on various subjects:

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- [The Shock Of A Tap](#)
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Teen Driving Safety Tips

Tip #1: Make It Old, Solid and Bold

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Some parents may want to buy a brand new car for their teen's first vehicle, however, it may not be the best vehicle to learn in. If you must buy your teen a car, here are some tips...

- OLD, LARGE and SOLID
- Think classic station wagon or full-size sedan with a small engine
- Check the vehicle's history to assure that it's a safe and reliable

Parent's Tip: "Old, large and solid" may not be the words your teenager wants to hear, but they'll like them better than "take the bus."

Source: [Safe Young Drivers](#), Phil Berardelli

Shocking Stats

In the last decade, over 68,000 teens have died in car crashes.

Motor vehicle crashes are the leading cause of death for American teenagers.

Tip #2: Be a Winning Coach. Motivate Your Young Driver

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To be a successful teacher, you need to understand a few things about motivating a student during driving sessions...

- Check frequently to ensure that your teen understands
- Keep things moving by giving your instructions in real time
- Point things out as they happen
- Act more as the co-pilot than taskmaster
- Keep an eye on the road ahead of you at all times

Parent's Tip: Practice these tips in every driving session. And leave the whistle at home, coach!

Source: [Safe Young Drivers](#), Phil Berardelli

Shocking Stats

Car crashes are the #1 cause of death for 16-year olds.

Taking on the role of driving coach and sharing years of experience may save your child's life.

Tip #3: Less is More - The Potential Catastrophe of Passengers

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Other teens in the car is one of the greatest risks...

- Friends lead to excitement, distractions and peer pressure
- Fatal crashes with teen drivers are more likely to involve passengers
- Teens are less likely to wear seat belts when driving with other teens

Parent's Tip: Teens plus teens in a car equals disaster. Just say "no" to passengers for the first year.

Source: [National Highway Traffic Safety Administration](#)

Shocking Stats

Teens are involved in three times as many fatal crashes as other drivers.

65% of all teen passenger deaths occur when another teen is driving.

Tip #4: Keep Your Hands on the Wheel to Avoid Distractions

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There are all kinds of distractions that can take our eyes off the road.

Shocking Stats

Here's a way to help maintain your attention:

- Keep both hands on the wheel while driving
- Don't talk on the phone without a hands-free accessory
- Wait 'til the next stoplight to change that CD
- Don't drive with passengers until you are more experienced

At 35 mph, a 2 second lapse in attention means you've traveled 100 feet without looking!

Teens are much more likely to be distracted when traveling with other teens.

Parent's Tip: Don't remind your teen of all the possible distractions. Instead, enforce keeping your hands on the wheel and you'll avoid most of the distractions that cause serious crashes.

Source: [Safe Young Drivers](#), Phil Berardelli

Tip #5: Kissing the Windshield: Why Teens Don't Buckle Up

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Most teens grew up riding in car seats, but today they aren't buckling up. So what gets young drivers and passengers to buckle up?

- Linking belt use to graduated driving privileges
- Making your teen pay any fines that they incur
- Teaching by example - always wear your seatbelt
- Exercising your parental authority

Shocking Stats

Teens have the lowest seat belt use rate of all drivers.

This rate becomes worse when there are other teens in the car.

Parent's Tip: Tell your kids to buckle up or walk. No negotiation. When they have kids, they'll understand!

Source: [Insurance Institute for Highway Safety](#)

Tip #6: Defensive Driving for Teens

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The first year of driving is a high-risk period especially for beginners starting at age 16. Inexperience, nervousness and lack of practical skills can lead to bad decisions behind the wheel. Create a home graduated licensing program with your licensed teen:

- Continue to ride along and coach your teen even after they obtain a license.
- Set a driving curfew (morning and night) to limit 'after dark' driving.
- Monitor and limit your teens driving during inclement weather.
- Restrict the number of passengers when your teen is driving.
- Talk to your teen - find out what situations or techniques he/she has trouble with, then take them to a low-traffic location and have them practice with you in the car.

Shocking Stats

During the first year of licensed driving, 1-in-5 male and about 1-in-10 female 16-year old drivers will have a crash.

Parent's Tip: Teach your teen to drive defensively -- anticipating conditions and situations that increase risk. Watch for poor driving habits like not signaling, sloppy turns, speeding, lack of alertness or overcorrecting.

Source: [Drivers.com](#)

Tip #7: Boys vs. Girls

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More and more female drivers are taking to the roads as aggressively as males and paying a price for their risky behavior. Parents must teach both sons and daughters...

- This is not a competition either of them wants to win

Parent's Tip: "Anything you can do I can do better" is a phrase kids hear a lot growing up. Perhaps a better way to word that phrase should be "Anything you can do I can do safer."

Shocking Stats

Males are more than twice as likely to have serious crashes as females. But while the crash total for males has been declining over the past 20 years, the total for females has been rising.

Source: [Safe Young Drivers](#), Phil Berardelli

Tip #8: Learner's Permit Required?

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States with the most lenient licensing procedures have the highest crash rates for teens. Whether your state has a strict licensing procedure or not, you should always:

- Set your own waiting period for your teen
- Pursue a driving instruction program outside the school
- Log plenty of practice time with your teen before letting him or her take the driver's exam

Shocking Stats

Only 32 states require a learner's permit before a driver's license.
Only 15 of those 32 require the permits to be held for a minimum length of time.

Parent's Tip: *State laws and instruction are great ways to get your teen started on the road to safe driving, but what you do with and for your teen makes the most difference.*

Source: Insurance Institute for Highway Safety

Tip #9: Parent-Teen Driving Agreement

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To help your teen understand, take the time to review the issues and responsibilities associated with driving and consider making a Parent-Teen Driving Agreement using the outline below as a guide...

- Issue - Curfew
- Responsibility/Rule - Weekday evening curfew of 10 pm and a weekend evening curfew of midnight
- Agreement - Coming home after the curfew will result in the curfew being set one hour earlier for one week

Quick Tip

Don't forget: As the parent, you are the boss! Driving is a privilege-especially for teens. The parent giveth and the parent taketh away.

Parent's Tip: *Treat your teen with the same respect by allowing them some control over the rules of driving.*

Source: Teaching Your Teen To Drive Handbook, Virginia DMV

Tip #10: We all need our space. The 3 second rule

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Allowing enough space between you and other cars on the road allows for time to react in case of an emergency.

- As the car in front of you passes a fixed point like a sign, tree or building, count "one thousand one, one thousand two, one thousand three". If you reach the designated point before three, slow down.
- Increase your distance by one for each bad driving condition. For rain and fog you would add two seconds.
- Make sure you drive in the middle of the lane to allow space on the side of the car.
- If the driver behind you is too close, change lanes and let them pass.

Quick Tip

Perception is about one second and time to react is about three-fourths of a second in ideal conditions.

Parent's Tip: *Let your teen know that adding additional space between cars will not slow down their travel time any more than a few minutes. Better to arrive a few minutes late than not at all!*

Source: Car Tips and More, Virginia Driver's Manual

Tip #11: Making Time - Make it Count

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Driving requires commitment and discipline - from both the student and the coach. The best way to demonstrate these traits is to establish a practice schedule and stick to it.

Quick Tip

Teaching Tip: Develop a practice schedule with your teen.

- Commit to the 100 hours of supervised instruction (100 hours is only 2 hours/week for a year, or 4 hours/week for 6 months)

- Make it routine--set aside a specific day and time for driving practice (Put it in your day-planner if you have to; this is an appointment for safety)
- Go with the flow--when the lessons require driving at night or in bad weather, make adjustments

Don't cancel, reschedule--when you have to work late or something else unexpected comes up, don't cancel your driving date, reschedule it.

Parent's Tip: *Demonstrate to your child that you are making this a firm commitment to their safety*

Source: Safe Young Drivers, Phil Berardelli

Tip #12: Tapping the Wall

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Want to instill some respect in a young driver for the forces that can be unleashed in a crash? Here's a harmless way to do it - just be careful...

Quick Tip

Teaching Tip: Have your teen tap the wall with the bumper of your car!

- Make sure your vehicle doesn't have a fragile plastic license plate frame positioned in front of the bumper (If you have any doubts about the idea, or are worried about damage, don't try it. Or, you drive.)
- You or your teen pull into a parking space that abuts a solid concrete wall
- Stop, and then move forward slowly until the vehicle's front bumper contacts with the wall. Even at one mile an hour, the sensation will send a shiver through both of you

Parent's Tip: *Let them feel the shock of even the slightest bump; it will leave an imprint on your teen that will make them a safer driver.*

Source: Safe Young Drivers, Phil Berardelli

Tip #13: Mirror, Mirror on the Car

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Tunnel vision and blind spots can be a hazard to any driver but are particularly difficult for a new driver. Teach your teen how to minimize both...

Quick Tip

Teaching Tip: Regular and proper use of mirrors is hard to learn but the payoff is big.

For the driver side mirror:

- Have your teen roll up the window
- Press his or her head against the glass
- Then adjust the mirror so that they can just see the edge of the car

For the passenger side mirror:

- Have your teen place their head in the center of the car (directly behind the inside mirror mount)
- Adjust the outside mirror so that they can just see the edge of the car.
- This is necessary even with convex (curved) mirrors where the image is distorted a little

Parent's Tip: *Repeat that routine every time you and your teen begin a lesson to make blind spots virtually disappear.*

Source: National Motorists Association

Tip #14: Driving Practice -- The Ultimate Video Game

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If your teen can spend 10 hours getting hand-cramps from the latest video game, he or she can spend ten sessions meandering through your local countryside or back roads, to develop driving hand-eye coordination. Anytime visibility decreases, have your teen:

Quick Tip

Teaching Tip: Ten sessions driving is time well spent.

- Slow down
- Assess the situation
- If visibility is only 100 feet ahead, you should be doing no more than 35 MPH. If it's at 50 feet, it's 25 MPH, and so on.

Parent's Tip: Build up to an hour or more per session. It will help your teen's mind and body become more accustomed to driving and build more confidence.

Source: Safe Young Drivers, Phil Berardelli

Tip #15: Who's Afraid of the Big, Bad Road?

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When you read, you begin with ABC. When you teach your teen to drive, begin with **A Big Clear** parking lot. A large, unoccupied parking lot can be found in a myriad of places:

Quick Tip

Teaching Tip: Make it as simple as A,B,C. A Big, Clear parking lot.

- An office building or complex after hours
- A shopping mall early in the morning
- A place of worship any weekday
- A high school parking lot on weekends

Parent's Tip: Try your own office parking lot after work. These lots offer plenty of space, and as a bonus, they probably have marked, defined areas to practice maneuverability techniques.

Source: Safe Young Drivers, Phil Berardelli

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The Role of the Prosecutor in Municipal Court

Presented by

Arthur "Cappy" Eads
Municipal Judge
Village of Salado

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Judge Bill White, Texas Court
of Criminal Appeals

Judge Charlie Holcomb,
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