Case Law & Attorney General Opinion Update
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Except where otherwise noted, the following case law and opinions were handed down August 31, 2008 through October 1, 2009.

I. Constitutionality

A. 4th Amendment

1. Vehicle Searches

Does the 4th Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

Arizona v. Gant, No. 07-542 (4/21/09)

Yes. The Supreme Court ruled 5-4 that law enforcement may only make a warrantless vehicle search, incident to arrest, if the arrestee is within reaching distance of the vehicle or the officers believe that evidence of the offense for which the person is arrested may be discovered.

This decision debatably limits the holding of *New York v. Belton*, 453 U.S. 454 (1981), in which the Court condoned the contemporaneous search of an automobile's passenger compartment incident to lawful arrest. Affirming the decision of the Arizona Supreme Court, the Court held that Gant could not have reached his car during the search and posed no safety threat to the officers, making a vehicle search unreasonable under the "wingspan rule" of *Chimel v. California*, 395 U.S. 752 (1969), as applied to *Belton*.

Justice Stevens, writing for the majority and joined by Justices Bader, Ginsburg, Souter, Thomas, and Scalia, held that stare decisis cannot justify unconstitutional police practices in light of the facts of this case. Justice Scalia, in a concurring opinion, disparaged *Belton* and its progeny as badly reasoned and improperly justified by concerns for peace officer safety.

Justices Breyer, Alito, and Kennedy, joined by Chief Justice Roberts, dissented, claiming that stare decisis requires *Belton's* "bright-line rule" be preserved and that the Court's decision will lead to the unnecessary suppression of evidence and confusion by law enforcement.

2. School Searches

Was a 13-year-old student's 4th Amendment right violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school?

Safford Unified School Dist. #1 v. Redding, No. 08-479 (6/25/09)

Yes. The Supreme Court voted 8-1 to affirm that the "strip-search" violated the 4th Amendment. Justice Souter reaffirmed the Court's holding in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), that when school officials search students, the scope of the search must be justified at its inception and reasonable in scope in light of the age of the child and nature of the alleged wrong doing. While school officials were justified in searching Redding's outer clothing and backpack, and in strip-searching another student who was caught with pills and had in her possession Redding's day planner (containing, among other things, two small knives and a cigarette), there was no evidence that Redding had drugs, in her underwear or anywhere else. Justice Souter concluded that a "strip-search" was unjustified. However, because at the time of the search other federal courts were divided on the scope of immunity stemming from illegal searches, the school officials were entitled to qualified immunity. While Justices Ginsburg and Stevens agreed with Justice Souter's other conclusions, they disagreed with the Court's determination on the immunity issue. Justice Thomas, dissenting, argued that the search was not unreasonable and that the opinion, once understood, could encourage children to hide contraband in their underwear.

3. Exclusionary Rule

Does the exclusionary rule apply to evidence seized incident to an arrest unlawful under the 4th Amendment due to erroneous information negligently provided by another law enforcement agency?

Herring v. United States, No. 07-513 (1/14/09)

No. When mistakes by law enforcement, leading to an unlawful search, are the result of isolated negligence, rather than systemic error or reckless disregard of the Constitution, the exclusionary rule does not apply. Herring was arrested on a felony failure to appear warrant issued in a neighboring county. Unbeknownst to the arresting officers, the warrant was no longer valid and only remained in the database due to a clerical error at the sheriff's office. At trial, Herring moved to suppress evidence gathered in a search incident to his arrest in violation of the 4th Amendment. Under the exclusionary rule, courts must suppress most evidence gathered in violation of the Constitution. The trial court denied Herring's motion on two grounds: the arresting officers acted in good faith and applying the exclusionary rule would not deter future police misconduct. The appellate court affirmed.

The Supreme Court affirmed by a 5-4 vote. Chief Justice Roberts, writing for the majority and relying on criteria set forth in *United States* v. *Leon*, 468 U.S. 897 (1984), explained that in order for the exclusionary rule to apply, a police error must be sufficiently deliberate; otherwise, the exclusion is not a meaningful deterrent to misconduct and only undermines justice. Justice Ginsburg, writing for the dissent, objected to the Court's narrow reading of the exclusionary rule, noting the sheriff's office had inadequate procedures to insure warrant accuracy, and stressed the lack of effective remedies for illegal searches. She rejected Chief Justice Roberts's assurances that under the Court's approach, instances of reckless or deliberate record-keeping errors will invoke application of the rule.

Commentary: In *Arizona v. Evans*, 514 U.S. 1 (1995), the Supreme Court held that the exclusionary rule did not apply to evidence seized incident to an arrest that was unlawful under the 4th Amendment because it was based on erroneous information negligently provided by a court employee. Like *Evans*, this case reiterates that the primary purpose of the exclusionary rule is to

deter police misconduct. When there is no police misconduct, only clerical error (even if the clerk works for law enforcement), the exclusionary rule will not apply.

4. Blood Warrants

In ruling on a pre-trial motion to suppress, did the trial court err when it determined that probable cause was lacking because the blood search warrant affidavit failed to specify the time which the offense was believed to have occurred?

State v. Dugas, 2009 Tex. App. LEXIS 5972 (Tex. App.--Houston [14th Dist.] July 28, 2009)

Yes. Although the affidavit did not reflect the time that the stop occurred, it was undisputed that the alleged offense and the issuance of the warrant occurred the same day. In a matter of first impression, the court concluded that, as a maximum of six hours had elapsed since Dugas was stopped and arrested, it was not unreasonable for the magistrate to presume there still would be some evidence of intoxication found in Dugas's blood when the warrant was signed.

5. Supplementation of Search Warrant Affidavit

Did the trial court err in permitting the officer to supplement the warrant's description of the location to be searched?

Rogers v. State, 2009 Tex. App. LEXIS 4897 (Tex. App.--Texarkana June 26, 2009)

No. Although the court emphasized that an officer's knowledge of the premises cannot be used to totally supplant the description in the warrant, the court held that the executing officer's knowledge of the premises to be searched was relevant to the validity of the search warrant. The trial court did not err in permitting a police officer to supplement the warrant's description (specifically, the motel room number). In this case, the record reflected that the officer had the room under surveillance, had seen the informant enter and leave the room, signed the affidavit in support of the warrant, and was present during the execution of the search warrant. Accordingly, the trial court did not err in denying the motion to suppress and the judgment was affirmed.

Two intermediate appellate courts (Corpus Christi and El Paso) have limited their review of the location to be searched to the four corners of the warrant or affidavit. These courts have held that the warrant must be sufficient on its face to enable any executing officer to locate and distinguish the property, avoiding a reasonable probability of mistaken execution. The validity of the warrant cannot depend upon the individualized, supplementary knowledge of one officer. Two other intermediate appellate courts (both in Houston) have held that a very limited exception does exist for the description of the location to be searched. Cases from these courts have limited the application of such exception to when the same peace officer conducts the investigation, swears to the affidavit for the warrant, and executes the search warrant, so that the officer's knowledge of the exact premises may cure description deficiencies in the warrant or affidavit. The Texarkana Court of Appeals now joins Houston in acknowledging this exception to the four corner rule.

6. Postal Box Privacy

Did the trial court err in denying appellant's motion to suppress evidence seized from appellant's postal box?

Gabriel v. State, 2009 Tex. App. LEXIS 3729 (Tex. App.--Houston [14th Dist.] May 21, 2009)

No. Citing *United States v. Osunegbu*, 822 F.2d 472 (5th Cir. 1987), the court held that Gabriel's postal box could only be opened in the front by a key, however the back remained open to The UPS Store employees. The manager of The UPS Store consented to the postal inspector's request to view appellant's mail by collecting the mail from the postal box and copying the front of the envelopes for the inspector. Agreeing with the Fifth Circuit's analysis in *Osunegbu*, the court stated that the layout of The UPS Store was a critical factor in finding the manager of the store had authority to consent to the search.

7. Reasonable Suspicion

In trying the appellant for possession of cocaine, did the trial court err in finding that "littering" provided reasonable suspicion?

Simmons v. State, 288 S.W.3d 72 (Tex. App.--Houston [1st Dist.] 2009)

No. Appellant asserted that the officer's accusation of littering was conclusory and not based off of articulable facts giving rise to reasonable suspicion. The court of appeals disagreed. The officer testified that he detained and then arrested defendant because he observed defendant "littering pieces of paper on the street." The officer stated that he later determined the paper was a torn-up bus pass. The officer confirmed that "littering" was a criminal offense, specifically illegal dumping (Section 365.012, Health and Safety Code). At the conclusion of the pre-trial hearing, the trial court found that the officer had detained defendant because the officer saw defendant commit a Class C misdemeanor.

Citing the Court of Criminal Appeals' opinion in *Castro v. State*, 227 S.W.3d 737 (Tex. Crim. App. 2007), the court of appeals explained that the amount of specific and subjective detail that an officer must give to demonstrate that a detention is reasonable depends on the nature of the offense. The statutory definition of illegal dumping - and logic - dictate that the pieces of paper (a torn-up bus pass) discarded by defendant were "litter" or "solid waste" and that the street was not "an approved solid waste site." Thus, the judgment was affirmed.

Does walking on a street with ones back to traffic give rise to either reasonable suspicion or probable cause?

State v. Patterson, 2009 Tex. App. LEXIS 4667 (Tex. App.--Amarillo June 23, 2009)

Yes. A police officer observed Patterson walking westbound on the surface of a road. There were no sidewalks adjacent to that part of the street. Rather than walk on the left side of the surface to face oncoming traffic, Patterson walked on the right side with the traffic to his back. Believing this to be a violation of an Amarillo municipal ordinance, the officer stopped Patterson and asked for identification. Patterson had none on his person. The officer decided to place Patterson in his squad car while he attempted to determine his identity and subjected him to a pat-down search before doing so. Additionally, Patterson consented to the search of his pockets. The latter revealed the presence of marijuana. He was charged with possession of a controlled substance in a drug free zone.

In a pre-trial motion to suppress, Patterson asserted that the ordinance was inapplicable and the officer lacked both reasonable suspicion and probable cause to stop him as he walked on the street. The trial court agreed.

The court of appeals determined that, although the defendant's conduct was not prohibited by ordinance, it was prohibited pursuant to Section 552.006(a)-(b), Transportation Code, which makes it illegal to walk with ones back against traffic when a side walk is not available. Additionally, the court observed that the Transportation Code defines "highway" differently than the municipal ordinance. Therefore, the officer had a reasonable suspicion to make the stop based on the violation of the Texas state statute. Defendant was mistaken that the municipal ordinance superseded Section 552.006. The decision was reversed, and the case was remanded for further proceedings.

Does suspicion of panhandling and past experience with armed transients, by itself, justify a protective pat down?

Chism v. State, 2009 Tex. App. LEXIS 7278 (Tex. App.--Texarkana Sept. 16, 2009)

No. Here, the record reflected generalizations concerning weapons and narcotics abuse within the transient population of Gilmer, Texas. The officer's concerns for his safety lacked particularized suspicion. Without articulable facts and circumstances, broad and bold generalizations based on an individual's transient status are, by themselves, insufficient to authorize a reasonable belief or inference that the person is armed and dangerous. To conclude otherwise would subject nearly any lawfully detained homeless or transient person to a pat-down search at any moment.

Commentary: This case illustrates why peace officers should be as familiar with city ordinances as code enforcement officers (especially if they are going to use the ordinance as a pretext for a stop). In this case, the officer attempted to claim he had reasonable suspicion that Chism had violated a city ordinance prohibiting panhandling. At trial, however, he had to concede that the city ordinance prohibiting panhandling only applied to such activity between the hours of sunset and sunrise, a limitation about which the officer was unaware at the time of his encounter with Chism (which occurred around 9 a.m.). Such an error may still justify a stop, but not a pat down.

B. 5th Amendment

Did the court of appeals err in determining that a proper and functional Miranda warning was given and in finding appellant's custodial statement admissible?

Martinez v. State, 272 S.W.3d 615 (Tex. Crim. App. 2008)

Yes. Without being given Miranda warnings, Martinez was arrested and questioned about a robbery and murder, given a polygraph test, and told that he "failed" the polygraph. Afterwards, he was given Miranda warnings by a municipal judge, acting as a magistrate. Upon further questioning he discussed pertinent information about the crime and stated that he was not one of the assailants but was a lookout person. He was charged with capital murder. The trial court denied defendant's motion to suppress a statement given to police following midstream Miranda warnings. Defendant was convicted and sentenced to life in prison. The Thirteenth Court of Appeals upheld the conviction, and defendant sought further review.

In a 5-4 decision, the Court of Criminal Appeals held that defendant's post warning statements should have been suppressed. The two-step interrogation technique was used in a calculated way to undermine the Miranda warning, and no curative steps were taken. Thus, the post warning statements were inadmissible under the 5th Amendment. Although the record was lacking as to details of the first round of interrogation and polygraph test, the State bore the burden of establishing the admissibility of the confession. The majority expressed concern about the manner in which the polygraph test was administered. The Court reversed the judgment of the court of appeals and remanded the case to the court of appeals to conduct a harm analysis.

Commentary: The State's petition for certiorari in this matter was filed with the Supreme Court of the United States on March 13, 2009.

C. 6th Amendment

1. Right to Counsel

When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the 6th Amendment and preclude police-initiated interrogation without counsel present?

Montejo v. Louisiana, No.07-1529 (5/26/09)

No. No affirmative step is required by the defendant. However, despite earlier case law, in this instance, the appellant's 6th Amendment rights were not violated. Montejo was arrested for murder. At an initial preliminary hearing, he was deemed indigent, and counsel was appointed to represent him. Montejo remained silent during the preliminary hearing. After the hearing, but before meeting with his court appointed attorney, Montejo consented to a police-initiated interrogation without counsel present. At trial, over defense objections, the State introduced evidence from the interrogation. On appeal, it was argued that Montejo's consent to the interrogation was void due to *Michigan v. Jackson*, 475 U.S. 625 (1986) (holding that once an indigent defendant requests the appointment of counsel, their waivers of the right to counsel during subsequent police-initiated interrogations are void). Citing *Jackson*, Montejo contended that law enforcement may not initiate communications with defendants who have requested counsel nor may law enforcement request that they consent to interrogation. The Louisiana Supreme Court disagreed with this interpretation of *Jackson* because Montejo did not **affirmatively** assert his rights.

In a 5-4 decision, the Supreme Court overruled *Jackson* and its protection against badgering by law enforcement. Justice Scalia, writing for the majority, considered and rejected the rationale offered by both Montejo and the Louisiana Supreme Court. Citing *Edwards v. Arizona*, 451 U.S. 477 (1981) (preventing police-initiated custodial interrogations only after defendants affirmatively assert their right to counsel), Justice Scalia reasoned that, in light of the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), defendants are unlikely to ignorantly waive their 6th Amendment rights, and the Court should insure that defendants' waivers are proper (rather than using case law to make such waivers impossible). The dissent, written by Justice Stevens, disputed the majority's characterization of *Jackson* and suggested that the Court may now have to revisit the progeny of 5th Amendment decisions in the 6th Amendment context. He noted that the *Miranda* warning that one is entitled to counsel may prove too confusing to defendants who have

already obtained counsel, and thus their waiver of their Miranda rights may not amount to a "knowing waiver" of their 6th Amendment rights.

Justice Alito, with whom Justice Kennedy joined, wrote a separate concurrence noting that if the Court could reject stare decisis and overturn *New York v. Belton*, as it did with *Arizona v. Gant*, then the majority was entitled to do the same with *Jackson*. Justice Steven's dissent argued that *Jackson* was not poorly reasoned, and that *Belton* was not reversed, rather only the Arizona Supreme Court's interpretation of *Belton* was reversed. Justice Breyer refused to join part of this dissent to reiterate that this case and *Gant* were both wrongly decided because of stare decisis.

When a magistrated defendant simultaneously requests a lawyer and requests to speak to the police, must an attorney be provided to the defendant before the police can begin their interrogation?

When the police enter a hospital room to take a statement from the accused in custody after the police have been informed that the accused has requested an attorney and simultaneously indicated a willingness to speak to the police, has the accused 'reinitiated' contact with the police and voluntarily waived his 5th and 6th amendment right to counsel and right against self incrimination?

Pecina v. State, 268 S.W.3d 564 (Tex. Crim. App. 2008)

No. The record indicated that defendant did not himself initiate contact with the detectives. The detectives came to the hospital with a warrant for defendant's arrest and brought an Arlington municipal judge, in her capacity as a magistrate, for the purpose of "arraigning" the defendant. The magistrate informed the defendant of his rights and asked him if he wanted a court-appointed attorney. He said that he did. She asked him if he wanted to speak to the detectives, and he said, "Yes." Only after she asked him if he wanted to speak to detectives did he reply "Yes." In no way did that indicate the defendant himself initiated contact or opened the dialog with the authorities. The Court of Criminal Appeals ruled 8-1 (Judge Keller dissenting). The judgment of the court of appeals was reversed and the case was remanded for a harm analysis.

Commentary: This is essential reading for all judges who perform magistrate duties. As you recall, in *Rothgery v. Gillespie County* (07-440) (2008),the Supreme Court held that presentation before the magistrate marks the initiation of adversarial judicial proceedings that trigger 6th Amendment protections. For more information on *Rothgery v. Gillespie County*, see *The Municipal Court Recorder*, 18:2 (November 2008).

This case illustrates the post-*Rothgery* dynamics, that were discussed during last year's regional judges program - specifically, how *Rothgery* affects law enforcements' approach to securing statements from suspects. What happens when the magistrate is brought before the defendant, rather than the defendant being brought before the magistrate?

While the Court of Criminal Appeals used the term "arraignment" rather than "magistration," the Court has previously said that what a magistrate does pursuant to Article 15.17, Code of Criminal Procedure, is not an "arraignment" because of the specific requirements of Chapter 26, Code of Criminal Procedure (see *Watson v. State*, 762 S.W.2d 591, 594 (Tex. Crim. App. 1988)).

2. Confrontation Clause

Is a state forensic analyst's laboratory report, prepared for use in a criminal prosecution, "testimonial" evidence subject to the demands of the Confrontation Clause?

Melendez-Diaz v. Massachusetts, No.07-591 (6/25/09)

Yes. The Sixth Amendment's Confrontation Clause gives criminal defendants the right to cross-examine witnesses testifying against them. Melendez-Diaz appealed his drug conviction on the grounds that the State violated the Confrontation Clause of the 6th Amendment by admitting laboratory reports without allowing him to cross-examine the analysts who prepared the reports. His argument was rejected by two state appellate courts.

Writing for the majority, Justice Scalia, in a 5-4 opinion, concluded that drug lab reports are within the core class of testimonial statements covered by the Confrontation Clause. Thus, prosecutors may not use them as evidence unless defendants waive their right to cross-examine the analysts who prepared them. The majority emphasized that the courts may not ignore constitutional rights simply because compliance is inconvenient or expensive. Justices Stevens, Souter, Thomas, and Ginsburg joined Justice Scalia's majority opinion. Justice Kennedy, writing for the dissent, argued that the Court's holding ignored precedent, was precariously vague, and was not practical. He was joined by Justices Alito and Breyer and Chief Justice Roberts.

The majority and dissent disagreed as to the scope of the rulings' implications. The dissent contended that it could disrupt the entire criminal justice system. The majority suggested that it was only narrowly applicable.

Commentary: Chatter in appellate law circles is that this decision, which has caused considerable consternation, is likely to be revisited sooner rather than later and that the newest member of the SCOTUS, Justice Sonia Sotomayor, will likely be the deciding vote.

3. Ineffective Assistance of Counsel

Did defense counsel's failure to request a pre-trial diversion or attempt to procure a "Class C special expense" constitute ineffective assistance of counsel?

Ex parte Wolf, 2009 Tex. App. LEXIS 6152 (Tex. App.--Houston [14th Dist.] Aug. 4, 2009)

Yes. After being charged with Class A misdemeanor theft for stealing from his employer, Wolf, a college student, told his attorney that he needed to clear his record so that he could work in the banking and securities industry after graduation. His counsel negotiated a plea bargain under which he pled guilty and received deferred adjudication community supervision (Article 42.12, Code of Criminal Procedure). The attorney told Wolf that his conviction would be "sealed." After completing community supervision and obtaining an order for nondisclosure, Wolf was subsequently hired and fired from a job after the Security Exchange disclosed to his employer his deferred adjudication. He presented expert legal testimony that he could have had his arrest record expunged if his attorney had secured either a "pre-trial diversion" or a "Class C Special Expense" (i.e., deferred disposition, Article 45.051, Code of Criminal Procedure.) Wolf sought and received habeas corpus relief in county court based on the ineffective assistance of counsel. The State appealed. The court of appeals held that the county court had jurisdiction because the collateral

consequences of the disclosure of his record met the requirement of Article 11.09, Code of Criminal Procedure. Further, the State did not prove when Wolf should have discovered the ineffective assistance through reasonable care and diligence. Thus, laches did not bar relief. The court of appeals concluded that the evidence supported a finding of ineffective assistance of counsel, and the applicant was not required to show that he would have gone to trial.

Commentary: This is a must read for every criminal law practitioner. So the attorney provided ineffective counsel for not attempting to secure "pre-trial diversion" (which is not statutorily authorized) and for not attempting to get his client deferred disposition (which is inapplicable to Class A misdemeanors). All of this is compounded by the 14th Court of Appeals' inadvertent injection of a new word into the criminal law lexicon: "Class C special expense." Ignoring its own earlier opinion, *Jamshedji v. State*, 230 S.W.3d 224 (Tex. App.--Houston [14th Dist.] 2006), where the court at least implicitly acknowledged that *deferred adjudication* and *deferred disposition* were not the same thing, the court of appeals now conflates "deferred disposition" with deferred adjudication" by referring to it as "deferred-adjudication probation" AKA "Class C special expense." The fact that no member of the court commented or picked up on the implication of the use of the fabricated "Class C special expense" is proof that there is still a considerable lack of understanding about deferred disposition and how it differs from deferred adjudication. See "Deferred Disposition is not Deferred Adjudication," *Municipal Court Recorder* 11:7 (August 2002) at 13.

This case begs answers to a wide array of questions. Without further explanation, it appears to have the potential to open the flood gates for unprecedented kinds of ineffective assistance of counsel claims.

D. 14th Amendment

1. Recusal

Did the failure of a judge to recuse himself from participation in a case where one of the parties donated $3 million to his election campaign violate the Due Process Clause of the 14th Amendment?

Caperton v. A.T. Massey Co., No. 08-22 (6/08/09)

Yes. The Supreme Court held that due process required that Justice Brent Benjamin recuse himself from the appeal of a tortious interference, fraudulent misrepresentation, and fraudulent concealment case in which the defendant was found liable for $50 million in damages. Prior to consideration of the appeal, Mr. Caperton motioned for Justice Benjamin to recuse himself. He argued that since the C.E.O. of the corporate defendant had donated $3 million to Justice Benjamin's campaign to win a seat on the Supreme Court of Appeals of West Virginia, Justice Benjamin's participation would present a constitutionally unacceptable appearance of impropriety. The motion was denied. In a 3-2 decision with Justice Benjamin voting in the majority, the Supreme Court of Appeals of West Virginia reversed the trial court and ordered it to dismiss the case. After its decision, the court granted Caperton's motion for rehearing, but once again denied his motion for Justice Benjamin to recuse himself. On rehearing, the court maintained in a 3-2 decision that the trial court should be reversed and the case dismissed on grounds of a contractual venue matter and the doctrine of res judicata.

In a 5-4 decision, written by Justice Kennedy and joined by Justices Stevens, Souter, Ginsburg, and Breyer, the Court stated that it need not find that Justice Benjamin was actually biased in his decision making in order to find invalid the decision in which he took part. Rather, it need merely

be shown that Justice Benjamin's interest posed a risk of actual bias. Justice Benjamin should have recused himself if his participation posed a threat to due process. Citing *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927), such a risk exists when a judge has a "direct, personal, substantial, [or] pecuniary interest." The Court found that Justice Benjamin had such an interest and erred in not recusing himself.

Chief Justice Roberts dissented and was joined by Justices Scalia, Thomas, and Alito. Chief Justice Roberts contended the majority imprudently expands the standard for which a judge need recuse himself by merely showing a "probability of bias." This was illustrated in forty points of uncertainty that arise from the majority's vague standard. Justice Scalia also wrote a separate dissenting opinion. He argued that the majority performed its duties poorly as a clarifying body by making an area of law vastly more uncertain.

Commentary: This is the first SCOTUS opinion since *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (the right of judicial candidates to speak their minds in light of canons of judicial conduct), that illustrates the calamity that can occur at the intersection of judicial conduct and constitutional matters. If you are inclined to believe that this opinion only has something to offer judges who raise millions of dollars to serve in the judiciary: think again. This case is built on the foundation of two other SCOTUS opinions that address disqualification because of conflicts of interest in local government. In *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927), the Court held that a mayor acting as a judge violated due process because he received a salary supplement for performing judicial duties that was funded from the fines assessed. Disqualification was required under the principle that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Id.* at 532. Consider also *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), where a conviction in another mayor's court, even with the possibility of a trial de novo, was invalidated, even though the fines assessed went to the town's general fund, because the mayor faced a "possible temptation" created by his "executive responsibilities for village finances." *Id.* at 60. In light of these cases, can anyone explain how Section 29.004(b), Government Code, (allowing for mayors to serve as ex officio judges of municipal courts) remains on the books? It is an express reminder that judges who comingle their interests (express or perceived) may not only be potentially served with an ethics complaint, they may also be violating the constitutional rights of litigants.

2. Facial Validity of a Law

May a defendant accused of a crime challenge the facial validity of a statute for the first time on appeal?

Karenev v. State, 2009 Tex. Crim. App. LEXIS 961 (Tex. Crim. App. 2009)

No. Karenev was convicted of harassment per Section 42.07(a)(7), Penal Code. On appeal, the statute was found "on its face" to be unconstitutionally void for vagueness. The State petitioned for discretionary review claiming that the defendant forfeited his facial challenge to the constitutionality of the harassment statute by failing to raise it in the trial court, and that the statute was not unconstitutionally vague. The Court of Criminal Appeals concluded that a defendant could not raise for the first time on appeal a facial challenge to the constitutionality of a statute. The Court of Criminal Appeals reversed the judgment of the intermediate appellate court, and the matter was remanded to that court so that it could address defendant's remaining claims.

Commentary: So what has become known by Texas criminal law practitioners as the "*Rabb/Rose* rule" (i.e., questions involving the constitutionality of a statute upon which a defendant's conviction is based should be addressed by appellate courts, even when such issues are raised for the first time on appeal) is dead. Ostensibly, facial challenges to a statute must now be raised at trial in the same manner as "as applied" challenges. Defendants may no longer "lie behind the log" and raise such challenges for the first time on appeal. While this opinion has readily apparent implications on appeals from municipal courts of record, it does not contemplate cases that begin in non-record courts. Readers should take the time to carefully read the concurring opinion of Judge Cochran (joined by Judges Price, Womack, and Johnson). While labeled a concurring opinion, it is clear from the first sentence that these judges are not completely sold on the "raise it or waive it" rationale of the majority. If there is a fine line between *respectfully dissenting* and *respectfully disagreeing*, this memorable concurrence comes very close to straddling the line.

II. Substantive Law

A. Ordinances

Did the zoning ordinance violate the Texas Religious Freedom Restoration Act?

Barr v. City of Sinton, 2009 Tex. LEXIS 396 (Tex. 2009)

Yes. Barr, as part of a religious ministry, offered low-level offenders (no sex or violent offenders) transitional housing and religious instruction in two homes that he owned. In response, the City of Sinton passed Ordinance 1999-02. The trial court found no violation of the Texas Religious Freedom Restoration Act (TRFRA) (Tex. Civ. Prac. & Rem. Code Ann. § 110.002) and the court of appeals affirmed.

In reversing the court of appeals and the trial court, the Texas Supreme Court determined that the TRFRA's express terms required strict scrutiny of the zoning ordinance at issue in this case. The unanimous Court rejected the assertion that zoning ordinances are exempt from the TRFRA. The record reflected that Barr's ministry was substantially motivated by sincere religious beliefs and that the TRFRA required a factual case-by-case inquiry as to whether there was a substantial burden of religious exercise. In this case, Barr's ministry was effectively ended by the ordinance. The City failed to establish a compelling interest in this case, and it did not show that the least restrictive means were used to further its interest. The decision was reversed, and the case was remanded to the trial court for further proceedings.

Commentary: Reactionary ordinances and religious freedoms are a great combination for litigation. While this opinion only mentions that civil penalties in an amount of $500 per day could have been assessed under the ordinance, most city zoning ordinances authorize criminal penalties not to exceed $2,000 (per Section 54.001, Local Government Code). Municipal judges and prosecutors should familiarize themselves with the TRFRA. The TRFRA provides a new avenue of argumentation for certain persons alleged to have violated city ordinances. Consider, for example, Santeria animal sacrifices and Euless's animal slaughter ordinance (*Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009)).

In a case arising from the use of a residential property to host "swinger parties," did the trial court err in dismissing appellant's request for a temporary injunction and declaratory judgment for want of jurisdiction?

Trulock v. City of Duncanville, 277 S.W.3d 920 (Tex. App.--Dallas 2009)

No. The ordinance in dispute had been repealed and replaced with another ordinance. All criminal prosecutions stemming from the original ordinance had already been adjudicated in municipal court. No new criminal or civil actions stemming from the subsequent ordinance were pending. Trulock failed to specify how the subsequent ordinance contained the same constitutional infirmities alleged to exist in the original ordinance. Thus, no live controversy existed and an exception to the mootness doctrine was inapplicable.

Background: Trulock issued invitations to engage in sexual activity at his house, The Cherry Pit, located in Duncanville. Attendees are often advocates of a "swinging lifestyle."

After The Cherry Pit became the subject of citizens' complaints and local media attention, the City adopted a sex club ordinance (No. 2039) on November 6, 2007. Five days later, Trulock received his first of five citations issued under the ordinance. All citations were issued over a period of roughly two months.

On December 12, 2007, Trulock filed suit against the City seeking (1) a declaratory judgment that the ordinance was invalid and unenforceable because it violated his constitutional rights and (2) an injunction restraining the City from enforcing the ordinance. On January 7, 2008, the City filed special exceptions, an original answer, and counterclaims under the ordinance for civil penalties, nuisance, injunctive relief, and a declaratory judgment.

After allowing Trulock to amend his pleading, the county court dismissed his claims for lack of jurisdiction. Trulock appealed this ruling on March 10, 2008. Nearly two month later, on May 6, 2008, the ordinance in question was repealed, amended, and modified by another ordinance (No. 2051).

The court of appeals stayed all further civil proceeding until his appeal could be considered on October 22, 2008. Trulock did not, however, request that the municipal court proceeding be stayed. On October 28, 2008, Trulock was tried before a jury and convicted of five violations of Ordinance No. 2039. The judgment assessed fines and costs totaling $5,315.

Commentary: This is a good example of how civil and criminal penalties can be utilized by a local government to abate a nuisance. It also raises some interesting issues relating to privacy rights and land use. The case leaves readers wondering why there was no attempt by appellant to stay the municipal court cases. Failure to do so undermined efforts to seek interlocutory relief.

May a home rule city enforce land development regulations against an independent school district for the purposes of aesthetics and the maintenance of property values?

Tex. Atty. Gen. Op. GA-0697 (02/27/09)

A home rule city may enforce its reasonable land development regulations and ordinances against an independent school district for the purposes of aesthetics and the maintenance of property values.

B. Transportation Code

1. Obstruction of Roadway

Was the evidence legally insufficient to prove the offense of Obstruction of a Roadway?

Hardy v. State, 2009 Tex. Crim. App. LEXIS 960 (Tex. Crim. App. Apr. 22, 2009)

Hardy, Myers, and others engaged in an anti-war protest near the ranch of then President George W. Bush that included erecting a small tent in an off-road bar ditch. The defendants were arrested when they ignored a police officer's directive to leave the tent. Although the Court of Criminal Appeals did not adopt the reasoning of the court of appeals, it held that the court of appeals properly concluded the evidence was legally insufficient to support the verdict. The Court agreed with the State that an actual obstruction was not required; however, because the Legislature chose to use "prevent" rather than "remove" in Section 42.03(a)(2)(A), Penal Code, the use of "prevent" indicated that a potential obstruction had to exist. The Court held that an order to move to prevent an obstruction had to be reasonable in the prevailing circumstances. In this case, the defendants were previously ordered by law enforcement to remain in a bar ditch and off the road. They did as instructed. They were subsequently ordered to not sit in tents erected in the bar ditch. Such tents were prohibited by a county ordinance. While the county ordinance bars structures in the right-of-way, Section 42.03 prohibits obstruction only of the part of a road easement that is used for vehicular travel. Proof that defendants violated the county ordinance was not proof that defendants violated Section 42.03(a)(2)(A). Though not agreeing with the analysis of the court of appeals, the judgment was affirmed.

Commentary: This case is a reminder to prosecutors and policy makers of what can happen when penal statutes (in this case a state law and a county ordinance) comingle during the testimony offered at trial. Members of the Court disagreed as to whether the prosecution had mixed and merged the elements of the county ordinance and the penal statute. What is undisputed by members of the Court is that county law enforcement's approach was affected by the content of the ordinance and that this change became the focus of the testimony at trial. This, in turn, opened the door for legal sufficiency challenges for Obstruction of Roadway.

2. Display of License Plate

Did the trial court err by failing to instruct the jury that if it found the police did not have reasonable suspicion to stop the appellant for "improper display of license plate," then it could disregard the evidence discovered during the stop?

Spence v. State, 2009 Tex. App. LEXIS 7158 (Tex. App.--Amarillo Sept. 10, 2009)

No. A Lubbock police officer was watching a known "crack house" when he observed a car leave the driveway. It had no front license plate, so the officer initiated a stop. Drugs and a large amount of money were found on defendant's person during a frisk. He was convicted and appealed. In affirming the judgment, the court of appeals held that the trial court did not err by failing to give an exclusionary rule instruction under Article 38.23, Code of Criminal Procedure, or an instruction regarding Section 502.404(a), Transportation Code, governing the display of a license plate. Defendant was unable to have his license plate behind the windshield because Section 502.404(a) mandates that it be displayed on the "front" of the vehicle. The Amarillo Court of Appeals rejected the analysis in *State v. Losoya,* 128 S.W.3d 413 (Tex. App.--Austin 2004, pet. ref'd). In *Losoya*, the Austin Court of Appeals held that displaying a license plate on a car's dashboard comported with Section 502.404(a) if the plate could otherwise be seen from the front of the car. Therefore, the officer was not required to find some other reason to detain defendant after discovering the plate's location, and the trial court was not required to instruct the jury otherwise. The decision was affirmed.

C. Penal Code

1. Violation of an Emergency Protective Order

Was the evidence adduced at trial legally sufficient to support defendant's conviction for violation of the emergency protective order?

Villarreal v. State, 286 S.W.3d 321(Tex. Crim. App. 2009)

Yes. Villarreal and Love began an intimate dating relationship but did not cohabitate. Their relationship eventually soured and Villarreal was arrested for family violence against Love. Shortly after his arrest, he was taken before an Arlington municipal judge, who in her capacity as a magistrate and pursuant to Article 17.292, Code of Criminal Procedure, issued a magistrate's order of emergency protection (MOEP) prohibiting Villarreal, for a period of 61 days, from committing further family violence against Love and certain named members of her family. Villarreal was given a copy of the MOEP and the magistrate explained to him what it prohibited. Twenty two days later, Villarreal committed family violence by assaulting Love in the parking lot of an Arlington bar.

On appeal and upon petition for discretionary review, Villarreal asserted that that the definition of "family violence" on page two of the MOEP was limited to acts involving members of a family or household and does not include "dating violence." The definition of "family violence" in the order corresponded with the definition in Section 71.004, Family Code, as it existed before September 1, 2001. Effective September 1, 2001, the definition was expanded to include "dating violence." The Court noted that it appeared that the order was drafted using outdated computer software created or last updated in September 1997. As a consequence of the drafter's use of outdated software, the language used in the MOEP implied that Villarreal was a member of Love's family or household.

In utilizing a hypothetically correct jury charge, and comparing it to what was proven at trial, the Court, nevertheless, concluded that despite the deficient definition of "family violence," any reasonable person in appellant's position reading the MOEP would have understood that it prohibited him from committing violent conduct against Love or her family. From those facts, a

rational jury could have found, beyond a reasonable doubt, that appellant's violent conduct against Love violated the MOEP.

Commentary: Another interesting case with a technological twist. Petition for certiorari in this matter was filed with the Supreme Court of the United States on September 22, 2009.

2. **Criminal Mischief**

Was the evidence legally sufficient that appellant committed criminal mischief?

Lackey v. State, 2009 Tex. App. LEXIS 5072 (Tex. App.--Texarkana July 2, 2009)

Defendant's conviction arose from an incident in which roofing nails were tossed onto the road and numerous tires were punctured. The court of appeals rejected defendant's contention that the evidence was insufficient to support the identification of defendant as the perpetrator of the offense. Although there was conflicting evidence about the sequence and nature of events that occurred on the night in question, there was evidence from which the trier of fact could find that defendant was the individual responsible for scattering nails all over the roadbed. The court of appeals found that the police officers and prosecutor performed the duties required by the Code of Criminal Procedure. The court of appeals modified the judgment to reduce the grade of offense to a Class B misdemeanor, and it remanded the case to the trial court for a new punishment hearing.

3. **Failure to Appear/Bail Jumping**

Was the evidence legally sufficient that appellant committed Failure to Appear/Bail Jumping?

Walker v. State, 2009 Tex. App. LEXIS 4863 (Tex. App.--Texarkana June 23, 2009)

Yes. Factually and legally sufficient evidence supported the jury's conclusion that defendant intentionally or knowingly failed to appear in violation of Section 38.10, Penal Code, given that (1) two parties mailed formal notices to the address where defendant lived, (2) none of the notices came back as undeliverable, (3) defendant's aunt told the bail bondsman that defendant had received actual notice of the docket setting and would contact the bondsman, and (4) while defendant's testimony contradicted the inferences that could be drawn from other testimony, such contradictions were best resolved by the jury. Legally and factually sufficient evidence also supported the jury's decision to reject defendant's defense of having a reasonable excuse for failing to appear, as his defense depended entirely on whether the jury found him to be a credible witness who was more believable than the State's witnesses. The court of appeals affirmed.

III. Procedural Law Issues

A. Admission and Reliability of LIDAR

Did the court of appeals err by holding that the trial judge was required to hold a Rule 702 Kelly "gate keeping hearing" to determine the scientific reliability of information relied upon by the arresting officer (i.e., LIDAR) as probable cause for the stop?

Hall v. State, 2009 Tex. Crim. App. LEXIS 1205 (Tex. Crim. App. Sept. 16, 2009)

Yes. Hall was arrested for DWI after being stopped for speeding in the City of Venus. At a suppression hearing, he challenged the reliability of a LIDAR (Light Detection And Ranging) used to gauge the speed of his automobile. Hall claimed that because the State failed to prove the reliability of the LIDAR device, the peace officer's decision to stop him for speeding was not supported by probable cause. The court of appeals held that the trial judge erred by failing to hold a Rule 702 Kelly "gate keeping hearing" to evaluate the device's reliability. The Court of Criminal Appeals disagreed.

In a concurring opinion, Judge Price joined by Judge Johnson and Judge Holcomb emphasized that it is the responsibility of the prosecution to show that the peace officer had some reasonable basis for believing that LIDAR technology, when properly applied, can provide reliable information about the speed of a car, and that the officer properly applied the technology when he measured the appellant's speed. In this case, the State presented evidence of what the officer believed and why he believed it, but it presented no evidence whatsoever to show the reasonableness of the officer's reliance on LIDAR technology to support his belief. Judge Keller dissented without an opinion.

Commentary: A fundamental component of criminal law is "the justified traffic stop." It is a fallacy of criminal law, common in misdemeanor courts, that if something is a "common occurrence" then it must be "commonly understood." The decision in this case gets the award for most likely to be misunderstood. It is for this reason that members of the criminal law bench and bar should take the time to read it carefully. The Court of Criminal Appeals **did not** make a definitive ruling on the admissibility of LIDAR. The prosecution **did not** build a sufficient record that allowed the Court to determine the reasonableness of the officer's determination of probable cause. There is nothing in this opinion that should lead readers to conclude that the evidentiary bar has been raised by the Court. This is merely a case where the State either failed to ask the right questions or the officer was not prepared to give the right answers. According to Wikipedia, LIDAR is "an optical remote sensing technology that measures properties of scattered light to find range and/or other information of a distant target." Although a gross oversimplification, LIDAR can be explained as a laser beam hooked up to computer. The computer measures how long it takes for the laser to hit its target and then extrapolates from that measurement the speed of the target.

B. Charging

When is a person "officially charged" with a crime?

Garcia v. City of Killeen, 285 S.W.3d 94 (Tex. App.--Austin 2009)

An arrest warrant was issued for a police officer for domestic assault. As a result of the arrest, the officer was temporarily suspended as required by statute (Section 143.056, Local Government Code). One month after his arrest, an information was filed in the county court accusing the officer of assault against a family member. Later, the officer filed an action for declaratory relief, seeking the compensation that was withheld from him prior to the filing of the information in county court. Summary judgment was granted for the city, and this appeal followed. In reversing, the court of appeals determined that the employee was not officially charged with a Class A misdemeanor, for purposes of Section 143.056, until the information was filed in county court. The issuance of an arrest warrant by a magistrate was not sufficient. Therefore, there was no statutory basis for the city to suspend the employee prior to that date.

Commentary: This is a case of first impression for Texas appellate courts. Albeit an employment law case, it highlights two issues that are sometimes conflated by criminal justice practitioners. The issue in this case is whether the phrase "officially charged" requires that a formal charging instrument be filed in the appropriate court, as the officer contended, or whether the issuance of an arrest warrant by a magistrate is sufficient. This case is a valuable reminder to local courts and law enforcement that to "arrest" someone is not the same thing as "officially charging" them with a crime.

IV. Bailiffs

Are bailiffs authorized to supervise inmates detained in courthouse holding cells?

Tex. Atty. Gen. Op. GA-0692 (1/22/09)

As the agency charged with adopting reasonable rules and procedures establishing minimum standards for the custody, care, and treatment of prisoners, the Texas Commission on Jail Standards must determine, in the first instance, whether bailiffs have the authority to supervise inmates being held in courthouse holding cells.

V. Costs and Administration

A. In a criminal case, are court costs punitive and thus required to be included in an oral pronouncement of judgment?

Weir v. State, 278 S.W.3d 364 (Tex. Crim. App. 2009)

No. Defendant claimed on direct appeal that the court costs provision in the written judgment was invalid and had to be deleted because court costs were punitive and thus required to be orally announced as a precondition to being included in the judgment. The State argued that court costs are not punitive, but rather a recoupment of judicial resources expended in connection with the trial of the case, and that the legislative requirement that only convicted defendants pay court costs does not, in and of itself, make such payment a sentencing issue. A unanimous Court of Criminal Appeals agreed with the State that the statutory requirement that only convicted defendants pay court costs did not indicate that such costs were intended by the Legislature to be punitive and part of the sentence. The Court also agreed with the State that Section 102.021(1), Government Code, authorizing court costs against convicted defendants, was intended by the Legislature as a recoupment of the costs of judicial resources and not punitive in nature. Accordingly, the Court held that such costs do not have to be included in the oral pronouncement of sentence as a precondition to their inclusion in the trial court's written judgment. The judgment of the intermediate appellate court was affirmed in part and reversed in part. That part of its judgment deleting the trial court's order requiring appellant to pay court costs was reversed. The remainder of the judgment was affirmed.

B. Section 501.014(e), Government Code

Did the court of appeals err in requiring the trial judge to vacate an order he entered directing the Texas Department of Criminal Justice to withdraw funds from the inmate's trust fund to pay court costs?

Johnson v. Tenth Judicial District Court of Appeals at Waco, 280 S.W.3d 866 (Tex. Crim. App. 2008)

Because the proceeding did not involve a "criminal law matter" under Article 5, Section 5(c) of the Texas Constitution, the Court of Criminal Appeals found that it did not have jurisdiction and dismissed the application for writ of mandamus.

Background: Relator, a trial judge, ordered the Texas Department of Criminal Justice to pay monies from an inmate's trust-fund account in satisfaction of a judgment of court costs against the inmate, pursuant to Section 501.014(e), Government Code. Respondent, a court of appeals, granted the inmate's writ of mandamus, directing the trial judge to rescind the order. The court of appeals held the trial judge's order void because the withdrawal lacked the due-process guarantees of prior notice and an opportunity to be heard.

Commentary: In dissenting, Judge Keller, joined by Judge Meyers and Judge Holcomb, asserted that because the order requiring the withdrawal of inmate funds is an enforcement mechanism for the payment of costs ordered by judgments in criminal cases, the case was a "criminal law matter."

Did the trial court err in denying applicant's petition for equitable relief stemming from withdrawal per Section 501.014(e), Government Code?

In re Pannell, 283 S.W.3d 31 (Tex. App.--Fort Worth 2009)

No. Pannell claimed that the trial court violated his due process rights under the 14th Amendment and Article 1.04, Code of Criminal Procedure, by allowing the withdrawal of funds from his trust account for the payment of court costs associated with his convictions pursuant to Section 501.014(e), Government Code, without first giving him notice and opportunity to be heard. He sought mandamus relief. In denying the request, the court of appeals determined that mandamus relief is proper only to correct a clear abuse of discretion when there is no adequate remedy by appeal. In this case, the orders were final and appealable and Pannell had three legal remedies that he did not utilize (direct appeal, restricted appeal, or bill of review). His failure to make a timely notice of appeal was not a sufficient excuse to justify issuing a writ of mandamus. Mandamus relief is inappropriate when other adequate legal remedies are available. The petition was denied.

Did the trial court err by failing to rescind withdrawal orders pursuant to Section 501.014(e), Government Code?

Harrell v. State, 286 S.W.3d 315 (Tex. 2009)

No. Per Section 501.014(e), Government Code, money was withdrawn from Harrell's inmate trust account to pay for court costs and appointed-counsel fees. Harrell was sent copies of the withdrawal order. Arguing due process, he filed a motion to rescind the withdrawal order, which was denied by the trial court. Harrell appealed; however, the court of appeals dismissed for lack of jurisdiction.

After noting the division among intermediate appellate courts and the Court of Criminal Appeals' opinion in *Johnson v. 10th District Court of Appeals*, the Texas Supreme Court determined that it had jurisdiction under Article 5, Section 3(a) of the Texas Constitution to reach the due process issue presented in this case because it was civil in nature. The Court categorized the matter as a

"civil post-judgment collection action" that was distinct from the underlying criminal judgments assessing Harrell's conviction, sentence, and court costs, and that the collection action seized funds to satisfy the monetary portion of those judgments. While tangentially related to the underlying criminal judgments, the Court described such collection efforts on a "money judgment." The Court explained that inmates have a property interest in their trust accounts and are entitled to some standard of due process. Specifically, inmates are entitled to a copy of the order or other notification from the trial court, and an opportunity to be heard by the filing of a motion There is, however, no constitutional requirement of a comprehensive civil garnishment proceeding or even a pre-withdrawal notice. The decision of the court of appeals was reversed. Judgment was rendered affirming the trial court's decision to deny the inmate's motion to rescind the withdrawal orders.

Commentary: There is no doubt in a down economy that government will continue to pursue all avenues of revenue. The number of Section 501.014(e) cases in the past year potentially sets the stage for further case law and more questions, such as whether courts of limited jurisdiction (municipal, justice, and county courts) may utilize Section 501.014(e). To some this may appear the equal of searching for loose change between couch cushions; however, other will argue that every dollar counts.

C. Fees Imposed by Bail Bond Board

May a county bail bond board assess a fee to bail bond companies to recover the cost of employing a bail bond administrator?

Tex. Atty. Gen. Op. GA-0735 (08/06/09)

A county bail bond board may not impose a fee on bonding companies to pay for the cost of employing a bail bond administrator.

D. Conduct of Notary Public

May a private employer limit the notarial acts performed by an employee who is a notary public?

Tex. Atty. Gen. Op. GA-0723 (06/17/09)

A notary public is an appointed public officer for limited purposes. A private employer may limit or prohibit an employee who is a notary public from performing notarial acts during employment hours. Because a commission is issued to an individual notary, the notary's private employer may not take possession of or transfer the notary's book and seal after the notary leaves employment. The secretary of state may adopt rules to specify the details of the disposition of a notary's book and seal.

E. What is the authority of a county to contract with a private entity for the collection of delinquent fines, fees, and court costs?

Tex. Atty. Gen. Op. GA-0714 (5/12/09)

Article 103.0031, Code of Criminal Procedure, which authorizes the commissioners court of a county to enter into a contract with a private attorney or a public or private vendor for the

provision of collection services, does not violate Article V, Section 21 of the Texas Constitution by depriving the criminal district attorney of the authority to prosecute suits by the state.

VI. Prosecutor Ethics

May an assistant county or district attorney lawfully and ethically practice as a criminal defense attorney in federal court and in the state courts of a neighboring county?

Tex. Atty. Gen. Op. GA-0716 (06/01/09)

Article 2.08, Code of Criminal Procedure, does not prohibit an assistant county or assistant district attorney from practicing as a criminal defense attorney in federal court or in the state courts of a neighboring county, although, under certain circumstances, Section 46.005, Government Code, bars such practice by an assistant county attorney. Rules 1.06 and 1.10 of the Texas Disciplinary Rules of Professional Conduct caution against any such representation of a private client, although such inquiries must ultimately be addressed to the Committee on Professional Ethics.

VII. Immigration Issues

May a person held on an ICE detainer as a result of a Texas misdemeanor conviction seek statutory habeas corpus relief?

Le v. State, 2009 Tex. App. LEXIS 6353 (Tex. App.--Houston [14th Dist.] Aug. 13, 2009)

Yes. Le, a registered alien, entered a plea of guilty to two misdemeanor theft offenses. After her second conviction, she was taken into custody by the United States Immigration and Customs Enforcement and informed that the two convictions were deportable offenses. She sought habeas relief in county court, which was denied. In affirming, the court of appeals held that it was able to consider the habeas corpus appeal, even though appellant was not being detained by the State of Texas. The statutory writ of habeas corpus (Article 11.09, Code of Criminal Procedure) is applicable to people who are no longer confined, but who are subject to collateral legal consequences resulting from the conviction. Le's ICE detention and potential deportation were based solely on her Texas misdemeanor convictions. Nevertheless, the court of appeals concluded that habeas relief was properly denied because trial counsel's affidavit established that Le was advised of the possible sentence and consequences of her guilty plea. Additionally, there was proof that defense counsel provided effective assistance, that Le understood the admonishments, and did not request a translator. The decision was affirmed.

May the Texas Legislature pass law prohibiting local government policies that hinder enforcement of federal immigration laws?

Tex. Atty. Gen. Op. GA-0699 (3/19/09)

The Texas Legislature is not prohibited from adopting some form of legislation designed to compel local governments to comply with any duties they may have under federal immigration laws, so long as such legislation is not inconsistent with federal law.

VIII. School Attendance

Is a justice court authorized to hear a failure to attend school case involving a student who is enrolled in a district that is located outside the boundaries of the justice's precinct?

Tex. Atty. Gen. Op. GA-0701(3/27/09)

An offense for failure to attend school under Section 25.094(a), Education Code, may be prosecuted in a justice court of any precinct in the county in which the alleged truant resides or in which his school is located.

May a court use electronic monitoring as a condition of deferred disposition for defendant's accused of Section 25.094, Education Code?

Tex. Atty. Gen. Op. GA-0713 (5/06/09)

A court may use an electronic monitoring device as a condition of deferment of final disposition or probation for an individual found to have committed an offense under Section 25.094, Education Code, if the court determines that the use of the device in a given proceeding is reasonable.