

CASE LAW AND 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 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 wrongdoing. 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

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AROUND THE STATE

HONORABLE ROBERT "BOB" RICHTER, PRESIDING JUDGE, MISSOURI CITY NAMED OUTSTANDING JUDGE OF THE YEAR

The Honorable Robert "Bob" Richter was bestowed the Texas State Bar's Outstanding Municipal Judge of the Year Award (The Michael O'Neal Award) by the Municipal Judges Section at the Annual State Bar Meeting held in Dallas on June 23-25, 2009. Judge Richter has made many outstanding contributions to municipal courts, not only as a judge, but in almost every facet applicable to municipal courts.

Judge Richter has served as Presiding Judge in Missouri City for more than 20 years, a city that has quadrupled in population and expanded into different counties increasing his responsibilities during his time on the bench. He has presided over some very high profile arraignments with the upmost dignity and restraint. He has also served as both prosecutor and defense attorney; including prosecutor in the City of Bellaire more than 35 years, the City of Seabrook more than 25 years, and Nassau Bay more than 15 years. At one time, he served as prosecutor in seven cities in the Houston area. Judge Richter serves on the faculty of the Texas Municipal Courts Education Center (TMCEC) and is one of the first municipal judges to be certified as a court interpreter.

A founding charter member of the "Gulf Coast Association of Municipal Judges and Prosecutors" created in 1974 (the organization was renamed the Texas Municipal Courts Association (TMCA) in 1977), he is the only TMCA and TMCEC Board Member to serve on the Boards continuously since its inception. He continues to serve as the elected Treasurer of the Texas Municipal Courts Association having done so since 1984, shepherding millions of dollars in education funds for TMCEC programs.

CLERK CERTIFICATION

The Municipal Court Clerks Certification Program is pleased to announce that in FY09 and in the first quarter of FY10 five clerks have attained the highest level of distinction as Certified Municipal Court Clerk, the third level of the program. They are now entitled to bear the designation of CMCC after their name. Listed in order of completion:

Cathy Leloux, CMCC (Georgetown)
Teresa Borcik, CMCC (Abilene)
Rachel Frazier, CMCC (Keller)
Leona Clay, CMCC (Harker Heights)
Renee Moses, CMCC (Midlothian)

Over the year, many clerks completed the testing, educational requirements, and application at the various levels. TMCEC congratulates all on their achievement and encourages all clerks to consider participation in the program. In some cities, certification at each level results in increased compensation and in most cities there is recognition by city officials. Clerks in the program report that not only does participation increase their competence at their jobs, but also their self-confidence and morale. The total numbers of clerks completing each level and still working in Texas municipal courts in FY09 are shown below:

Level I: 429

Level II: 281

Level III: 33

The Texas Court Clerks Association (TCCA), the Texas Municipal Courts Association (TMCA), the Texas Municipal Courts Education Center (TMCEC), and Texas State University (San Marcos) sponsor the program. Questions about the program should be directed to Tracie Glaeser (TCCA Education Committee Chairperson) at 972.219.3437 or Tessa LaManna (TMCEC Program Coordinator) at 800.252.3718.



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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 on 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 one's 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 one's back against traffic when a sidewalk 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 U.S. Supreme Court 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)

In a 5-4 decision, the Supreme Court held that 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. Montejó was arrested for murder. At an initial preliminary hearing, he was deemed indigent, and counsel was appointed to represent him. Montejó remained silent during the preliminary hearing. After the hearing, but before meeting with his court appointed attorney, Montejó 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 Montejó'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*, Montejó 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 Montejó did not **affirmatively** assert his rights.

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 Montejó 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 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 that 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 6th 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 ruling’s 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 (Supreme Court of the United States), 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

misdeemeanor 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 Securities and Exchange Commission 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 term or phrase 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” a/k/a “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 40 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 comele 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. Sec. 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 Eules'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 Feb. 19, 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 months 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. 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) come together 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 Magistrate's Order for Emergency Protection

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 cohabit. 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 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. 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 take the time to read the case 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. 10th 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 Judicial 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

Cases Pending in the Texas Court of Criminal Appeals

When no other facts in a search warrant affidavit establish probable cause, should Texas have a blanket rule that finding traces of contraband in trash outside a residence on two consecutive weeks automatically supports issuance of a warrant to search that home? *Flores v. State*, 287 S.W.3d 307 (Tex. App.—Austin 2009)

Whether a bail bond surety is liable after executing a bail bond when the State of Texas subsequently changes and adds more serious charges to the charge for which the surety executed the bail bond. *Rodriguez v. State*, 283 S.W.3d. 465 (Tex.App.—San Antonio 2009)

As the defendant was unlawfully arrested without a warrant at the time of his interrogation, did the State carry its burden to prove that the taint of the illegal arrest was attenuated? *Monge v. State*, 276 S.W.3d 180 (Tex. App.—Houston [14th Dist.] 2009)

Whether the court of appeals erred in finding that both the pre and post-Miranda statements made by appellant to a trooper were the product of an illegal two-step interrogation technique that undermined appellant's right to remain silent and his ability to voluntarily waive that right. *Carter v. State*, 2009 Tex. App. LEXIS 2437 (Tex. App.—Amarillo 2009)

May a court of appeals decide an issue based on an argument that was not made in the trial court? May a trial court base its ruling on an unsworn police report offered into evidence at a pre-trial suppression hearing? *Ford v. State*, 268 S.W.3d 620 (Tex. App.—Texarkana 2008)

Did the Court of Appeals err in equating the use of deception in the creation of a document for interrogation purposes with a violation of Texas Penal Code Section 37.09 (tampering or fabricating physical evidence)? *Wilson v. State*, 277 S.W.3d 446 (Tex. App.—San Antonio 2008)

For purposes of double jeopardy, did the appellant's plea and conviction of "failure to yield right of way" preclude prosecution for intoxication assault? On motion for rehearing, *Ex parte Watson*, 2009 Tex. Crim. App. LEXIS 526 (Tex. Crim. App. 2009)

Case Law continued from page 12

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 U.S. 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.



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The National Judicial College offers a wide range of seminars and webinars for judges at all levels. The ones listed below may be of interest to municipal judges. Contact the NJC for additional information: 800.25-JUDGE or www.judges.org. Tuition typically varies from \$550 to \$1,495 and special conference fees may apply. Scholarships are sometimes available.

Seminar Series

<i>Current Issues in the Law</i> February 21-25, 2010 Orlando, Florida	<i>The Fourth Amendment: Comprehensive Search and Seizure Training for Trial Judges</i> May 24 – 27, 2010 Reno, Nevada	<i>Ethics, Fairness, and Security in Your Courtroom and Community</i> September 27-30, 2010 Reno, Nevada
<i>Commercial Driver's Licensing Laws</i> March 22-25, 2010 Reno, Nevada	<i>Decision Making</i> July 12-15, 2010 Reno, Nevada	<i>The Fourth Amendment: Comprehensive Search and Seizure Training for Trial Judges</i> October 4-7, 2010 Oxford, Mississippi
<i>Conducting the Trial</i> April 12-15, 2010 Reno, Nevada	<i>Effective Caseflow Management</i> August 9 -12, 2010 Reno, Nevada	<i>Management Skills for Presiding Judges</i> October 4-8, 2010 Reno, Nevada
<i>Traffic Issues in the 21st Century</i> May 17-20, 2010 Reno, Nevada	<i>Special Court Jurisdiction</i> August 9-19, 2010 Reno, Nevada	<i>Advanced Evidence</i> October 11-14, 2010 Reno, Nevada
<i>Advanced Evidence</i> May 23-27, 2010 San Francisco, California	<i>Special Court Jurisdiction: Advanced</i> August 9-19, 2010 Reno, Nevada	

Webinar Series

<i>Selected Criminal Evidence Issues: A Web-Based Course</i> February 22 – April 9, 2010/Web	<i>Ethics and Judging: Reaching Higher Ground</i> May 17 – July 1, 2010/Web	<i>Special Considerations for Rural Court Judges</i> September 13 – October 29, 2010/Web
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Register for TMCEC Conferences Online!

Judges and clerks are now able to register online for TMCEC conferences. Credit card payment is required at the time of registration. All judges and clerks were sent a letter with their user name and password in mid-December. Not only can you register, but you can update your profile information, give TMCEC your emergency contact information, look at the courses that you have taken since September 1, 2007, and print off duplicate certificates from September 1, 2007.

If you have questions about online registration, please contact Jameson Crain at TMCEC (800.252.3718 or crain@tmcec.com).

Bailiffs and warrant officers will be able to register online in 2010 (hopefully no later than February 1, 2010). Watch for a letter from TMCEC with your user name and password, please.



FROM THE CENTER

Important Change in Registration Policies

At the September meeting, the TMCEC Board of Directors directed the staff to strictly enforce the prepayment of registration fees policy. Participants will not be allowed admittance to a TMCEC conference without prior payment of the registration fee. Participants will not receive a confirmation letter until payment is received. Instead, an invoice will be mailed showing payment due.

In addition, for a registration fee to be refunded, the participant must notify TMCEC of the cancellation or transfer 10 working days prior to the start of the event. The start of the event is the first day that on-site registration is scheduled. If an unexpected emergency or illness arises, the court may substitute another court employee or judge up to 72 hours prior to the first day of on-site registration.

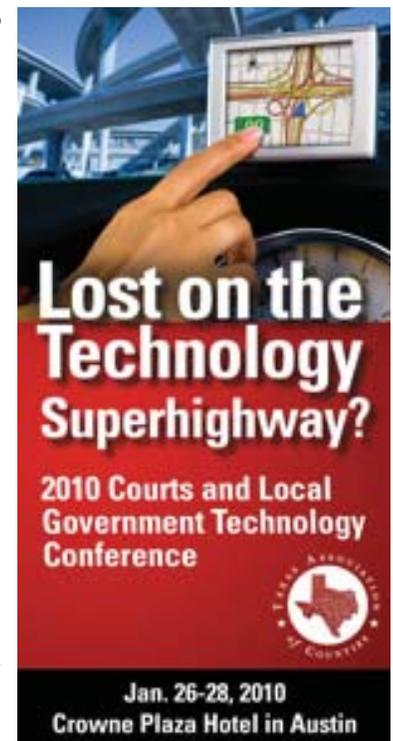
TMCEC recognizes that these changes may be inconvenient; however, these changes are necessary. TMCEC has been operating on the same amount of grant funds from Fund 540 for the last 10 years. During the same period of time, the number trained has continued to increase annually. Increased program income via registration fees has allowed TMCEC to maintain the same level of programming and services to its constituents with two exceptions: the court interpreters programs were not scheduled in FY09 and FY10, and the print copies of the TMCEC *2009 Bench Book* and *2009 Forms Book* are no longer provided to municipal courts without a charge (see attached order form). Although TMCEC strives to provide the highest level of customer service, the number of cancellations, transfers, and substitutions within the 10-day period prior to an event has become unmanageable. The new registration policies are essential to maintaining efficiency, programming, and cost control.

TMCEC has “gone live” with online registration via its website. It is hoped that with the savings on staff time that TMCEC will be able to continue to offer the same high quality programs at a reasonable cost in the next biennium. Please see the article on page 14 of *The Recorder* for information on how to register online.

2010 COURTS & LOCAL GOVERNMENT (CoLoGo) TECHNOLOGY CONFERENCE

TMCEC is again collaborating with the other judicial education entities to co-sponsor *CoLoGo* on January 26-28, 2010 in Austin, Texas. This annual conference is organized by the Texas Association of Counties and offers judges and clerks from all levels of the judiciary the opportunity to stay up-to-date on the latest technological advances affecting court administration. The registration fee is \$175 after January 1st. The conference will be held at the Crowne Plaza Hotel (6120 North IH 35, Austin 78728—888.444.0401). Participants are responsible for making their own hotel reservations and payment. A limited number of rooms are available at the state rate of \$85 plus tax. Attendance at the program counts toward clerk certification credit and as an approved alternative for the annual mandatory judicial education requirement for municipal judges. Note: Municipal judges must have attended two TMCEC programs and not have “opted-out” in the previous academic year. See page 18 of the Academic Catalog for additional information.

Registration for the conference allows you to attend informative technology workshops, presentations, and exhibits, including four specialized workshops on January 26th for municipal courts, justice courts, county courts, and local government professionals. In addition to the on-site vendor show with products specific to county and municipal governments, attendees are furnished transportation and admission to the exposition floor of the Government Technology Conference (GTC) Expo on the Wednesday afternoon (January 27th). The GTC Expo at the Austin Convention Center is part of the 2010 Annual Government Technology Conference, and features more than 100 vendors of products and services used by government entities. A brochure was sent to all courts in December.





TMCEC REFERENCE MATERIALS

August 2009 TMCEC Legislative Update DVD. Available for purchase for \$20+ shipping/handling (see chart). The videos may be helpful in conducting staff trainings. All of the course materials may also be downloaded from the TMCEC website [www.tmcec.com]. The videos may also be viewed online at no charge.

2009 Bench Book. First published in 1998--Revised in FY 09. The material was updated with the legislative changes of the 81st Session. Spiral bound book (314 pages): \$25+ shipping/handling - see chart.

2009 Forms Book. First published in 1998--Revised in FY 09. It is also accessible via the TMCEC website. A set of translated forms (Spanish) is included in the *2009 Forms Book*. New forms include a blood search warrant, a corporate summons, a motion and order to revoke personal bond, nondisclosure order, and more. Loose-leaf, 3-hole version (375 pages): \$25+ shipping/handling - see chart.

CD-ROM: 2009 Bench Book and 2009 Forms Book -- Contains both publications in a pdf version and a word version. Both are contained on one CD-ROM. \$5. No shipping charges apply.

Court Interpreter's Municipal Court Legal Glossary -- Developed by Judge Bonnie Goldstein and Court Interpreter Janie Moreno, this booklet (50 pages) provides Spanish translations of the glossary and definitions provided by the Texas Department of Licensing and Regulation. Cost: \$10+ shipping/handling - see chart.

Although in the past TMCEC was able to provide a complimentary copy of some these publications, there was NOT sufficient funding in FY 09 to send complimentary copies to the courts.

TMCEC Shipping Charges

For Orders Totaling:	Please add:
\$0 - \$25	\$3.95
\$25.01 - \$50	\$5.95
\$50.01 - \$75	\$8.95
\$75.01 - \$100	\$10.95
\$100.01 - \$150	\$12.95
\$150.01 - \$200	\$14.95
\$200.01 plus	\$16.95
Standard delivery within 4-6 business days	

Qty	Cost	Title	Extended Price
_____	25.00	2009 TMCEC <i>Bench Book</i> for Municipal Judges	_____
_____	25.00	2009 TMCEC <i>Forms Book</i>	_____
_____	5.00	CD-ROM <i>Forms Book/Bench Book</i> (combined)	_____
_____	20.00	<i>Role of Municipal Court in City Government</i> (DVD)	_____
_____	25.00	<i>Level I Clerks Certification Study Guide</i> (looseleaf)	_____
_____	25.00	<i>Level II Clerks Certification Study Guide</i> (looseleaf)	_____
_____	10.00	<i>Level III Clerks Certification Study Questions</i>	_____
_____	39.00	<i>Texas Criminal Law and Traffic Law Manual</i> (Judicial Edition)	_____
_____	10.00	<i>Quick Reference Trial Handbook</i>	_____
_____	10.00	<i>Rules of Evidence</i>	_____
_____	10.00	<i>Court Interpreters' Municipal Court Legal Glossary</i> (Spanish)	_____
_____	_____	Other: _____	_____
Subtotal			_____
Shipping charge (see above)			_____
TOTAL			_____

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

Name: Texas Municipal Courts Education Center 1609 Shoal Creek Boulevard, Suite 302 Austin, Texas 78701 Fax: (512) 435-6118

Court: _____

Court Address: _____

City, State, Zip: _____

Court Telephone Number: (____) _____ Email Address: _____

CREDIT CARD PAYMENT INFORMATION:

MasterCard

Visa

Credit card number: _____

Expiration Date: _____

Verification # (found on back of card): _____

Name as it appears on card (print clearly): _____

Amt to be Charged: _____ + _____ Convenience Fee for credit card (see back of this page) = \$ _____

Authorized signature: _____

ERRATA: Please note that the Passenger Restraint (Safety Belt) Laws chart disseminated at the Legislative Update in August was **INCORRECT** in stating that for children (under 8, unless 4'9") the range of fine for driver is \$100-\$200. The version of the chart published in the Legislative Issue of *The Recorder* (August 2009) **INCORRECTLY** stated that the fine range for a person sitting in the driver's seat is "\$25 for the first offense, not to exceed \$250 for subsequent offense." **DISCARD CHARTS** with the footer Rev. 07/09 and 08/09. The chart shown below, revised 9/09, located on our website, correctly reflects the law.

SAFETY BELT LAWS

Back Seat

ADULTS (17 and over) \$25 - \$50 fine to offender
 CHILDREN (15-16) \$25 - \$50 fine to passenger & \$100 - \$200 fine to driver
 CHILDREN (8-15, and those under 8 but taller than 4'9") \$100 - \$200 fine to driver
 CHILDREN (under age 8, unless 4'9" tall) not to exceed \$25 for first offense, not to exceed \$250 for subsequent offense



Driver's Seat
 DRIVER (over 15) \$25 - \$50 fine

Front Seat

ADULTS (17 and over) \$25 - \$50 to offender
 CHILDREN (15-16) \$25 - \$50 fine to passenger & \$100 - \$200 fine to driver
 CHILDREN (8-15, and those under 8 but taller than 4'9") \$100 - \$200 fine to driver
 CHILDREN (under age 8, unless 4'9" tall) not to exceed \$25 for first offense, not to exceed \$250 for subsequent offense

Safety Belt Laws Effective September 1, 2009	
Child in safety seats	A child <i>under 8 years old, unless the child is taller than four feet nine inches (4'9")</i> must be restrained in a child passenger safety seat in accordance with the manufacturer's instructions.
Child in safety belts	A child <i>age 8 and younger than age 17</i> must be restrained in a safety belt regardless of position in the vehicle. A child under 8 years old who is not required to be in a safety seat must be in a safety belt.
Adults in safety belts	A person must be restrained in a safety belt regardless of position in the vehicle.
Pick-up trucks and trailers	A child <i>under age 18</i> cannot ride in the open bed of a pick-up truck or trailer on a public road.



Funded by a grant from the Texas Court of Criminal Appeals.

Rev. 09/09

TRAFFIC SAFETY UPDATE



Rollover Convincer

The Rollover Convincer is an excellent resource to encourage traffic safety through buckling up! The “Roll-Over Convincer” was at the May 2009 Municipal Traffic Safety Initiative or Initiatives Conference in Austin.

The Rollover Convincer is basically the cab from a pickup truck attached to a frame with a motor and mounted on top of a trailer. The windshield and doors have been removed so that the interior can be viewed. When the electric power is turned on, the cab rotates to simulate a rollover crash.

When demonstrating the Rollover Convincer, an adult dummy is used in the driver position, and either another adult dummy or a child size dummy in a safety seat is used in the passenger position. First, the demonstration shows what happens when the dummies are correctly using their safety belts. The dummies remain in the cab as the Convincer is rotated one or more times. Then, the dummies are unbuckled and the demonstration is repeated. After one or more rotations, the dummies are tossed around in the cab, and often either partially or fully ejected, thereby showing the importance of wearing safety belts.

Any organization may request the “Roll-Over Convincer” to demonstrate what happens to adults and children when a vehicle rolls and seat belts are unattached or improperly fastened. There are two Rollover Convincers in College Station, one in the Abilene area, and another in the Texarkana area. To make arrangements to check one out, contact Bev Kellner, Program Manager, Passenger Safety at 979.862.1782, bkellner@ag.tamu.edu; Myrna Hill, Program Coordinator, Passenger Safety at 979.862.4658 or 210.452.1496-cell, mr-hill@tamu.edu; or Bobbi Brooks, Program Coordinator, Passenger Safety at 979.862.4658, blbrooks@ag.tamu.edu. A presenter can be provided, if there is a team member available. It is important to give as much lead time as possible to reserve a Convincer.

Information for the Rollover Convincer is available on the TMCEC Municipal Traffic Safety Initiatives website at http://tmcec.com/tmcec/MTSI/Resources_and_Materials.

The Rollover Convincer would be great to use at a special community event such as Municipal Court Week in November. This resource is provided at no cost to you, thanks to a traffic safety grant from Texas Department of Transportation.

Seat Belt Statistics

Traffic Safety Facts: 2008 Data Occupant Protection, National Highway Safety Administration DOT HS 811 160

Research has found that lap/shoulder seat belts, when used, reduce the risk of fatal injury to front-seat passenger car occupants by 45 percent and the risk of moderate-to-critical injury by 50 percent. Ejection from the vehicle is one of the most injurious events that can happen to a person in a crash. In fatal crashes in 2008, 77 percent of passenger vehicle occupants who were totally ejected from the vehicle were killed. Seat belts are effective in preventing total ejections: only 1 percent of the occupants reported to have been using restraints were totally ejected, compared with 30 percent of the unrestrained occupants.

2010 Municipal Traffic Safety Initiatives Awards



Purpose:

To recognize those who work in local municipalities that have made outstanding contributions to their community in an effort to increase traffic safety. This competition is a friendly way for municipalities to increase their attention to quality of life issues through traffic safety activities. Best practices will be shared across the state. Each submission will be recognized.

Eligibility:

Any municipal court in the State of Texas is eligible. Entries may be submitted on behalf of the court by the following: Judge, Court Clerk, Deputy Court Clerk, Court Manager, Court Administrator, City Manager, City Councilperson, Law Enforcement Representative, or a Community Member.

Categories:

There are three categories with nine (9) awards given:

- Two (2) in the large volume courts, serving populations of 150,000 or more;
- Three (3) in the medium volume courts, serving populations between 30,000 and 149,999; and
- Four (4) in the small volume courts, serving populations below 30,000.

Awards:

Award recipients will be honored at the Texas Municipal Courts Education Center (TMCEC) Municipal Traffic Safety Initiatives Conference that will be held May 23-25, 2010, in Houston at the Omni Riverway Hotel. Award recipients receive (for two municipal court representatives) complimentary conference registration, travel to and from the 2010 Municipal Traffic Safety Initiatives Conference to include airfare or mileage that is within state guidelines, two night's accommodations at the conference hotel, and most meals and refreshments. *There may be categories where no awards will be presented due to a lack of entries.*

Honorable Mentions:

If there are a number of applications that are reviewed and deemed outstanding and innovative, at the discretion of TMCEC, honorable mentions may be selected. Honorable mentions will receive complimentary conference registration (for two municipal court representatives) to attend and be recognized at the Municipal Traffic Safety Initiatives Conference.

How Entries are Judged:

A panel of judges will review each application and assign points based on the materials submitted. After judging, the scores will be averaged and a final score assigned. Applicants will be judged on the basis of what their court has done from January 1, 2009 through December 31, 2009 in terms of public outreach in their community to increase traffic safety while decreasing traffic crashes, traffic fatalities, juvenile DUI, child safety seat offenses, red light running and other traffic related offenses. It may be helpful to review "What Can You Do?" on page 9.

Section I: *A maximum of 50 points can be awarded.*

What did you do from January 1, 2009 through December 31, 2009? Please provide a written report that is no longer than five pages in length. This may include details regarding, but not limited to: monthly or regular articles in local publications; sponsorship of mock trials; community outreach; distribution of written materials and pamphlets; creative sentencing; bilingual programs and initiatives on traffic safety; endorsements of national programs, such as Click It or Ticket; web-pages addressing traffic safety; presentations to local civic groups and organizations; interaction with youth; outreach with repeat offenders; utilizing the Driving on the Right Side of the Road program in the classroom; joining the TMCEC Speaker's Bureau; and community partnerships. Court programs may be represented in conjunction with city departments, local schools, civic groups, and other community programs.

Section II: *A maximum of 30 points can be awarded.*

Section II: *A maximum of 30 points can be awarded.*

Attachments/Samples:

Seeing is believing. Show us samples or digital photos of your materials. This may include, but is not limited to: copies (these will not be returned) of photos, news articles, press releases, materials you distribute, copies of your web-pages, flyers, and letters of support.

Section III: *A maximum of 20 points can be awarded.*

Neatness, organization of materials, and following submission guidelines.

General Tips on a Winning Submission:

- First impressions count. A neat, well-organized submission that is easy to understand during the judging makes a big difference.
- Make sure that all of the information you want the judges to see is securely attached.

Entry Rules:

- Three copies of the application packet must be submitted.
- Provide a completed application form/packet that includes the application form.
- All typed pages should be 1.5 or double spaced, printed single-sided in at least a font size of 12. Excluded: attachments and samples do not have to follow these guidelines.
- Each application packet can not contain more than 30 pages or documents, including attachments, pictures, and supporting documentation. You may include letters of support as long as you do not exceed page limitations. If, for example, you create a four-page handout on Juvenile DUI to distribute to your local schools, this will count as one document.
- Please provide copies only, no originals, as your submission will not be returned.
- No late submissions will be considered.

Deadline:

Entries must be postmarked no later than Friday, January 22, 2010.

Send applications to:

TMCEC – Traffic Safety Awards

Attn: Lisa Robinson, CFLE

TxDOT Traffic Safety Grant Administrator

1609 Shoal Creek Boulevard, Suite 302

Austin, TX 78701

Presentation:

Award recipients and Honorable Mention winners will be notified by Friday, March 19, 2010 and will be honored during the Municipal Traffic Safety Initiatives Conference on 24, 2010 in Houston at the Omni Riverway Hotel.

Best Practices:

Information submitted will be compiled and shared statewide for community networking, collaboration, and examples of best practices.

For more information, please contact Lisa R. Robinson, CFLE, TxDOT Traffic Safety Grant Administrator, at 512.320.8274 or robinson@tmcec.com.

Traffic safety benefits can go far beyond the traffic stop!

What Can You Do?

- Get involved
- Add traffic safety materials to your city's and court's websites
- Host a warrant round-up with nearby cities
- Invite school groups into your court
- Start a proactive fine collection program
- Recognize situations where a "fine is not fine"
- Join the TMCEC listserv on traffic safety
- Approve adequate funding, staff, and support for your municipal court
- Speak to local civic groups on the importance of traffic safety
- Build community partnerships
- Provide a Traffic Safety Exhibit
- Ask law enforcement officers and prosecutors to work together to identify at-risk drivers in your community
- Create meaningful sentencing alternatives for repeat offenders, especially juveniles and minors using deferred disposition
- At the close of a trial after sentencing, remind jurors and court observers of the importance of compliance with traffic laws
- Adopt a safety belt policy for all city employees
- Participate annually in Municipal Court Week



TEXAS MUNICIPAL COURTS EDUCATION CENTER

Municipal Traffic Safety Initiatives



TMCEC Traffic Safety Award Application

Deadline: January 22, 2010 (postmarked)

Please print all information as you would like to appear on the award

Name of Person Submitting & Position: _____

Court Nominated: _____

Mailing Address: _____

City: _____ Zip Code: _____

Telephone number: (____) _____ - _____ Email address: _____

Category (please check one):

- _____ *Large Volume Court: serving a population of 150,000 or more*
- _____ *Medium Volume Court: serving populations between 30,000 and 149,999*
- _____ *Low Volume Court: serving a population below 30,000*

Judge's Signature: _____

DO NOT WRITE IN THIS AREA:

Section I: Written Report: Maximum of 50 points: _____

Section II: Attachments/Samples: Maximum of 30 points: _____

Section III: Neatness, Organization of Materials
& Following Submission Guidelines: Maximum of 20 points: _____

Total Points Awarded: _____

Notes: _____



2009 - 2010 TMCEC Academic Schedule At-A-Glance

Seminar	Date (s)	City	Hotel Information
Regional Judges and Clerks Seminar	January 11 - 13, 2010	San Antonio	Omni San Antonio at the Colonnade 9821 Colonnade Blvd., San Antonio, TX
Webinar - Setting Up a Warrant Round-Up	January 21, 2010	Webinar	www.tmcec.com
Level III Assessment Clinic	January 26 - 29, 2010	Austin	Radisson Hotel 111 E. Cesar Chavez, Austin, TX
Texas Association of Counties: Courts & Local Government Technology Conference	January 26 - 28, 2010	Austin	Crowne Plaza 6120 North IH-35, Austin, TX"
Court Administrators Special Topic ICM: Concluding Seminar"	February 1 - 5, 2010	Austin	Omni Southpark 4140 Governor's Row, Austin, TX
Webinar - Ethics and Technology	February 10, 2010	Webinar	www.tmcec.com
One Day Clinic - Teen Courts	February 18, 2010	Austin	TMCEC 1609 Shoal Creek Blvd. Ste. 302, Austin, TX
Regional Judges Seminar	February 21 - 23, 2010	Galveston	The San Luis Resort and Spa 5222 Seawall Blvd., Galveston, TX
Orientation for New Judges and Clerks	March 3, 2010	Austin	TMCEC 1609 Shoal Creek Blvd. Ste. 302, Austin, TX
Webinar - Jury Preparation	March 10, 2010	Webinar	www.tmcec.com
Regional Judges and Clerks Seminar	March 14 - 16, 2010	Houston	Omni Hotel Houston 4 Riverway, Houston, TX
Regional Judges and Clerks Seminar	March 22 - 24, 2010	Addison	Crowne Plaza Addison 14315 Midway Road, Addison, TX
Regional Clerks Seminar	March 24 - 25, 2010	Addison	Crowne Plaza Addison 14315 Midway Road, Addison, TX
Webinar - Trends in Traffic Safety	April 7, 2010	Webinar	www.tmcec.com
Regional Judges and Clerks Seminar	April 12 - 14, 2010	Lubbock	Holiday Inn Park Plaza 3201 South Loop, Lubbock, TX
One Day Clinic - Juvenile Records: Nondisclosure & Expunction	April 15, 2010	Austin	TMCEC 1609 Shoal Creek Blvd. Ste. 302, Austin, TX
Prosecutors & Bailiffs/Warrant Officers	April 18 - 20, 2010	Austin	Crowne Plaza 6120 North IH-35, Austin, TX
Regional Clerks Seminar	May 2 - 4, 2010	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd., South Padre Island, TX
Orientation for New Judges and Clerks	May 5, 2010	Austin	TMCEC 1609 Shoal Creek Blvd., Austin, TX
Regional Attorney Judges Seminar	May 9 - 11, 2010	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd., South Padre Island, TX
Regional Non-Attorney Judges Seminar	May 11 - 13, 2010	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd., South Padre Island, TX
Webinar - Judicial Appointments	May 19, 2010	Webinar	www.tmcec.com
Traffic Safety Conference	May 23 - 25, 2010	Houston	Omni Hotel Houston 4 Riverway, Houston, TX
One Day Clinic - Topic: TBD	June 17, 2010	Austin	TMCEC 1609 Shoal Creek Blvd. Ste. 302, Austin, TX
Prosecutors & Court Administrators Seminar	June 21 - 23, 2010	Houston	Omni Hotel Houston 4 Riverway, Houston, TX
Bailiffs/Warrant Officers Seminar	June 28 - 30, 2010	Houston	Omni Westside 13210 Katy Freeway, Houston, TX
One Day Clinic - Dangerous & Cruelly Treated Animals	July 14, 2010	Austin	TMCEC 1609 Shoal Creek Blvd. Ste. 302, Austin, TX
Regional Judges and Clerks Seminar	July 18 - 20, 2010	El Paso	Camino Real 101 S El Paso St, El Paso, TX
New Judges and Clerks Seminar	July 26 - 30, 2010	Austin	Omni Southpark 4140 Governor's Row, Austin, TX

www.tmcec.com

- New, Non-Attorney Judge or New Clerk at 32-hour program (\$200)
- Non-Attorney Judge (\$50)
- Attorney Judge **not seeking CLE credit** (\$50)
- Attorney Judge **seeking CLE credit** (\$150)
- Traffic Safety Conference - Judges & Clerks (\$50)
- Clerk/Court Administrator (\$50)
- Bailiff/Warrant Officer* (\$150)
- Assessment Clinic (\$100)
- Prosecutor **not seeking CLE/no room** (\$200)
- Prosecutor **seeking CLE/no room** (\$300)
- Prosecutor **not seeking CLE credit** (\$350)
- Prosecutor **seeking CLE credit** (\$450)

By choosing TMCEC as your MCLE provider, attorney-judges and prosecutors help TMCA pay for expenses not covered by the Court of Criminal Appeals grant. Your voluntary support is appreciated. (For more information, see the TMCEC Academic Schedule)

Name (please print legibly): Last Name: _____ First Name: _____ MI: _____
 Names you prefer to be called (if different): _____ Female/Male: _____
 Position held: _____
 Date appointed/Hired/Elected: _____ Years experience: _____
 Emergency contact: _____

HOUSING INFORMATION

TMCEC will make all hotel reservations from the information you provide on this form. TMCEC will pay for a single occupancy room at all seminars: four nights at the new judges/clerks seminars, three nights at the assessment clinics, and two nights at the regional seminars. To share with another participant, you must indicate that person's name on this form.

- I need a private, single-occupancy room.
 - I need a room shared with a seminar participant. Please indicate roommate by entering seminar participant's name: _____ (Room will have 2 double beds)
 - I need a private double-occupancy room, but I'll be sharing with a guest. [I will pay additional cost, if any, per night]
 I will require: 1 king bed 2 double beds
 - I do not need a room at the seminar.
- Arrival date: _____ Smoker Non-Smoker

Municipal Court of: _____ Email Address: _____
 Court Mailing Address: _____ City: _____ Zip: _____
 Office Telephone #: _____ Court #: _____ Fax: _____
 Primary City Served: _____ Other Cities Served: _____

STATUS (Check all that apply):

- Full Time Part Time Bailiff/Warrant Officer/Marshal* Court Clerk Deputy Court Clerk
- Presiding Judge Attorney Non-Attorney Prosecutor Mayor (ex officio Judge)
- Court Administrator Associate/Alternate Judge Justice of the Peace Other: _____

***Bailiffs/Warrant Officers/Marshals:** Municipal judge's signature required to attend Bailiff/Warrant Officer programs.

Judge's Signature: _____ Date: _____
 Municipal Court of: _____ TCLEOSE PID #: _____

I certify that I am currently serving as a municipal judge, prosecutor, or court support personnel in the State of Texas. I agree that I will be responsible for any costs incurred if I do not cancel 10 working days prior to the conference. I agree that if I do not cancel 10 working days prior to the event that I am not eligible for a refund of the registration fee. I will first try to cancel by calling the TMCEC office in Austin. If I must cancel on the day before or day of the seminar due to an emergency, I will call the TMCEC registration desk at the conference site IF I have been unable to reach a staff member at the TMCEC office in Austin. If I do not attend the program, TMCEC reserves the right to invoice me or my city for meal expenses, course materials, and, if applicable, housing (\$85 or more plus tax per night). I understand that I will be responsible for the housing expense if I do not cancel or use my room. If I have requested a room, I certify that I work at least 30 miles from the conference site. **Payment is due with the registration form. Registration shall be confirmed only upon receipt of registration form and payment.**

 Participant Signature (May only be signed by participant)

 Date

PAYMENT INFORMATION

- Check Enclosed (Make checks payable to TMCEC.)
- Credit Card (Complete the following; \$5.00 will be added for each registration made with credit card payment.)

Credit Card Payment:

Credit card type:	Amount to Charge:	Credit Card Number	Expiration Date
<input type="checkbox"/> MasterCard	\$ _____	_____	_____
<input type="checkbox"/> Visa	_____	Name as it appears on card (print clearly): _____	
		Authorized Signature: _____	

Please return completed form with payment to TMCEC at, 1609 Shoal Creek Boulevard #302, Austin, TX 78701, or fax to 512.435.6118.

**TMCEC MISSION
STATEMENT**

To provide high quality judicial education, technical assistance, and the necessary resource material to assist municipal court judges, court support personnel, and prosecutors in obtaining and maintaining professional competence.

Change Service Requested

THE LAST WORD

Did you know that courts are required to report to DPS traffic convictions and forfeitures of bail in all traffic offenses. As of September 1, 2009, the report must be submitted not later than the 7th day after the date of conviction or forfeiture of bail. Prior to this date, courts had 30 days to submit this report. The report is to be submitted by the magistrate, judge, or clerk of the court. Sec. 543.203, Transportation Code. Since this statute requires reporting if the offense was a law regulating the operation of a motor vehicle, courts are required to report final convictions or forfeiture of bail on all city ordinance traffic offenses also. Because clerks are the custodians of the records, they usually prepare this report and submit it to DPS. Failure of a judge or clerk to properly and timely report final convictions of traffic offenses may constitute misconduct in office and may be grounds for removal. Sec. 543.206, Transportation Code. Courts may not submit a record of a traffic offense when the court defers disposition of the case under Article 45.051, Court of Criminal Procedure, if the defendant completes the terms of the deferral and the case is dismissed. Sec. 543.204, Transportation Code.