

CASE LAW AND ATTORNEY GENERAL OPINION UPDATE TMCEC ACADEMIC YEAR 2012

By Ryan Kellus Turner
General Counsel and Director of Education, TMCEC

The following decisions and opinions were issued between the dates of October 1, 2010 and October 1, 2011.

I. Constitutional Issues

A. 1st Amendment

The 1st Amendment precludes tort liability for people who picket military funerals.

Snyder v. Phelps, 131 S. Ct. 1207 (2011)

The U.S. Supreme Court, in an 8-1 decision with the majority opinion written by Chief Justice Roberts, once again reminds us that the protections provided by the 1st Amendment supersede even the most popular legislative enactments where such enactments infringe on even the most unpopular free speech. Justice Alito's dissenting opinion resonates with popular sentiment: the 1st Amendment should not be a license for vicious verbal assaults against a nonpublic figure whose son was killed while serving his country in Iraq.

Commentary: The State of Maryland created a tort (intentional infliction of emotional distress) stemming from disruption of funeral processions. The "third rail shock" of such 1st Amendment case law is when any form of legislative enactment focuses on the context or content of communication. Regardless if the enactment is civil or criminal in nature, passed by a state legislature or city council, heightened standards apply when the enactment pertains to free speech in a public place relating to matters of public interest. In explaining how the Maryland law violates the 1st Amendment, the majority opinion, laden with qualifiers and explanations of precedent, thinly veils its scorn for the repugnant conduct of the members of the Westboro Baptist Church. Justice Breyer's concurring opinion serves as a qualifier that the opinion does not mean that the state is always powerless to provide private individuals with necessary protection. In this instance, however, the picketers complied with all lawful requirements. Although offensive, the picketers were not disorderly.

B. 4th Amendment

1. Technology

A peace officer executing an arrest warrant while the defendant was using his cell phone had the right to perform a warrantless search of the phone and read any text messages contained on the phone.

United States v. Curtis, 635 F.3d 704 (5th Cir. 2011)

Defendant was arrested along a roadside on a Harris County warrant alleging that he made a false statement to obtain credit. Relying on its earlier holding in *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007), the officer could view the

text messages both at the time of his roadside arrest and after processing the prisoner as a search incident to arrest.

Commentary: The defendant in this case likely thought he was initially being pulled over for a traffic violation, and had no clue that his arrest on the Harris County warrant was merely a pretext charging him with conspiracy to commit mortgage fraud. The defendant left his cell phone on the console of the car as he exited the vehicle. Shortly thereafter, two incriminating text messages were received on his phone.

The search and seizure of a cell phone is a topic of ever-growing importance, but remains murky and piecemeal absent an opinion from the Supreme Court. In this case, the 5th Circuit Court of Appeals continues to gradually push the matter forward.

Do you have a smart phone? Does your phone “auto lock” and require a password? Is entering a password too much of a hassle and inconvenience? If you answered “yes” to each of these questions, perhaps you should reconsider if you put a premium on your expectation of privacy. Welcome to the brave new world of search and seizure in the digital age.

A person with consent to drive another person’s car had no standing to challenge the placement of a GPS tracking device, and the attachment of the device did not constitute a warrantless search.

United States v. Hernandez, 647 F.3d 216 (5th Cir. 2011)

Commentary: This case is another sign of the times. Thanks to technology, we have entered a new era of 4th Amendment case law. Notably in this case, the defendant had standing to challenge the **use** of a GPS device by the government because he drove his brother’s pickup with consent; however, he did not have standing to challenge the **placement** of the device because the pickup belonged to his brother. The 5th Circuit Court of Appeals rejected the argument that a search warrant was required prior to the surreptitious placement of the GPS device in part due to the nature of the device. Rather than sending a perpetual signal and providing a specific location, the “slap on” tracker used an intermittent signal which only provided locations within 50 yard radius.

2. Search Warrants

An appellate court improperly engages in hyper-technical review of a search warrant affidavit when it strictly applies rules of grammar and syntax in its analysis and bases its opinion on implications found within a warrant affidavit, rather than deferring to any reasonable inferences the reviewing magistrate could have drawn from the affidavit.

State v. McLain, 337 S.W.3d 268 (Tex. Crim. App. 2011)

The majority opinion concludes that the magistrate could infer that informant saw defendant with contraband within 72 hours of signing the search warrant affidavit in which affiant testified (“In the past 72 hours, a confidential informant advised the Affiant that [defendant] was seen in possession of a large amount of methamphetamine at his residence and business.”).

Commentary: On one hand, this opinion seems fact specific and adds nothing new. A magistrate’s determination of a probable cause affidavit is to be reviewed in a non-technical, real world manner. On the other hand, this case reminds us that words have different meaning depending on their sequence and grammar is technical.

In a lone dissent, Judge Johnson reminds us that just as courts are bound by the plain language of a statute passed by the Legislature, reviewing courts should be bound by what affiants actually write down and that the latter is hardly second guessing the magistrate’s determination, but rather taking the affiant/peace officer to mean what he says.

Certainly, cases like this and *Jones v. State*, 338 S.W.3d 725 (Tex. App.—Houston [1st Dist.] 2011) (use of “recently” in search warrant affidavit was insufficient to justify search warrant issuance) are a reminder that peace officers should be as specific as possible in providing time references.

A blood search warrant is not presumptively invalid when the affidavit contains the date but not the time of the observations that led the officer to conclude the defendant had committed a DWI.

State v. Jordan, 342 S.W.3d 565 (Tex. Crim. App. 2011)

Commentary: As explained in the October 2010 issue of *The Recorder*, this is an important case because the Austin Court of Appeals took a diametrically opposite position to Houston's 14th District Court of Appeals in *State v. Dugas*, 296 S.W.3d 112 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

Here, the Court of Criminal Appeals unanimously reversed the Austin Court of Appeals holding that evidence from a blood test was properly suppressed by a Travis County court-at-law judge under Article 18.01(c) of the Code of Criminal Procedure because the warrant affidavit did not state the time and date of the underlying events and there were no facts from which the municipal judge, in his role as a magistrate, could reasonably infer that a sufficiently short period of time had passed and that alcohol would still be in the defendant's blood.

The Austin Court of Appeals erred in failing to consider the totality of the circumstances contained within the four corners of the affidavit in reviewing the magistrate's basis for determining probable cause. Under the circumstances of this case, it was a reasonable inference that the observations occurred on the same date that the offense was alleged to have occurred. Blood warrants are no different than other search warrants in that magistrates are allowed to interpret a search warrant affidavit in a non-technical, common-sense manner and are allowed to draw reasonable inferences from the facts and circumstances contained within its four corners. (In a concluding endnote Judge Womack, nevertheless, states the better practice is for affiants to specify the times of critical events described so that magistrates have more precise information with which to determine probable cause.)

More recently, a different Travis County court-at-law judge suppressed evidence resulting from a blood draw because the affidavit did not specify what the blood would be used for after being drawn from the defendant's body. The Austin Court of Appeals reversed the trial court's ruling explaining that it relied on a hyper-technical construction of the affidavit. The court relied on the Court of Criminal Appeals ruling in *Jordan* and also cited *Dugas*. See, *State v. Webre*, 347 S.W. 3d 381 (Tex. App.—Austin 2011).

County court-at-law judges in their capacity as magistrates do not have authority to issue blood search warrants for execution in another county.

Sanchez v. State, 2011 Tex. App. LEXIS 3824 (Tex. App.—Houston [1st Dist.] May 19, 2011)

Commentary: While district judges, in their roles as magistrates, have authority to issue search warrants for execution in any county in the state, justices of the peace and county court-at-law judges, in their role as magistrates, are restricted to their counties.

Interestingly, this case relies on federal case law for the proposition that a district judge as a magistrate has the authority to issue a search warrant statewide and *Gilbert v. State*, 493 S.W.2d 783 (Tex. Crim. App. 1973) for the proposition that a search warrant from a justice court can be executed anywhere in the county in which the justice court is located. What the court of appeals does not state, but it is important to note, is that the *Gilbert* case actually had to do with the authority of a municipal judge in Hedwig Village (which is located in Harris County) to issue a search warrant to be executed outside Hedwig Village but still within Harris County. Hence, municipal judges are not magistrates for their municipality, but rather for any county in which their municipality is located. Accordingly, this case can be construed, albeit indirectly, to stand for the proposition that under Article 18.01 of the Code of Criminal Procedure, municipal judges do not have authority to issue blood search warrants for execution in a county in which no portion of their city is located.

A peace officer executing a blood draw warrant in a non-medical environment does not necessarily violate the 4th Amendment.

State v. Johnston, 336 S.W.3d 649 (Tex. Crim. App. 2011)

Commentary: This case presents the very question that the Supreme Court did not address in *Schmerber v. California*,

384 U.S. 757 (1966). The blood draw was not taken by medical personnel or in a medical environment. It was taken by Dalworthington Garden police officers in a DWI investigation room located in the police station. The State really could not have asked for better facts to litigate in the case. Law enforcement went through the steps to properly procure a search warrant for the defendant's blood. The defendant attempted to resist the drawing of her blood. The peace officer who drew the blood had 16 years of experience as an EMT. He and the other peace officer who assisted in executing the warrant were certified by a local emergency room physician as venipuncture technicians.

In *Beeman v. State*, 86 S.W.3d 613 (Tex. Crim. App. 2002), the Court of Criminal Appeals held that Chapter 724 of the Transportation Code is inapplicable when there is a warrant to draw blood; therefore, compliance with Chapter 724 is not necessary to satisfy the 4th Amendment. Accordingly, whether a blood draw is conducted pursuant to a warrant or not, the assessment of reasonableness is purely a matter of 4th Amendment law. Compliance with Section 724.017 is one way to establish reasonableness under the 4th Amendment, but is not a litmus test.

The circumstances and location where blood is drawn will be examined on a case by case basis. Judge Johnson in a concurring opinion made it clear that the Court had not held that a blood draw, done on the side of the road at the rear of a police car, is properly "taken in a sanitary place" per Section 724.017(a).

A blood warrant may be issued based upon a sworn oath in support of an affidavit being submitted by telephone or facsimile.

Hughes v. State, 334 S.W.3d 379 (Tex. App.—Amarillo 2011)

Commentary: This is an important case that is easily misconstrued. This case is about the proper administration of the oath, not about whether a search warrant can be sworn to by telephone or facsimile. The essence of the defendant's argument was that language on the blood warrant stated that it was issued upon the personal presentation of the probable cause affidavit sworn to before the magistrate when actually no such personal appearance before the magistrate ever occurred. Rather, a peace officer swore to the truth of the probable cause affidavit before another peace officer acting as a notary public. The sworn oath in support of the affidavit was then presumably faxed to the magistrate, who determined the existence of probable cause and issued a warrant that contained the standard, albeit archaic, language that has appeared on search warrants for more than 200 years. Without fleshing out all of the mechanics of how the warrant was procured, the Amarillo Court of Appeals rejected the argument as being an unsubstantiated technical assault.

It is emphasized: this case does **not** support or authorize search warrant affidavits being sworn to over the phone. In fact, in an unpublished decision, the Tyler Court of Appeals concluded that where the oath was taken solely over the telephone and not physically in front of any officer authorized to administer oaths, the presence requirement is not met and a blood warrant is invalid. *Aylor v. State*, 2011 Tex. App. LEXIS 3274 (Tex. App.—Tyler Apr. 29, 2011).

Blood warrants are invalid where probable cause affidavits fail to provide the magistrate a substantial basis for concluding that there is probable cause that a person has committed DWI or that evidence of intoxication would be found in the person's blood.

Farhat v. State, 337 S.W.3d 302 (Tex. App.—Fort Worth 2011)

The trial court entered the following finding of fact:

At about 12:50AM on January 11, 2009, Corporal Patrick Finley of the City of Highland Village Police Department was [traveling] westbound in the 1900 block of Justin Road in Denton County, Texas when he observed a vehicle traveling at 30 MPH in a 40 MPH zone. He further observed that the vehicle was weaving from side to side and travelled in the left lane of traffic (a reasonable interpretation being that he was driving in the wrong lane, to wit: the oncoming lane) for approximately one-half a mile. The Officer stopped the vehicle, identified as a BMW with dealer plates, in a parking lot at 2180 Justin Road. Upon contacting the driver, the Officer observed two pill bottles in the console, and asked the driver, identified as Samuel David Farhat to step out of the vehicle. The driver refused to participate in roadside tests to determine intoxication. The Officer, suspecting the driver may be intoxicated, based on the erratic driving behavior, the pills in the console, and the Officer's opportunity to personally observe the driver, subsequently placed the driver under

arrest. Corporal Finley further sought and obtained a search warrant for the driver's blood from a qualified magistrate.

Commentary: Failure to specify what he observed when the officer had an “opportunity to personally observe the driver” was deemed by the court of appeals to be the fatal flaw in the affidavit. This is the reason why peace officers are trained to include evidence of intoxication, such as odor of alcohol on one’s breath or body, bloodshot eyes, slurred speech, unsteady balance, and a staggered gait.

This opinion is an important reminder that a magistrate’s probable cause determination cannot be a mere ratification of a peace officer’s conclusions.

The peace officer’s repeated use of undefined acronyms did not render his blood draw warrant affidavit defective.

Hogan v. State, 329 S.W.3d 90 (Tex. App.—Fort Worth 2010)

The appellant asserted that the affidavit was defective because it described the driving path of an “IMP,” but did not explain to the magistrate what “IMP” means and did not explicitly state that appellant was driving the “IMP” or otherwise operating a motor vehicle. The officer also used “HGN,” “WAT,” and “OLS” without defining those acronyms or explaining the significance of the number of “clues” as related to the acronyms. While the affidavit could have been clearer, in according substantial deference to the magistrate’s determination, the acronyms did not prohibit the magistrate from being able to reasonably infer that appellant drove the vehicle described in the affidavit.

3. Reasonable Suspicion

The trooper unconstitutionally prolonged the suspect’s detention by asking irrelevant and unrelated questions without reasonable suspicion of criminal activity, and thus violated the 4th Amendment.

United States v. Macias, 2011 U.S. App. LEXIS 19647 (5th Cir. Sept. 27, 2011)

Macias was stopped for not wearing his seatbelt. After stopping the car, he discovered that the teenage female passenger was also not wearing her seatbelt and the vehicle had no proof of financial responsibility. Macias was asked to get out of the vehicle and was questioned for 11 minutes. The questions were unrelated to the seatbelt violation stop. The trooper returned to his car, checked for warrants, and discovered Macias’ extensive criminal record. When he returned to Macias, he issued Macias citations and returned Macias’ driver’s license. He did not inform Macias that he was free to go and continued to hold the passenger’s identification card. He began questioning Macias again and ultimately obtained permission to search the vehicle, where drug paraphernalia and other contraband were discovered. (All of this occurred in the course of 47 minutes.) The court of appeals concluded that even if Macias’ actual consent was voluntary, such consent was not an independent act of free will. In absence of other evidence, the judgment of the trial court was reversed and an acquittal was ordered.

The defendant’s non-criminal behavior (grinning and staring) was enough to justify an investigative stop without reasonable suspicion of a particular offense.

Derichsweiler v. State, 2011 Tex. Crim. App. LEXIS 112 (Tex. Crim. App. Jan. 26, 2011)

Commentary: Strange things were afoot at 8 p.m. on the evening of December 31st, 2006 at McDonald’s in Lewisville, Texas (you know, the one adjacent to the Wal-Mart). Joe and Joanna Holden were driving through the drive-thru when an unknown man inexplicably pulled up next to them and began grinning and staring at them. This lasted for about 30 seconds to half a minute. After they placed their order, the Holdens were asked to pull out of the drive-thru lane while their food was being prepared. When they did so, they once again noticed the grinning stranger staring at them. This seemed to last for 15 to 20 seconds, after which the man circled the restaurant and then pulled up behind, and to the left side of, the Holden’s car (not quite blocking them in). He renewed his grinning and stared at them for about the same duration, maybe a little longer. The Holdens felt threatened and intimidated by the man’s peculiar conduct. They suspected that there might be a robbery in progress or that they were themselves being sized up or stalked. Joanna insisted that Joe call 911 and report the encounter. Joe did so and reported the car as being a small gray car with license plates 971-MPM. The grinning man left the McDonald’s and drove into the parking lot of the adjacent Wal-Mart. Shortly thereafter,

led by rookie Lewisville Police Officer Wardel Carraby, the police surrounded the suspect's car; Carraby approached it and contacted the driver, whom he identified in court as Derichsweiler. When Derichsweiler rolled down the driver's side window, the officer smelled a strong odor of alcoholic beverage coming from the vehicle, and he began a DWI investigation that culminated in Derichsweiler's prosecution. Because of two prior DWI convictions the jury, under enhanced sentencing provisions, sentenced Derichsweiler to 47 years in prison.

The court of appeals found that the trial court erred when denying the defendant's motion to suppress because Officer Carraby did not have reasonable suspicion when he and other officers detained Derichsweiler by "blocking in" his vehicle with their police vehicles. (Presumably, the officer should have first personally observed the behavior of the suspect to develop his own basis for stopping the vehicle or dispatch should have provided the officer with more detailed information justifying a stop.)

The Court of Criminal Appeals' 7-2 opinion is thought-provoking. It authorizes information known only by police dispatch to be imputed to a detaining officer. The majority makes it clear that reasonable suspicion, unlike probable cause, does not have to be associated with any specific offense. Accordingly, under the totality of the circumstances, Officer Carraby was justified in stopping Derichsweiler. Presiding Judge Keller, in her concurring opinion, states that state and federal precedent requires that a peace officer have reasonable suspicion that a person (1) is, (2) has been, or (3) **soon will be** committing an offense. Judge Keller believes that Carraby was legally justified to stop Derichsweiler as he had reasonable suspicion that Derichsweiler would soon be committing an offense.

In a dissenting opinion, Judge Meyers (joined by Judge Johnson) opines that the court of appeals got it right: Officer Carraby had no specific, articulable facts from which to develop reasonable suspicion. While the stop may have been justified under a community caretaking theory, which was not asserted in the trial court, the dissenting members of the Court were not buying into the notion that a person can be stopped on the basis of "anticipatory illegal behavior" (in this case, grinning).

The dissenting opinion claims the majority has changed in the law in Texas. Yet, it says so while taking a jab at "anticipatory illegal behavior," which seems more applicable to the concurring opinion. Rest assured, this case will be relied on by law enforcement and prosecutors. Stay tuned. This may set the stage for a more extensive discussion of the meaning of "soon will be committing an offense." (Have you ever seen the movie *Minority Report*?)

The opinion also stresses the important role a police dispatcher potentially plays in a peace officer executing a lawful stop. The legality of a stop very well can come down to how much information is obtained and conveyed by the dispatcher prior to the stop. Contrast this opinion with *Martinez v. State*, 2011 Tex. Crim. App. LEXIS 912 (Tex. Crim. App. June 29, 2011), where insufficient information about bicycles being stolen was relayed to the dispatcher, and there was, thus, nothing for law enforcement to corroborate.

Although Texas law provides alternative ways to establish financial responsibility, a peace officer's use of an electronic data base that reveals that a car is uninsured does give rise to reasonable suspicion to stop the vehicle to ascertain if a criminal offense has occurred.

Crawford v. State, 2011 Tex. App. LEXIS 3609 (Tex. App.—Houston [1st Dist.] May 12, 2011)

Commentary: Local trial court prosecutors have been waiting for a published decision standing for the proposition that accessing TexasSure (the State's insurance verification system) via a patrol car's Mobile Data Terminal (MDT) gives rise to reasonable suspicion.

How did the court of appeals reach its decision? In *United States v. Cortez-Galaviz*, 495 F.3d 1203 (10th Cir. 2007), the federal appellate court held that the officer had reasonable cause to stop a vehicle and briefly detain its driver where the computer database report on the vehicle stated that it was uninsured. The court of appeals also cites *Foster v. State*, 326 S.W.3d 609, 612-14 (Tex. Crim. App. 2010) for the proposition that the mere fact alternate methods exist to satisfy the Transportation Code's financial responsibility requirement does not render the stop unreasonable where the officer relies on information obtained from a MDT. (In *Foster*, handed down in December 2010, the Court of Criminal Appeals held that, among other circumstances, lurching motion of the truck supported reasonable suspicion for stop despite plausibility

of innocent explanation for truck's erratic movements.)

Judge Meyers would have granted review of this case. The Court of Criminal Appeals' newest member, Judge Elsa Alcala, was a member of the panel of the 1st District Court of Appeals that issued this opinion. Accordingly, she did not participate in reviewing the PDR for this case.

Where a peace officer had reasonable suspicion that a person was violating the city's sound ordinance, the officer was justified in stopping the person's vehicle, where he subsequently observed a seatbelt violation for which the defendant was arrested and that culminated in the discovery of contraband.

In re A.S., 2011 Tex. App. LEXIS 2519 (Tex. App.—San Antonio Apr. 6, 2011)

Commentary: This is a good illustration of an ordinance being used in a daisy chain series of pretexts culminating in a lawful search and seizure. Notably proof of an actual violation of the City of San Antonio's sound ordinance was not required to justify an investigatory stop.

Absent additional information and despite testifying that he knew that "gang members like to fly their colors," the peace officer did not have reasonable suspicion merely by observing four youths with blue rags hanging from their pockets and walking at night behind a strip mall.

Parks v. State, 330 S.W.3d 675 (Tex. App.—San Antonio 2010)

By shining a spotlight on the youths, and using an authoritative tone of voice to ask them to walk over and place their hands on the patrol vehicle, and by the youths submitting to the request, the officer engaged in more than a mere encounter and unlawfully detained the youths. Subsequently discovered incriminating evidence was deemed inadmissible.

4. Inventory Searches

The trial court properly ruled that the inventory search was unjustified and invalid.

State v. Molder, 337 S.W.3d 403 (Tex. App.—Fort Worth 2011)

While the majority opinion addresses the need to conform to standardized written policy when conducting inventory searches, the concurring opinion stresses that because of the proximity of the vehicle from the site of the arrest, there was no need for an inventory of the vehicle's contents.

The arresting officer was at a gas station visiting with a station employee. The employee received a call from defendant. The officer heard defendant threaten the employee. The officer went to the motel where defendant was staying. Defendant was arrested for assault by threat. The officer took an inventory of defendant's truck, which was parked and locked in a private lot. The officer found contraband in a cigarette box in the truck. Defendant was charged with possession of the contraband. The trial court granted his motion to suppress the evidence found in his truck. On appeal, the court of appeals found that because the evidence was found within a closed container, and the State did not meet its burden of showing the legality of the inventory of that container the trial court did not err in granting the motion to suppress. The officer's testimony, the only evidence presented at the suppression hearing, failed to show any particular standardized criteria or routine concerning the scope of the inventory per DPS policy for closed containers.

5. Exclusionary Rule

Searches conducted in objectively reasonable reliance on federal precedent case law are not subject to the Exclusionary Rule.

Davis v. United States, 131 S. Ct. 2419 (2011)

Commentary: For proponents of the Exclusionary Rule, this is another disappointing opinion from the U.S. Supreme

Court. While this case has no direct bearing on Texas' statutory Exclusionary Rule (Article 38.23 of the Code of Criminal Procedure), it is easy to imagine how it may be adapted for argumentation by Texas prosecutors.

In a 7-2 decision, the majority opinion explains that application of the Exclusionary Rule makes no sense because suppression would not deter police misconduct and would be expensive in terms of truth and safety. Justices Breyer and Ginsberg, dissenting, opine that the majority has created a new good faith exception that is incompatible with the Court's other opinion regarding retroactive application of precedent.

6. Consent to Search

After a defendant terminated his initial consent to search the premises, police officers were not legally on the business premises at the time the officers conducted a dog sniff around the defendant's van, which was not parked in a public parking lot or on any part of the business premises open to the public.

State v. Weaver, 2011 Tex. Crim. App. LEXIS 1320 (Tex. Crim. App. Sept. 28, 2011)

In a 5-4 decision, Judge Cochran, writing for the majority, concluded that the defendant's initial consent to search the premises was terminated after he unequivocally refused to consent to any further search of his van.

Presiding Judge Keller, dissenting, writes that no 4th Amendment violation occurred because a dog sniff is not a search. Weaver did not consent to law enforcement's presence on the premises. Judge Keasler, dissenting, would remand the case for a fact determination on whether the van was parked in a public lot.

It is reasonable for police to believe that a person who answers the door of a residence in the middle of the night has authority to invite police to enter even if the person is 13 years old and it is 2 a.m.

Limon v. State, 340 S.W.3d 753 (Tex. Crim. App. 2011)

Commentary: The authority of a person to consent to police entry may be either actual or perceived and is determined on a case by case basis. The determination is made based on a preponderance of the evidence and is reviewed as a mixed question of law and fact. In absence of findings of fact, appellate courts view the evidence in the light most consistent with the court's ruling on the ultimate question. That is exactly what happened here. Perhaps the ruling would have been different if findings of fact had been included in the record.

Judge Meyers dissenting opinion explains that nobody gives a teenager permission to allow strangers into their home at 2:00 in the morning. The police should presume that minors have no authority to consent to entry and should ask to speak to an adult. If no adults are available, then the officers need to get a warrant (and possibly call CPS).

7. Excessive Force

Eight Taser "drive stuns" (one lasting 20 seconds) to the groin of a defendant in custody for Class C warrants was excessive and unreasonable despite law enforcement suspicion that the defendant had crack cocaine in his mouth that could have proven potentially fatal if digested.

Hereford v. State, 339 S.W.3d 111 (Tex. Crim. App. 2011)

In a "drive stun" the officer removes the wire firing cartridge, places the Taser gun directly against the target's body, and pulls the trigger to give a jolt of electricity to a concentrated area of the body.

Petition for Discretionary Review (PDR) was granted in this case because the State asserted that it presented an important issue of state or federal law that has not been, but should be, settled by the Court of Criminal Appeals. However, it is more likely to be chalked up as a documented win for critics who claim that there is inadequate attention to law enforcement's abusive use of Tasers.

8. Check Points

Evidence was not illegally obtained where a K-9 unit was present at a checkpoint for checking drivers' licenses and insurance.

Lujan v. State, 331 S.W.3d 768 (Tex. Crim. App. 2011)

Police officers may act upon information properly learned at a checkpoint stop even where such action may result in the arrest of a motorist for an offense unrelated to that purpose, as long as the primary purpose of the checkpoint is lawful.

In a concurring opinion, Judge Johnson agrees with the dissent that the presence of a K-9 unit undermines the legitimacy of the checkpoint, but believes that the contraband would have inevitably been discovered in the defendant's care after he was arrested for admitting that he had no driver's license.

Judge Meyers, in a dissenting opinion, states that the presence of the K-9 unit undermines the contention that the checkpoint was for driver's license and insurance verification purposes and not for prohibited general law enforcement purposes.

9. Plain View Doctrine

So long as the probable cause to believe an item in plain view is contraband arises while the police are still lawfully on the premises, and their further investigation into the nature of those items does not entail an additional and unjustified search of, or presence on, the premises, the seizure of those items is permissible under the 4th Amendment.

State v. Dobbs, 323 S.W.3d 184 (Tex. Crim. App. 2010)

Commentary: This case abandons the Court of Criminal Appeals' prior holding in *White v. State*, 729 S.W.2d 737 (Tex. Crim. App. 1987). In *White*, the Court construed the plain view doctrine to require additional probable cause to further investigate and develop the probable cause if a peace officer did not instantly recognize the item as contraband. Under prior case law, a warrantless seizure of an item is lawful under the Plain View Doctrine when three requirements are met: (1) law enforcement officers must lawfully be in a place where the item can be viewed in plain sight; (2) it must be **immediately apparent** to the officers that the item constitutes evidence, fruits, or instrumentalities of a crime; and (3) the officers must have the lawful right to access the object. Without dissent, the Court in *Dobbs*, subject to certain conditions, loosens the immediately apparent requirement.

Commentary: This opinion makes the Texas Plain View Doctrine more consistent with federal case law.

C. 5th Amendment

1. Double Jeopardy

The judge in a misdemeanor jury trial erred in determining manifest necessity for a mistrial where the defendant objected and wished to proceed to trial with fewer than six jurors. Double Jeopardy hence applied.

Ex parte Garza, 337 S.W.3d 903 (Tex. Crim. App. 2011)

The federal case law is clear. The 6th and 14th Amendments confer upon an accused in state court a constitutional right to insist on the verdict of a jury composed of at least six members. However, such cases do not speak to whether the accused may opt to affirmatively **waive** that right, at his election, as occurred in this case. State law does not prohibit such a waiver of a full jury in county court. A trial court must be considerate of the defendant's valued right to proceed to verdict with the jury originally selected. Failure to do so is an abuse of discretion when, as in this case, the trial court does not first entertain every reasonable alternative.

Commentary: This opinion is fact driven. Nevertheless, there is no reason to doubt its applicability to municipal court

proceedings. How many defendants or their attorneys will want to proceed to trial with only five jurors? The answer is undoubtedly more if they have read this opinion.

2. *Miranda* Warnings

The age of a child subject to police questioning is relevant to the “custody analysis” of *Miranda*.

J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011)

In a 5-4 decision, the U.S. Supreme Court injects a new variable—age—in determining whether a person is in custody for purposes of receiving the warning required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The majority opinion, written by Justice Sotomayor, states that it is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. If a child’s age is known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of *Miranda*. Seeing no reason for police officers or courts to blind themselves to that common sense reality, the majority holds that a child’s age properly informs the *Miranda* custody analysis.

The dissenting opinion, written by Justice Alito, celebrates *Miranda* for its clarity and simplicity in application and then explains how the majority opinion, while reasonable on its surface, provides no guidance for judges, prosecutors, or defense attorneys and is most likely to eventually erode *Miranda* by imposing a standard that will only muddy the water.

Commentary: This case notably involved a 13-year-old, 7th grade student. The child had been seen near a home where a digital camera was stolen. The camera was retrieved at the school. There were reports that the child had been seen with the camera on school grounds. In conjunction with investigators, a school resource officer, on more than one instance, took the child out of class for questioning regarding the burglary and stolen camera. References in the majority opinion about the legal system not treating children as merely small adults are particularly thought provoking in light of the recent attention Texas has received for issuing citations to children.

D. 6th Amendment

1. Public Trial

A prison inmate’s right to a public trial was not violated when court proceedings were conducted in the prison chapel.

Lilly v. State, 337 S.W.3d 373 (Tex. App.—Eastland 2011)

The defendant, a prison inmate, was charged with assault. After being arraigned in the prison chapel he moved that subsequent proceedings be conducted publically at the county courthouse. His motion was denied. In absence of evidence that anyone was prevented from attending his trial or that anyone was dissuaded from attempting to attend the trial because of its location, there was no violation of the 6th Amendment, Article I § 10 of the Texas Constitution, or Article 1.24 of the Code of Criminal Procedure. Conducting court proceedings in the prison chapel did violate the Establishment Clause of the 1st Amendment but was harmless error because it did not contribute to the defendant’s decision to plead guilty.

Commentary: While it is unknown if any municipal court proceedings are being conducted in church chapels, it has become a time-honored tradition for municipal and justice courts to conduct criminal proceedings from behind bars (see, “Jail House Pleas: Is *Rothgery* a Tap on the Shoulder or a ‘Fly in the Ointment’ of Local Trial Court Expediency,” *The Recorder* (August 2010)). This case indirectly provides more food for thought about the legal issues surrounding the practice. In considering how this case relates to jail house pleas in Class C misdemeanors, keep the following in mind: (1) the defendant had a meaningful opportunity for assistance by legal counsel; and (2) the Texas Legislature has expressly authorized district judges to “hear a nonjury matter relating to a civil or criminal case at a correctional facility in the county in which the case is filed or prosecuted if a party to the case or the criminal defendant is confined in the correctional facility.” See, Article 24.012(e) of the Code of Criminal Procedure. (Why don’t municipal and justice courts seek legislative authority that balances the interest of efficiency with 6th Amendment concerns?)

The Court of Criminal Appeals has granted PDR on both the public trial and Establishment Clause issues presented in this case. It may provide insight to how an appellate court would analyze an appeal stemming from a “jail house plea.”

2. Assistance of Counsel

Although a court generally has no duty to appoint counsel to a non-indigent defendant, there may be circumstances in which a court may do so when the interests of justice so require.

Tex. Att’y. Gen. Op. GA-884 (9/7/11)

A court may require a defendant, in an order of community supervision, to pay attorney fees according to the county’s schedule of fees established under Article 26.05 of the Code of Criminal Procedure, regardless of the county commissioners court’s contract with individual attorneys.

Per Article 26.05(g), funds paid under an order of supervision should be deposited as court costs regardless of the amounts agreed to in a contract by the commissioners court and the individual attorneys.

Commentary: Without regard to Article 26.05, which pertains to the compensation of counsel appointed to defend, the request for this opinion also cites Article 1.051 of the Code of Criminal Procedure, which allows for the appointment of counsel in any criminal proceeding if the court concludes that the interest of justice requires representation. There is no reason to doubt the authority of a municipal court or justice court to make such an appointment (see, “The Oversimplification of the Assistance of Counsel in the Adjudication of Class C Misdemeanors in Texas,” *The Recorder (January 2009)*).

This opinion, however, raises an interesting related question: under what circumstances, if any, can a non-indigent defendant accused of a Class C misdemeanor who is appointed counsel “in the interest of justice” be assessed related costs?

3. Batson Challenges

Because the State failed to demonstrate a clear and reasonably specific, legitimate race-neutral reason for its peremptory strikes of the specified two African American venire members, the municipal court’s determination was clearly erroneous as to the two peremptory strikes.

Hassan v. State, 346 S.W.3d 234 (Tex. App.—Houston [14th Dist.] 2011)

Commentary: Yet another installment in a recent string of *Batson* challenges made in Houston’s municipal courts. See, also, *Kassem v. State*, 263 S.W.3d 377 (Tex. App.—Houston [1st Dist.] 2008); *McQueen v. State*, 329 S.W.3d 255 (Tex. App.—Houston [14th Dist.] 2010).

What is not readily apparent from this opinion, but that should be emphasized to judges and prosecutors in high volume municipal courts of record, is the challenges that come when a case is sent back from an appellate court so that a *Batson* hearing can be conducted. The passage of time, volume of cases, changes in prosecutor personnel, deficient notation, and lack of recollection potentially make conducting such a hearing very difficult. In this case, the complaint was filed more than half a decade ago (7/25/2005).

The noted trend toward sending *Batson* challenges back for evidentiary hearings in the trial court has been the subject of recent scholarship. See, “Criminal Law: The Proper Remedy for a Lack of *Batson* Findings: The Fall-Out from *Snyder v. Louisiana*,” 101 J. Crim. L. & Criminology 1 (Winter 2011). One of the cases originating from the Houston Municipal Courts is mentioned in an endnote.

4. Crawford Issues

The U.S. Supreme Court held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause “would not

have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.”

- *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) In a 5-4 decision, a majority of the U.S. Supreme Court held that the Confrontation Clause does not permit prosecutors to introduce a laboratory report containing a testimonial certification through in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. The dissent claims that the majority’s application of *Crawford* imposes an undue burden on prosecutors and that requiring the actual analyst to testify is a “hollow formality.”
- *Wisser v. State*, 2011 Tex. App. LEXIS 3334 (Tex. App.—San Antonio May 4, 2011) - *Crawford* is inapplicable to probation revocation proceedings because they are administrative and not criminal in nature.

5. Ineffective Assistance of Counsel

It has been nearly two years since the U.S. Supreme Court ruled in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) that a lawyer representing an alien charged with a crime has an obligation to tell the client that a guilty plea carries a risk that he will be deported. Last December it was explained that for years, most states, including Texas, have viewed deportation as a possible collateral consequence of being convicted of a crime, not as part of the penalty. *Padilla* eliminated any such distinction and the burden on defense attorneys was increased as the notion of providing effective assistance of counsel became enhanced. Once again, it is emphasized that *Padilla* does not directly pertain to judicial admonishments or defendants proceeding pro se. While the Court of Criminal Appeals has not yet granted a PDR on a *Padilla* claim it is just a matter of time. Here are some related holdings from various courts of appeals:

- *Ex parte De Los Reyes*, 2011 Tex. App. LEXIS 7166 (Tex. App.—El Paso Aug. 31, 2011) - Counsel rendered ineffective assistance by failing to adequately admonish a permanent resident about the immigration consequences of his guilty plea. *Padilla* applies retroactively in post-conviction habeas proceedings. Although the plea papers stated the possibility of deportation, the defendant, a permanent resident, was not advised by his attorney that deportation was a virtually inevitable consequence of his plea to a second theft offense.
- *Ex parte Tanklevskaya*, 2011 Tex. App. LEXIS 4034 (Tex. App.—Houston [1st Dist.] May 26, 2011) - *Padilla* applies retroactively. Trial counsel rendered ineffective assistance when he failed to specifically inform a lawful permanent resident that a guilty plea to a Class B misdemeanor would render her presumptively inadmissible and her removal upon returning to the United States was “presumptively mandatory” and “virtually certain.” Furthermore, the trial court’s statutory admonishment did not cure any prejudice arising from counsel’s inadequate advice.
- *Ex parte Rodriguez*, 2011 Tex. App. LEXIS 3726 (Tex. App.—San Antonio May 18, 2011) - Defense counsel did not render ineffective assistance because he failed to adequately advise the defendant about the immigration consequences of his plea. The defendant failed to establish under *Padilla* that the deportation consequence for the misdemeanor assault conviction was clear.

E. 14th Amendment

1. Sufficiency of Evidence

Texas appellate courts will no longer be conducting factual sufficiency review of the evidence.

Brooks v. State, 323 S.W.3d 893 (Tex. Crim. App. 2010)

For nearly 15 years, Texas has had two standards for reviewing the sufficiency of evidence in criminal cases upon appeal. The basic, **legal sufficiency review**, rooted in the 14th Amendment, is the standard from *Jackson v. Virginia*, 443 U.S. 307 (1979). Under the *Jackson* standard, the reviewing court asks, considering all of the evidence in the light most favorable to the verdict, was a jury rationally justified in finding guilt beyond a reasonable doubt?

To provide a secondary safeguard against wrongful conviction, the Texas Court of Criminal Appeals in *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996) adopted a **factual sufficiency review** which permits a finding that the evidence is factually insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust or (2) the adverse finding is against

the great weight and preponderance of the evidence. (Note, that evidence is not viewed in the light most favorable to the verdict.)

In a 5-4 decision, the Court of Criminal Appeals held that the *Jackson* legal-sufficiency standard was indistinguishable from the *Clewis* factual-sufficiency standard, and therefore that the *Jackson v. Virginia* standard was the only standard that a reviewing court should apply in determining whether the evidence was sufficient. The Court therefore overruled all other cases to the contrary, including *Clewis*.

Commentary: Many prosecutors have claimed since its inception that *Clewis* created a muddled mess that allowed appellate courts to improperly second guess the verdict of trial courts. Many defense lawyers claimed that the *Clewis* standard was a rarely used safeguard that prevented convictions based on deficient evidence that would not have been prevented if only the *Jackson* standard was utilized. For more insight, I recommend reading two articles: Ricardo Pumarejo, Jr., “Clueless over *Clewis* or: How I Learned to Stop Worrying and Welcome *Brooks v. State*,” 23 App. Advoc. 246 (Winter 2010) or Charles McGarry, “Point of Personal Privilege: In Defense of *Clewis v. State* and the Right of the Innocent to Justice,” 23 App. Advoc. 492 (Spring 2011). (Notably, Mr. McGarry is the Former Chief Justice of the Dallas Court of Appeals who wrote the intermediate appellate courts opinion in *Clewis*.)

2. Brady Evidence

In *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court held that willful or inadvertent suppression by prosecutors of evidence favorable to the accused upon request violates due process where evidence, exculpatory or impeaching, is material either to guilt or punishment.

A prosecutor’s office cannot be held liable for a single *Brady* violation on the theory of inadequate training.

Connick v. Thompson, 131 S. Ct. 1350 (2011)

In a 5-4 decision, Justice Thomas, writing the majority opinion, explained that the failure to train must amount to deliberate indifference to the rights of persons with whom the untrained employees come into contact. Deliberate indifference in this context requires proof that city policymakers disregarded the known or obvious consequence that a particular omission in their training program would cause employees to violate citizens’ constitutional rights. Thompson did not contend that he proved a pattern of similar *Brady* violations, and four reversals by Louisiana courts for dissimilar *Brady* violations in the 10 years before the robbery trial could not have put the district attorney’s office on notice of the need for specific training. Thompson mistakenly relied on a hypothesized “single-incident” liability theory, contending that the *Brady* violation in his case was the “obvious” consequence of failing to provide specific *Brady* training and that this “obviousness” showing can substitute for the pattern of violations ordinarily necessary to establish government culpability.

Justice Ginsburg, writing for the dissent, would uphold the jury’s verdict for the gross, indifferent, and long-continuing violation of Thompson’s fair-trial right which resulted in his 18 years of incarceration (14 years on death row). The Orleans Parish District Attorney’s Office failed to turn over potentially exculpatory blood evidence. Orleans Parish District Attorney, Harry Connick, is not entitled to rely on prosecutors professional training, for Connick himself should have been the principal insurer of that training. Connick was aware of his office’s high turnover rate. He recruits attorneys who are fresh out of law school, and promotes them rapidly through the ranks. Thus, the dissenters opine, he bears responsibility for ensuring that on-the-job training takes place.

Brady applies when the prosecution unintentionally fails to disclose the audio portion of a videotape containing exculpatory statements the defendant made to police.

Pena v. State, 2011 Tex. Crim. App. LEXIS 1319 (Tex. Crim. App. Sept. 28, 2011)

Because the audio portion of the videotape was favorable evidence that was material to Pena’s case and the State failed to disclose such evidence to Pena, despite two requests for the production of the audiotape and its knowledge of the existence of the audio recording, the State violated Pena’s constitutional rights as expressed in *Brady*. Accordingly,

Pena's conviction was based upon the wrongful withholding of exculpatory evidence and was reversed and remanded.

II. Substantive Law

A. Culpable Mental States

The charging instrument was defective because it failed to allege “with reasonable certainty the act or circumstance which indicates Rodriguez discharged the firearm in a reckless manner.”

State v. Rodriguez, 339 S.W.3d 680 (Tex. Crim. App. 2011)

By only stating the defendant “recklessly discharged a firearm by pulling the trigger on a firearm which contained ammunition and was operable,” the State addressed how he discharged the firearm, but not how the defendant was reckless. Article 21.15 of the Code of Criminal Procedure requires language that sets out the acts relied upon to constitute recklessness.

Commentary: To drafters of penal statutes and prosecutors in Texas (which in municipal court sometimes is one and the same person: your city attorney) consider this opinion to be a public service announcement and a clear warning. Merely alleging that an act is reckless is not enough. You must also allege the circumstances that make the act reckless, even though a penal statute may not require it. As in this case, the task is further complicated when the penal statute is encumbered by what Judge Price describes as “peculiar and confusing” drafting.

The use of a cell phone by a driver, who causes a crash resulting in death, is insufficient to prove culpable mental state for criminally negligent homicide.

Montgomery v. State, 346 S.W.3d 747 (Tex. App.—Houston [14th Dist.] 2011)

At trial, the State presented evidence of defendant's use of a cell phone while driving, her unsafe lane change, and her failure to maintain a proper lookout, placing primary emphasis on cell phone usage. The court of appeals held that the evidence was not sufficient to sustain the jury's finding that defendant acted with the requisite mental state for criminally negligent homicide, noting that using a cell phone while driving was not an illegal activity in Texas, except under very limited circumstances inapplicable to this case. The prosecution failed to present evidence that the defendant's conduct and failure to perceive the risk of her conduct (using a cell phone while driving) amounted to a gross deviation from the ordinary standard of care justifying criminal sanctions. The court of appeals opined that the case did not involve high rates of speed, racing, intoxication, or other clearly egregious conduct, but rather distracted driving and a bad lane change. The additional factor of cell phone usage did not elevate defendant's conduct to criminally negligent homicide in the absence of evidence that there was an increased risk of fatal crashes from cell phone usage and that such risk was generally known and disapproved of in the community.

Commentary: The dissent claims that the majority put an undue burden on the State and ignores that it is well known in 2011 that the use of cell phones while driving increases risk of traffic deaths. The Court of Criminal Appeals granted PDR on September 21, 2011.

B. Health and Safety Code

Lack of definition of “unprovoked” and “attack” by the Legislature did not render Section 822.005(a)(1) of the Health and Safety Code unconstitutionally vague.

Watson v. State, 337 S.W.3d 347 (Tex. App.—Eastland 2011); *Smith v. State*, 337 S.W.3d 354 (Tex. App.—Eastland 2011)

Texas Rule of Evidence 404(b) is inapplicable to the bad acts of a dog. The rule specifically relates to “a person.” Moreover, the dog's prior bad acts were admissible to show that the dog's attack in this case was unprovoked and also, to the extent that appellant knew of the dog's prior bad acts, to show that appellant acted with criminal negligence in failing to secure the dog.

Commentary: The facts of this case are heartbreaking. Seven-year-old Tanner Joshua Monk was mauled to death by a pit bull owned by the two defendants, a husband and wife. A third party gave the defendants the dog after it had killed a neighbor's dog. Tanner was a friend of the defendants' children and was killed after retrieving a toy from their home.

PDR has been granted in both of these cases by the Court of Criminal Appeals. Chapter 822 of the Health and Safety Code (Dogs that are a Danger to Persons) contain the provisions used by municipal courts to order the destruction of dangerous dogs. It is unclear, how an appellate court opinion could affect other provisions in Chapter 822. TMCEC will monitor this case. Even without a Court of Criminal Appeals opinion, many believe, that in the interest of public safety and property rights, the Legislature needs to improve Chapter 822.

C. Penal Code

The evidence was insufficient to convict the defendant for theft of property when the State alleged that the owner was Mike Morales and not Wal-Mart.

Byrd v. State, 336 S.W.3d 242 (Tex. Crim. App. 2011)

In a unanimous decision, the Court of Criminal Appeals held that the State failed to prove the defendant stole any property from Mike Morales, whom it had alleged as the owner of the shoplifted item. Because the State failed to prove that Mike Morales had any ownership interest in the property that the defendant stole, the evidence is insufficient and the defendant is entitled to an acquittal of that specifically charged offense.

Commentary: Mike Morales was the manager at the Wal-Mart. While his name appeared on a police report, the report was not offered into evidence. This is a reminder that prosecutors need to take the time to carefully review their charging instrument in a theft case. It also cites the significant trilogy of Court of Criminal Appeals case law that created a shift in variance law: *Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997) (sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case); *Gollihar v. State*, 46 S.W.3d 243 (Tex. Crim. App. 2001) (when there is variance between the charging instrument and the evidence at trial it is to be measured against a hypothetically correct jury charge, and a variance between the wording of a charging instrument and the trial evidence is fatal only if the variance is material and prejudices the defendant's substantial rights); and *Fuller v. State*, 73 S.W.3d 250 (Tex. Crim. App. 2002) (in determining whether a variance is material, we consider whether the charging instrument offers an accused enough notice of the charged offense to allow preparation of an adequate defense and precludes the accused from being prosecuted later for the same crime).

D. Transportation Code

1. Driver Responsibility Program

Having unpaid surcharges resulting in a driver's license suspension does not preclude the granting of an occupational driver's license.

Wood v. Texas Department of Public Safety, 331 S.W.3d 78 (Tex. App.—Fort Worth 2010)

Wood could not renew his driver's license because he owed \$8,580 in surcharges under the Driver Responsibility Program (Sections 708.002-708.158 of the Transportation Code). He sought an occupational license as he was indigent and could not pay the surcharges. The trial court denied his request. On appeal, the court reversed and remanded.

State law contains an express list of who is ineligible for an occupational driver's license. Indigent persons with surcharges are not on the list. The trial court erred because Section 521.244(a) of the Transportation Code requires a finding as to whether an essential need for an occupational license exists. No such finding was made.

2. Red Light Cameras

Failure to exhaust administrative remedies under Chapter 707 (authorizing use of red light cameras and the imposition of civil penalties) precludes subject matter jurisdiction in a district court to grant a declaratory judgment.

The majority explains that, while it is generally presumed that a district court has jurisdiction to resolve all disputes, that presumption disappears if the Texas Constitution or other law conveys exclusive jurisdiction on another court or administrative agency. Under Chapter 707 of the Transportation Code, municipalities are authorized to establish an administrative process for people who contest penalties stemming from red light cameras. The exclusive jurisdiction for appealing the administrative determination belongs to the municipal court. In this case, Edwards failed to utilize any of the procedures for contesting or appealing the imposition of the civil penalty. Thus, she could not seek relief in district court.

Justice Frost, in a concurring and dissenting opinion, explains that the district court erred in failing to rule on Edward's invalidity claim (asserting that Tomball's red light ordinance is not consistent with, and exceeds the authority granted by Chapter 707 and hence is unenforceable) because of governmental immunity. She explains that if a party sues a municipality and seeks a declaration that a municipal ordinance is invalid, based upon either constitutional or non-constitutional grounds, the Legislature has waived the municipality's governmental immunity. Justice Frost does not believe that Edwards was obligated to exhaust administrative remedies because the Legislature did not authorize either an agency or a municipal court to find a red light camera ordinance to be invalid or unenforceable by means of a declaratory judgment.

Commentary: This is an opinion certainly worth reading. While it does not address it, the opinion references the messiest part of Chapter 707, specifically, Section 707.016(e): "An appeal under this section shall be determined by the court by trial de novo." A "trial de novo" means a new trial. This begs the question, when was the original trial? (No trial has yet to occur.) Is the trial de novo criminal or civil? Would not then, either the rules of criminal or civil procedure apply? If this is an administrative matter would it not make more sense to simply allow a local trial court to conduct a "de novo review" of the hearing officer's determination?

The vagaries in Chapter 707 have resulted in local governments having little direction and making debatable decisions that are memorialized by ordinance. In some cities, once the case is appealed from the hearing officer, the case is re-filed as a criminal case. At least one city wanted its municipal judges to act as administrative hearing officers and saw no problem that the same judges potentially hear the appeal. Cities that cherish their red light camera programs have a vested interest in having deficiencies in Chapter 707 remedied by the Legislature.

3. Automated Traffic Control System

Section 542.2035 of the Transportation Code prohibits a municipal peace officer from using a handheld laser speed enforcement device that also obtains photos of the vehicle, its license plates, or the driver to collect evidence before initiating a traffic stop.

Tex. Atty. Gen. Op. GA-846 (2/28/11)

By enacting Section 542.2035, the Legislature has prohibited a municipality from using any radar device that records the speed of a motor vehicle and obtains one or more photographs or other recorded images of the vehicle, its license plate, or its operator.

Commentary: The only thing more disappointing than this opinion's lackluster effort to construe other possible meanings of "automated traffic control system" in Section 542.2035 is the fact that the Legislature failed to define it in 2009 or in 2011. While other commentators mistakenly conclude that this statute is related to opposition of red light cameras, it is aimed at prohibiting use of "speed trucks," where a vehicle on the side of a road surreptitiously measure speed, takes pictures, and sends automated "traffic tickets" to people. This opinion, which is not binding on the judiciary (but rather a persuasive source of secondary authority) makes Section 542.2035 applicable to any radar/lidar unit capable of taking pictures, even a handheld unit. Notably, only municipalities are prohibited from using such systems.

4. Equipment Violations

There is no exception for diesel turbine engines to the requirement that all vehicles have a muffler.

Tex. Atty. Gen. Op. GA-873 (8/9/11)

A motor vehicle must be equipped with a “muffler,” which is defined in part as “a device that reduces noise.” Accordingly, in order to meet the requirement of Section 547.604 of the Transportation Code, a vehicle must be equipped with a muffler that reduces noise.

5. Traffic Investigations

Neither a sheriff nor a fire department gets to decide where to land a helicopter during the investigation of a traffic accident.

Tex. Atty. Gen. Op. GA-859 (5/5/11)

The helicopter pilot rather than a fire department or sheriff’s office has the final say on where to land a helicopter for the purpose of transporting patients from a motor vehicle accident.

III. Procedural Law

A. Magistrate Related

1. Family Violence

Double jeopardy protections do not bar a charge of assault after a Magistrate’s Order of Emergency Protection (MOEP) is entered in the same matter.

Ex parte Necessary, 333 S.W.3d 782 (Tex. App.—Houston [1st Dist.] 2010)

Article 17.292 of the Code of Criminal Procedure reflects the Legislature’s intent that a MOEP is issued for the purpose of protecting alleged victims of family violence, and not for the purpose of imposing a criminal punishment. While the MOEP precluded the defendant from possessing a firearm, that restraint did not approach imprisonment. Any effects of Article 17.292 that reflect the traditional goals of punishment are incidental. A MOEP is civil in nature and not criminally punitive. Jeopardy never attached. Double jeopardy was not implicated.

Commentary: From grasping at straws, comes new case law: a MOEP is a civil remedy. Notably, the court of appeals reaches this conclusion by exclusively citing cases dealing with protective orders issued pursuant to Chapter 81 of the Family Code.

The term “dating relationship” is not ambiguous as to whether it applies to same-sex relationships.

Ochoa v. State, 2010 Tex. App. LEXIS 9562 (Tex. App.—Houston [1st Dist.] Dec. 2, 2010)

The court of appeals found that Section 71.0021(b) (Dating Violence) applies to a relationship between individuals. The statute does not distinguish between relationships between individuals of the same sex and relationships between individuals of the opposite sex. Because a “dating relationship” does not necessarily include sexual intercourse, there is no conflict between the Legislature’s criminalization of Deviate Sexual Intercourse (Section 21.06, Penal Code) and its protection of persons in same-sex dating relationships from domestic violence. The definition “dating relationship” is not unconstitutionally vague in its applicability to same-sex relationships. Section 71.0021(b) provides fair notice for an ordinary person to have a reasonable opportunity to know what conduct is prohibited.

Commentary: Deviate sexual intercourse, a Class C misdemeanor, was invalidated by *Lawrence v. Texas*, 539 U.S. 558 (2003). The U.S. Supreme Court declared Section 21.06 unconstitutional as applied to private sexual conduct between consenting adults. Although the Legislature has yet to repeal Deviate Sexual Intercourse, law enforcement, prosecutors, and judges need to know that Section 21.06 is a provision which is “dead in the book.” Although this case stems from an

enhanced assault charge, its holding is pertinent to the issuance of a Magistrate's Order of Emergency Protection (MOEP) (Article. 17.292, Code of Criminal Procedure). A MOEP may be issued (and sometimes is required to be issued) following an arrest stemming from "family violence," which by definition in Section 71.004 of the Family Code includes "dating violence," which encompasses "dating relationship." Accordingly, this case supports the issuance of a MOEP in same sex relationships.

2. Property Hearings

A property hearing under Chapter 47 of the Code of Criminal Procedure (Disposition of Stolen Property) is a prerequisite for district court jurisdiction of a "takings claim" where a city seizes vehicles from a vehicle storage facility resulting in the loss of fees related to the vehicles' storage.

City of Dallas v. VSC, LLC, 347 S.W. 3d 231 (Tex. 2011)

VSC, a non-consent vehicle storage facility, sued the City of Dallas, alleging the City's seizure and subsequent disposition of vehicles from its property without notice was an unconstitutional taking that violated the business's right to just compensation, and sought declaratory judgment. A district court denied the City's plea to the jurisdiction. The City filed an interlocutory appeal. The court of appeals affirmed the trial court's denial of the City's plea to jurisdiction, and the city petitioned for review before the Supreme Court.

In a 5-4 decision, reversing the court of appeals, the Supreme Court, in an opinion by Chief Justice Jefferson held that, because VSC had actual knowledge of the City's seizure of certain vehicles, its failure to use the post-deprivation process contained in Chapter 47 precluded a takings claim in district court. Having given constitutionally sufficient notice of the seizures, the City was under no obligation to invite VSC to request a Chapter 47 property hearing.

Justice Wainwright, writing for the dissent, thoroughly explains that Chapter 47 is schizophrenic in what a magistrate may determine, whether it is the person who "has the superior right to possession," or who is the "actual owner" of the property. Because it is unspecific and lacks a comprehensive scheme, the dissent claims the only way to view Chapter 47 is as a **process** rather than a **proceeding**, applicable to a number of different judicial forums. The dissent contends that the holding creates a new rule preferring one type of civil claim over another, when no governing statute or case law has heretofore required it.

Commentary: From TMCEC's communication with courts, it is safe to say that many municipal judges would agree with the dissent's scathing critique of Chapter 47. Some of the "holes" in Chapter 47, such as issues relating to notice, are referenced in the TMCEC *Bench Book* which is cited by the dissent.

It is not every day in Texas that its Supreme Court construes a chapter in the Code of Criminal Procedure. It is important to remember that there are other provisions in the Code of Criminal Procedure that are civil in nature that pertain to municipal courts. Civil jurisdiction of municipal courts receives scant attention and is a piecemealed sandwich of confusion. This decision indirectly illuminates the role of municipal courts in civil matters (a role which is widely overlooked and misunderstood by the Legislature and most members of the Texas judiciary). This is not likely the last time the Texas Supreme Court will have to directly or indirectly address a civil matter stemming from municipal court proceedings. It is most likely the Legislature will continue to inconsistently and without proper forethought scatter other kernels of civil jurisdiction on municipal courts. Wouldn't the public and judicial system equally benefit if clarification came sooner rather than later?

3. Emergency Mental Detentions

The law does not specify who is responsible for an individual who is the subject of an emergency detention order after the person is apprehended on a warrant.

Tex. Atty. Gen. Op. GA-877 (8/12/11)

There is no provision in Chapter 573 of the Health and Safety Code that expressly requires a particular law enforcement agency to oversee a mentally ill person once the person has been transported to a facility pursuant to a Section 573.002 emergency detention order. Because the Legislature has not enacted a statute that requires a specific law enforcement

agency to oversee mentally ill persons, the Attorney General cannot opine that Chapter 573 places a duty on any particular law enforcement agency over another.

4. Juvenile Confessions

The juvenile knowingly, intelligently, and voluntarily waived his right to counsel, and his confession was not obtained in violation of Section 52.02 or other applicable provisions in the Family Code.

Martinez v. State, 337 S.W.3d 446 (Tex. App.—Eastland 2011)

No statutory violations occurred. The juvenile had not been arrested or charged when he accompanied officers to a juvenile processing office and gave his statement. The warnings administered by the magistrate were not the equivalent of “magistration” per Article 15.17 of the Code of Criminal Procedure; therefore, *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (establishing attachment of right to counsel in Texas) did not apply. When the requirements of Section 51.095 of the Family Code are followed, the written statement of a juvenile is admissible in evidence even if the juvenile is in a detention facility or in the custody of an officer when he gives the statement. The fact that appellant was not under arrest when he was first taken before a justice of the peace, acting as a magistrate, is an additional reason why his statement was admissible; even if he had been arrested, the result would be the same. The issue of custody equivalent to arrest arises when the requirements of Section 51.095 are not followed.

B. Code of Criminal Procedure

1. Statute of Limitations

When the State errs and the defendant’s prosecution is barred by the statute of limitations, the defendant is not required to preserve the issue for appeal.

Phillips v. State, 2011 Tex. Crim. App. LEXIS 825 (Tex. Crim. App. June 15, 2011)

In a 5-3 decision (Judge Meyers did not participate), the Court of Criminal Appeals held that an absolute statute-of-limitations bar is not forfeited by the failure to raise it in the trial court. Presiding Judge Keller, writing for the dissent, opines that the statute in question in this case is not an ex post facto law.

Commentary: This case led me to reconsider my understanding of case law regarding statutes of limitations in Texas. Specifically, it is important when thinking about the statute of limitations to distinguish between special issues “based on facts” that are required to be stated in the charging instrument versus “pure law” where the charge simply was not formally filed in time.

In *Phillips*, Judge Cochran, writing for the majority, explains that even if a defendant did not object and raise the statute of limitations, the claim is not waived on appeal. The statute of limitations had run three years before the State ever filed charges. The prosecution ultimately was unsuccessful in their attempt to use a change in statutory law to roll back the hands of time. In an earlier case, *Proctor v. State*, 967 S.W.2d 840 (Tex. Crim. App. 1998), the Court held that a defendant will forfeit a statute of limitations defense if it is not asserted at or before the guilt stage of trial. Thus, it is a defense that is implemented only upon request.

What *Phillips* makes clear, however, is that *Proctor* only governs statute of limitations scenarios that are “based on facts” (e.g., challenging a pleading that includes a tolling paragraph, explanatory averments, or even allegations that suffice to show that the charged offense is not, at least on the face of a charging instrument, barred by limitations), not **pure law** (challenging a charging instrument that shows on its face that prosecution is absolutely barred by the statute of limitations).

This distinction provided by this opinion is significant for municipal and justice courts. Despite case law clarifying that the complaint is the charging instrument for alleging a Class C misdemeanor, and legislation amending Article 27.14 of the Code of Criminal Procedure that mandates the filing of a complaint in the event a defendant either pleads not guilty or does not appear in court after being issued a written promise to appear, we still face lingering issues about the court’s role

in the event that a formal charging instrument is not filed within the statute of limitations.

What, if anything, should judges do when they know that the two year statute of limitations has run prior to the filing of a complaint? *Phillips* only assists in answering this question to the degree we know that it is not a matter that must be raised by the defendant at trial to be preserved on appeal. From a purely legal perspective, trial judges neither appear prohibited from bringing a statute of limitations bar to the attention of a pro se defendant or a defense attorney who does not do so, nor are they required to do so.

2. Probation

Article 42.111 of the Code of Criminal Procedure authorizes a county court to grant deferred adjudication on appeal to a defendant who fails, for one reason or another, to request a driving safety course in either a justice or municipal court per Article 45.0511, but prohibits the granting of deferred adjudication on appeal to a defendant who commits a “serious traffic violation” while driving a commercial motor vehicle.

State v. Hollis, 327 S.W.3d 750 (Tex. App.—Waco 2010)

Commentary: While it contains an extensive legislative history of the driving safety course statute, this opinion is unfortunately unclear and unwieldy. While the Waco Court of Appeals makes it clear that Hollis did not commit a “serious traffic violation” while driving a commercial motor vehicle; the opinion never expressly states that Hollis did not possess a CDL (or even that she was not driving a commercial motor vehicle). The opinion makes sense only if you assume that Hollis was not a commercial driver’s license holder and was not operating a commercial motor vehicle at the time she was speeding.

While various court of appeals opinions have inconsistently distinguished deferred disposition from deferred adjudication (Article 42.12), this opinion calls everything deferred adjudication. This opinion goes one step further in conflating distinct statutes. The deferral of proceedings in cases appealed to county courts (Article 42.111), deferred disposition (Article 45.051), and driving safety courses (Article 45.0511) are each referred to as deferred adjudication. (In fact, the only thing not referred to as deferred adjudication is deferred adjudication.)

While perhaps this case can be cited for the proposition that a county court cannot grant any kind of statutory deferred to a CDL holder, the opinion reads like a Rorschach test; users are likely to end up seeing what they want to see when construing this opinion (which is why after reading this opinion, many of you are likely to wish that it had been designated as an unpublished opinion).

3. Pre-Trial Motions/Issues

a. Recusal and Disqualification

Since 2010, TMCEC has made a special effort to reemphasize the importance of recusal and disqualification laws in Texas municipal courts, while illustrating serious conflicts and deficiencies in laws relating to municipal courts. See, Ana M. Otero and Ryan Kellus Turner, Removal of Judges from Texas Cases: Distinguishing Disqualification and Recusal, *The Recorder* (July 2010). In response, the Texas Municipal Courts Association and the Texas Judicial Council collaborated with policymakers during the 82nd Regular Legislature to resolve these problems and avert the possibility of widespread gridlock in Texas municipal courts.

S.B. 480 repealed the problematic Section 29.012 of the Government Code and replaced it with a comprehensive series of procedures located in Subchapter A-1 of Chapter 29 of the Government Code. These new highly detailed rules, derived and adapted from Texas Rule of Civil Procedure 18A, are designed to accommodate all sizes of municipal courts, and strike a balance between uniformity in application of the law and judicial efficiency. The new series of rules can be used in any kind of criminal or civil case in which a municipal court has jurisdiction. It will be awhile before we have any specific case law relating to the new subchapter. In the interim, for some semblance of guidance, it is worthwhile to know how appellate courts construe Rule 18A.

• *Kuykendall v. State*, 335 S.W.3d 429 (Tex. App.—Beaumont 2011)— A trial judge, who had previously represented the

defendant on two prior convictions alleged for enhancement purposes in the pending case was not disqualified from presiding in the matter before the court because the judge did not serve as counsel for the accused in this pending case. In contrast to moving for recusal of the judge, the defendant did not need to preserve the disqualification claim to raise it on appeal.

- *Gaal v. State*, 332 S.W.3d 448 (Tex. Crim. App. 2011) - After defendant had twice violated his bond conditions and had changed his mind at a plea setting, he requested a second plea setting. At that hearing, defendant again changed his mind and decided not to plead. The State then retracted its plea offer, and the trial judge stated that the only plea bargain he would accept would be for the maximum sentence. The judge assigned to hear the recusal matter denied defendant's motion to recuse, stating that the trial judge did not have to take a plea bargain and that the trial judge's statement was not arbitrary because the case file showed that defendant had repeatedly attempted to drink and drive while he was out on bond. The Court of Criminal Appeals stated in a unanimous decision that Texas Rule of Civil Procedure Rule 18a(f) did not preclude the court from reviewing the decision of the court of appeals. The Court found no abuse of the assigned judge's determination that, under Texas Rule of Civil Procedure Rule 18b, the trial judge was unbiased. The trial judge gave no indication as to what sentence he would or would not impose. The trial judge's comment appeared to be an expression of impatience rather than a showing of a deep-seated favoritism or antagonism.
- *In re Thompson*, 330 S.W.3d 411 (Tex. App.—Austin 2010) - This case involves the very unusual situation in which relatives of an executed capital murder defendant from Navarro County filed a request to convene a court of inquiry with a Travis County judge. The Navarro County district attorney filed a motion to recuse that particular Travis County judge, but the judge refused to consider the motion to recuse, believing that the Navarro County district attorney had no standing before the court of inquiry. Very touchy issues are involved in this case: opposition to the death penalty, actual innocence, exoneration. But it seems that there is a right way to do things and a wrong way to do things. And attacking a Navarro County conviction and death sentence in a Travis County court does not seem to be the right way. The bottom line of this decision is that, when a judge receives a motion to recuse, he or she generally has no choice but to grant the motion or refer the motion to the presiding judge of the local administrative region.
- *Ex parte Sinegar*, 324 S.W.3d 578 (Tex. Crim. App. 2010) - The requirements of Rule 18a of the Rules of Civil Procedure apply in habeas proceedings conducted at the trial level. When the defendant has complied with Rule 18a, the trial judge is required to either recuse himself or forward the matter to the presiding judge of the administrative judicial region for a recusal hearing before another judge. (By the way, on a related side note, did you know that a municipal judge in a court of record has the authority to issue writs of habeas corpus in cases in which the offense charged is within the jurisdiction of the court? See, Section 30.00006, Government Code.)

b. Suppression of Evidence

In a State's appeal from a pretrial order granting a motion to suppress, per Article 44.01(a)(5) of the Code of Criminal Procedure, it is not required that the record reflect specifically what evidence is suppressed in order for an appellate court to consider the interlocutory appeal.

State v. Chupik, 343 S.W.3d 144 (Tex. Crim. App. 2011)

In this case, the trial court granted defendant's motion to suppress, and the Austin Court of Appeals held that the State's appeal presented nothing for review because there was nothing in the record to show that the ruling would result in the exclusion of any evidence at trial. Reversing the lower court's decisions, the Court of Criminal Appeals held that the record did not need to reflect the suppressed evidence; rather it was sufficient that the prosecuting attorney certified that the suppressed evidence was of substantial importance in the case. On remand, in an unpublished opinion, the Austin Court of Appeals reversed the trial court's determination.

Concurring, Judge Johnson explained the narrow scope of the Court's ruling. Dissenting, Judge Price and Judge Meyers opined that because of the absence of reference to any concrete evidence in the record, the majority's opinion is an advisory opinion that ignores alternative reasons for the lower court's ruling.

In a motion to suppress under Section 38.23 of the Code of Criminal Procedure, the defendant has the initial burden of proof, which shifts to the State only when the defendant has produced evidence of a statutory violation.

State v. Robinson, 334 S.W.3d 776 (Tex. Crim. App. 2011)

In this 7-2 opinion, Presiding Judge Keller explains that the burden was mistakenly placed on the State after it stipulated the arrest was without a warrant resulting in the State proceeding first on the motion. After the State called its only witness, the trial court incorrectly suppressed evidence when legally the burden of proof had shifted to the defendant to establish that evidence was not legally obtained.

Judge Cochran, in a concurring opinion (joined by Judge Hervey), provides an exemplary explanation of burden shifting (it is worth reading, check it out).

Dissenting, Judge Meyers agrees that the court of appeals erred, but not that the State is entitled to relief; Judge Price states that because the State bears the burden of proof in this instance, the State statutorily did bear the burden on the motion to suppress.

c. Discovery

Under Article 39.14(a) of the Code of Criminal Procedure, a trial court has the discretion to order the State to make copies of a DVD for the defendant as part of a discovery order.

State v. Dittman (In re Dist. Attorney's Office of the 25th Judicial Dist.), 2011 Tex. Crim. App. LEXIS 414 (Tex. Crim. App. Mar. 30, 2011)

Presiding Judge Keller, dissenting, opines that the majority is ignoring precedent where, in an unpublished opinion, the Court ruled that a trial court may not order the State to copy documents and provide those copies to a defendant, but it may order the State to produce discoverable materials and allow the defendant to copy them under the supervision of the State.

Commentary: Prosecutors are likely to hate this opinion. However, they should keep the following in mind: (1) this case only stands for the **discretion** of a trial judge to order the State to make copies (it does not provide a mandate); and (2) this opinion should be construed in light of specific facts (in this case, the content of the DVD, presumably an outcry statement, recorded at a child advocacy center).

d. Jury Selection

In municipal court, it is not a violation of Due Process to allow jurors whom the prosecutor has had on a prior panel the same day and questioned during such voir dire before the same judge when defense counsel was not present to serve on the jury without informing defense counsel of the existence of such jurors or giving defense counsel information as to what was said during such voir dire proceeding.

Ruiz-Angeles v. State, 346 S.W.3d 261 (Tex. App.—Houston [14th Dist.] 2011)

The court of appeals rejects the argument that Section 62.021 of the Government Code (providing that in counties with a population of more than 1.5 million, a prospective juror who has been removed from a jury panel must not serve on another panel until his or her name is again drawn for jury service) is applicable to municipal courts in Harris County because Article 45.027(b) of the Code of Criminal Procedure provides that individuals summoned for jury service in justice and municipal courts shall remain in attendance as jurors in **all** cases that may come up for hearing until discharged by the court.

Commentary: It is worth emphasizing that case does not address the merits of “recycling” jurors once they actually served on a jury. Furthermore, this case can be cited for the general inapplicability of Chapter 62 of the Government Code, unless expressly applicable or located in Subchapter F: Municipal Court Juries (i.e., Section 62.501).

4. Closing Arguments

The trial court erred by denying closing argument to the defendant.

Hyer v. State, 335 S.W.3d 859 (Tex. App.—Amarillo 2011)

Defense counsel was not allowed to make a closing argument during the punishment phase of defendant's trial. When defense counsel asked to speak, the court said "no." The State conceded that the decision was reversible error if preserved for review. The court of appeals held that the error was preserved for review and constituted violations to the defendant's constitutional right to the effective assistance of counsel under the United States and Texas Constitutions. Counsel's uttering "all right" after the court said "no" could not reasonably be interpreted as intent to waive his request to make closing remarks or approve of what the trial court did.

IV. Court Costs

If a defendant challenges the clerk's assessment of court costs, claiming insufficient evidence to show he has the resources to pay the fees, is it a "criminal law matter."

Armstrong v. State, 340 S.W.3d 759 (Tex. Crim. App. 2011)

Although there is not a definitive statement of what constitutes a "criminal law matter," the term encompasses, at a minimum, all legal issues arising directly out of a criminal prosecution, even if civil and criminal law matters potentially overlap. The Court of Criminal Appeals is the proper court to make such determination. The Court has held that disputes which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure, and which arise as a result of or incident to a criminal prosecution, are criminal law matters.

Commentary: Albeit, this case does not relate to a court cost collected in either a municipal or justice court, it is still an important decision because such local trial courts collect the lion's share of court costs in Texas. Similar to *Weir v. State*, 278 S.W. 3d 364 (Tex. Crim. App. 2009) (holding that in a criminal case court costs are punitive and thus required to be included in an oral pronouncement of judgment), this case provides one more piece to the puzzle when it comes to the law of court costs.

Another interesting juxtaposition: this year we saw the Texas Supreme Court construe the Code of Criminal Procedure in a civil law matter (see, *City of Dallas v. VSC, LLC*, 347 S.W. 3d 231 (Tex. 2011)). Here, the Texas Court of Criminal Appeals explains that, if an issue stems from the Code of Criminal Procedure, they are the proper court to determine if it is a "criminal law matter." (Notably, cases like *Johnson v. 10th Judicial District Court of Appeals at Waco*, 280 S.W.3d 866 (Tex. Crim. App. 2008) illustrate that members of the Court are not always in agreement in applying this label.)

The judicial fund created by Section 21.006 of the Government Code can be used to offset a statutory probate court's reduction in funding by the county commissioners' court.

Tex. Atty. Gen. Op. GA-875 (8/9/11)

The Legislature requires that state judicial fund dollars allocated to a county's contributions fund be used only for court-related purposes for the support of the statutory probate courts in the county. Beyond this requirement, we find no statutory restrictions on how the funds may be used. However, a county may not reduce the amount of funds provided for the support of the statutory probate courts in the county because of the availability of funds from the county's contribution fund. A county may not use the allocated judicial funds contrary to these statutory requirements.

Commentary: Section 21.006 states, "The judicial fund is created in a separate fund in the state treasury to be administered by the comptroller. The fund shall be used only for court-related purposes for the support of the judicial branch of this state." Is any of this money used for court-related purposes to support municipal courts; the courts in the judicial branch of this state that generate the most money for the state treasury?

V. Local Government

A. Preemption

The State of Arizona's licensing law, aimed at curtailing the employment of undocumented aliens, is not expressly preempted by federal law.

Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968 (2011)

The federal Immigration Reform and Control Act of 1986 (IRCA) pre-empts any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens.

The disputed statute in this case, the Legal Arizona Workers Act (LAWA), imposes civil sanctions upon those who employ unauthorized aliens. It does so through a combination of civil penalties and license suspensions and revocations for employers that knowingly or intentionally employ unauthorized aliens. The majority, in a 6-3 opinion, holds that LAWA is a licensing law, and is thus not expressly preempted by the IRCA. The dissent asserts that the majority reaches its result by over-expanding the meaning of a "license" and that LAWA fails to fall within exceptions provide by IRCA.

Commentary: So states are allowed, if not encouraged, to experiment with laws involving undocumented workers as long as such efforts are carefully cloistered within the broad licensing exception to the federal law? Did the majority unleash states and localities to determine whether someone has employed an unauthorized alien (so long as they do so in conjunction with licensing sanctions)? This opinion certainly sets the stage for broad array of similar measures to be introduced by states and local governments. Anticipate municipalities wanting to get on the *Whiting* bandwagon to pass concurrent enforcement ordinances that "trace" federal law.

B. Substandard Structures

Unelected municipal agencies cannot be effective bulwarks against constitutional violations in the context of nuisance determinations involving substandard structures. Determination should not be reviewed under a substantial evidence standard but rather must be considered de novo in a trial court.

City of Dallas v. Stewart, 2011 Tex. LEXIS 517 (Tex. July, 2011)

In a 5-4 decision, Chief Justice Jefferson, writing for the majority of the Texas Supreme Court opines that the nuisance determination by members of the city-council appointed Urban Rehabilitation Standards Board (URSB), and the affirmance of that determination under a substantial evidence standard pursuant to Sections 54.039(f) and 214.0012(f) of the Local Government Code were not entitled to preclusive effect in a takings action against the City of Dallas brought by the owner of the house. Furthermore, a substantial evidence review of the nuisance determination did not sufficiently protect the owner's rights under the Texas Constitution.

Justice Guzman, dissenting, opines that the Court's decision opens the door to a host of takings challenges to agency determinations of every sort, and in every such challenge a right to trial de novo will be claimed. It further opines that the decision invites judges at every level of the judicial system to substitute their own factual determinations for that of an agency or even a lower court. Cities are faced with complex challenges posed by a crisis level of abandoned and dangerous buildings, and one of the most important weapons provided by the Legislature to combat this problem is summary nuisance abatement. Because the Legislature defined what constitutes a nuisance and provided and set the standard of review, due process does not require de novo reviews. The URSB's finding, pursuant to legislative enactments, as affirmed by the trial court on substantial evidence review, should have precluded Stewart's takings claim. As of November 16, 2011, a motion for reconsideration is pending. Stay tuned!

Commentary: This decision very well may prove to be one of most important decisions in the history of municipal courts in Texas. Every municipal judge in a court of record (and court administrators) should read this opinion carefully and contemplate its implications. (It is a safe bet your city attorney already has.) This case, like *City of Dallas v. VSC, LLC*, 2011 347 S.W. 3d 231 (Tex. 2011) and *Armstrong v. State*, 340 S.W.3d 759 (Tex. Crim. App. 2011) fundamentally challenges many commonly held, "cut and dry" beliefs about judicial process. (It also potentially hints to possible new

glide paths for municipal courts in the new century.)

The Texas Municipal League on its website reported in August that many cities have brought their substandard structure and other nuisance ordinance enforcement to a halt. They also stated that “[p]erhaps the safest course of action, which is also impractical, would be to have an elected judge (or at the very least an appointed municipal court judge in a court of record) bless every nuisance action that could be considered a taking.”

The implications of this opinion are too numerous to fully detail here. So for now, a summary will have to suffice:

1. This case does not address the legality of having preliminary determinations made in a municipal court of record.
2. This case does not address whether a judge appointed by a city council, rather than elected by the people, would be viewed in the same negative light as an appointed city board.
3. This case epically sets the stage for debating the preceding two points.
4. This decision will more than likely put the appointment process (or lack thereof) cities use in appointing municipal judges under the microscope of critics.
5. This is an important reminder that when city council members appoint judges, they should be appointing people who put the public’s interest in the rule of law above the interests of any city or its local agenda; each council member should cast their vote on behalf of the people who elected them (i.e., an indirect democracy).
6. In light of popular sentiment (even in Texas) that opposes the partisan election of judges, city attorneys should welcome challenges to the appointment of judges under Chapter 29 or 30. (The frightening thing is that this case may also highlight and enternalize in case law longstanding misperceptions about municipal courts.)
7. Any subsequent cases challenging the legality of municipal judges conducting substandard building proceedings should hinge on judicial independence (not separation of powers); hence, municipal judges must be independent and the value of such independence should be evidently embraced in the conduct of municipal government (e.g., city managers, city attorneys, council members, and mayors). Remember, folks, the municipality hosts the municipal court (just like the county hosts the county court). The municipal court is not akin to a city commission or department, it is part of the state judicial system. See, http://www.courts.state.tx.us/oca/pdf/Court_Structure_Chart.pdf.
8. The absence of separation of powers in municipal government is already being used to challenge the propriety of municipal courts conducting such hearings based on the holding in *Stewart*. See, Page 5 of the Plaintiffs’ August 24, 2011 Original Petition in *Align LP and 600 Elsbeth Street v. City of Dallas*, available on-line at: <http://www.scribd.com/doc/63205859/600-Elsbeth-Appeal>.
9. Though unlikely, this case could ultimately result in Chapter 30 of the Government Code being amended to require all municipal judges in courts of record (if not all municipal judges) to be elected. Alternatively, some cities that currently appoint municipal judges may opt to elect municipal judges.
10. If the Legislature wants municipal courts of record to play a role in substandard buildings and balance expediency with property rights, it should pass legislation authorizing the Texas Supreme Court to adopt rules of procedure rather than allowing a rule of procedure to be developed at the local level in a piecemeal manner.

C. Dual Office Holding

A part-time municipal judge may not simultaneously serve as a member of a board of commissioners for a drainage district.

Tex. Atty. Gen. Op. GA-853 (4/1/11)

Texas Constitution, Article XVI, Section 40 prohibits a compensated part-time municipal court judge from simultaneously

serving as a member of the Board of Commissioners of the Jefferson County Drainage District No. 7.

Commentary: The Commission on Judicial Conduct does not recognize the existence of a “part-time” municipal judge for purposes of applying the Canons of Judicial Conduct. In this opinion it was not necessary for the Attorney General to analyze if there is any such distinction because both civil offices of emoluments were compensated. Caution is advised in applying the term “part-time.” “Part-time” is connoted with the number of hours worked by **employees**. Although many municipal judges spend less than 30 hours a week on the bench, they are not employees, who under Texas law can be fired at-will by employers. Municipal judges are either elected or appointed to terms of office of two or four years. See, Section 29.004, Government Code.

D. Law Enforcement

Police officers from the City of Carrollton, a home-rule municipality, had countywide jurisdiction and thus lawfully searched a residence outside their city limits but within the same county.

§27,877.00 Current Money of the United States v. State, 331 S.W.3d 110 (Tex. App.—Fort Worth 2010)

Home-rule municipalities are different from general-law municipalities, because a home-rule city derives its power not from the Legislature but from Article 11, Section 5 of the Texas Constitution. Home-rule cities possess the full power of self-government and look to the Legislature not for grants of power, but only for limitations on their power. A home-rule municipality’s powers may be limited by statute, but only when the Legislature’s intention to do so appears with unmistakable clarity. The reason that Section 341.003 of the Local Government Code does not grant home-rule police countywide jurisdiction is because home-rule municipalities do not receive their grants of power from the Legislature. General-law municipalities, on the other hand, do. General-law municipalities are political subdivisions created by the State and, as such, possess those powers and privileges that the State expressly confers upon them. Chapter 341 of the Local Government Code does not show any legislative intent to restrict a home-rule municipality police force to a jurisdiction any less than that of a general-law municipality.

Commentary: It is not every day that an appellate court issues an opinion that warrants the attention of city attorneys, criminal law practitioners, and law enforcement. This is a great opinion highlighting an intersection between municipal law and criminal law.

A volunteer assistant fire marshal is not designated as a reserve law enforcement officer under Chapter 1701 of the Occupations Code.

Tex. Atty. Gen. Op. GA-853 (4/1/11)

The Legislature did not grant county commissioners courts and county fire marshals authority to commission or appoint a volunteer assistant fire marshal as a reserve law enforcement officer. The Legislature did not include the term “volunteer assistant fire marshal” in the statutory definition of a “reserve law enforcement officer.” Accordingly, a person appointed to serve as a volunteer assistant fire marshal is not, as an automatic consequence of the appointment, a reserve law enforcement officer.

E. Ordinances and Charter Provisions

A Type A general-law municipality may adopt and enforce an ordinance prohibiting the discharge of certain firearms or other weapons on property located within its original corporate limits.

Tex. Atty. Gen. Op. GA-862 (6/16/11)

Section 229.002 of the Texas Local Government Code does not prohibit a Type A general-law municipal ordinance from regulating the discharge of a firearm or other weapon in an area that is within the municipality’s original city limits.

Despite a charter provision, a county judge does not have the authority to order a municipal recall election.

Tex. Atty. Gen. Op. GA-870 (8/2/11)

Texas law does not authorize a county judge to order a municipal recall election. A city charter provision imposing a duty upon a county judge to perform an act that the county judge has no authority under Texas law to perform is inherently inconsistent with Texas law and is unenforceable.

Appellate courts have determined that similar municipal charter provisions impose upon a city council the ministerial duty, subject to compulsion by mandamus, to order the recall election.

Commentary: Certainly not the first or last time that a municipality overreached in a charter provision. City attorneys: the rationale behind this opinion could likely be used to similarly explain why it is illegal for either a city charter or an ordinance to proscribe additional authorities or duties to a municipal judge not expressly authorized by the Legislature.