TEXAS MUNICIPAL COURTS EDUCATION CENTER

COURSE MATERIAL

12-Hour Judges

1609 Shoal Creek Boulevard, Suite 302 Austin, TX 78701
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Funded by a grant from the Texas Court of Criminal Appeals

TMCEC IS A PROJECT OF THE TEXAS MUNICIPAL COURTS ASSOCIATION

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12-Hour Judges' Program

TMCEC 12-Hour Regional Judges Program

AGENDA

2:00 - 5:00 p.m.	OPTIONAL PRE-CONFERENCE SESSION: **Asked and Answered** Ryan Turner, General Counsel, TMCEC
3:00 - 5:00 p.m.	**Registration**

6:45 - 8:00 a.m.	**Registration and Breakfast**
8:00 - 8:10 a.m.	Announcements Course Director: Winfield Scott, Municipal Judge, University Park
8:10 - 9:15 a.m.	**Juvenile Alcohol Offenses** W. Clay Abbott, DWI Resource Prosecutor, Texas County and District Attorneys Association, Austin
9:30 - 10:30 a.m.	**Language Interpreters** Ted Wood, Special Counsel for Trial Courts, Office of Court Administration, Austin
10:45 - 12:00 p.m.	**Federal and State Case Law Update** Ryan Kellus Turner, General Counsel, TMCEC
12:00 - 1:00 p.m.	**Lunch**

	Track A	Track B
1:00 - 2:00 p.m.	**Driver's License Offenses** Scott Kurth, Municipal Judge, Red Oak & De Soto	**Sovereign Defendants** *(.50 Ethics)* Ilse Bailey, Assistant City Attorney, Kerrville
	Break	
2:15 - 3:30 p.m.	**21st Century Traffic Dilemmas: Things with Wheels** W. Clay Abbott, DWI Resource Prosecutor, Texas County and District Attorneys Association, Austin	**Access to Justice** *(.25 Ethics)* Marty Cirkiel, Mental Health Magistrate, Round Rock and Greg Sisco, Program Attorney, TX Lawyers & Judges Assistance Program, Austin
	Break	
3:45 - 5:00 p.m.	**Ordinance Issues: Junked Vehicles** Candace Chappell Senior Prosecutor and City Attorney II, Irving	**Ethics of Fine Collection** *(1.25 Ethics)* Don McKinley, Assistant Collections Specialist, Office of Court Administration, Austin

6:45 - 8:00 a.m. **Breakfast**

8:00 - 9:00 a.m. **Ethics: TV Justice and Reality in the Courtroom** ***(1.0 Ethics)***
Seana Willing, Executive Director, Commission on Judicial Conduct, Austin

	Track A	Track B	Track C
9:15 - 10:30 am	**Ordinance Issues: Rubbish and Refuse** Lisa Hayes, Assistant City Attorney, El Paso	**Attorney General Opinion Update** Julian Grant, Assistant Attorney General, Municipal Affairs Division, Austin	**DSC and Deferred Disposition** **(concurrent with Clerks program)** Brian Holman, Judge, Lewisville and Tracie Glaeser, CCMC, Court Administrator, Round Rock
	Break		
10:45 - 12:00 p.m.	**Magistrate Duties: Juvenile Statements** Ryan Kellus Turner, General Counsel, TMCEC	**Expunction** W.E.B. Blackmon, Municipal Judge, Houston	**Judgments and Non-contested Cases** **(concurrent with Clerks program)** Brian Holman, Judge, Lewisville and Tracie Glaeser, CCMC, Court Administrator, Round Rock

12:00 p.m. Seminar Adjourns

ANNOUNCEMENTS

FOR

12-hour Judges Seminar Attendees

I

Welcome

II

Funding

Our judicial classes are mandatory for each municipal judge in the state and are provided by a grant from the Texas Court of Criminal Appeals that is funded by dollars that are collected on each conviction.

III

Notices to Attendees

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

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

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

Attendance

The Texas Municipal Courts Association Board of Directors has adopted the following policy: **All judges at the TMCEC seminars must attend and fully participate during all hours as designated by the schedule. Any undue tardiness to class or reading of non-pertinent materials, *e.g.*, newspapers, magazines, *etc.*, will place the judge in "non-compliant" status resulting in the loss of that particular class and the non-certification of the judge for that current year. In order to comply with certification rules, those judges in non-compliance must make up those hours lost at another seminar held within that fiscal year at his/her own expense.**

The Center staff will not inform you of your violation. They will report the infraction to the Executive Director who will make the decision to certify or not. Any questions you might have with infraction and/or loss of certification must be taken up with the Executive Director.

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

Judges are expected to sign in when they register. If the TMCEC staff perceives that the seminar is not fully attended by all participants at all times, roll will be called or circulated. If you must leave the seminar for an emergency or if you become ill, we ask that you check out with the staff at the registration table.

Concurrent Sessions

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

Program Materials

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

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

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

Breaks

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

Messages

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

Rooms

The Center pays for the cost of single rooms or double sleeping rooms for judges sharing a room with another judge or clerk and is direct billed for such. However, you must pay for all incidentals, including telephone charges, movies, room service, and cleaning. By the provisions of the grant, the Center **CANNOT** pay for these expenses. Please do not put us in any precarious position regarding this matter.

The hotel may or may not charge extra for your rooming guest. Please check with the hotel at the time of check-in. If there is any extra charge, you must pay this expense at checkout.

Smoking

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

Meals

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

Shuttle

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

Check out

The hotel has a set check out time. It will be announced on the first day during the welcoming announcements. Please insure that you do not go beyond this time. Extra-day charges imposed by the hotel will be your responsibility.

CONTINUING EDUCATION UNITS

The Texas Municipal Courts Education Center will award 1.2 CEU to each participant who successfully completes the 12-Hour Judges' Program. The CEU is a nationally recognized unit designed to provide a record of an individual's continuing education accomplishments. Upon written request to the Center, a record will be made available as designated by the participant.

The CEU concept provides individuals with recognition for their efforts to update or broaden their knowledge, skills, or attitudes. Records of CEU awarded provide a framework within which individuals can develop and achieve long-range educational goals.

The availability of the CEU records and documentation permits individuals to maintain and transmit to others a record of their lifelong learning experiences. For example, individuals may use personal records of number of CEU earned for:

- Reporting maintenance or improvement of professional competence;
- Documenting continuing qualifications for renewing licensure, recertification, or registration; or
- Presenting evidence of personal and vocational growth and adjustment to meet changing career demands.

Probably, the two most common uses of a CEU record by the individual learner are: (1) to supply an employer or prospective employer with information on continuing education and training experiences pertinent to an occupational competence; and (2) to provide documentation to registration boards, certification bodies, or professional and occupational societies of continuing education undertaken to maintain or increase professional competence.

There is no relationship between CEU and academic credit. By definition, the CEU relates only to non-credit continuing education experiences. Academic credit applies specifically to degree requirements and CEU are not awarded for that purpose. No institutions of higher education are known to give automatic credit for CEU.

State Bar CLE information for attorney judges

COURSE NUMBER:

000070887

COURSE TITLE:

TMCEC Judges Seminar

Please note the following changes to the CLE card:

- The new CLE card requires you to enter the number of hours attended even if you attended all 15 hours.

- The card also requires you to enter ethics hours separately. This seminar has been approved for **3.0** hours ethics, depending on the breakout courses attended.

Criminal Law Specialization

This course has been approved by the Texas Board of Legal Specialization for certification and recertification continuing legal education requirements for attorneys and legal assistants in the following specialty field:

Approved Hours	Specialty Field
12.0	Criminal Law
12.0	Juvenile Law

TEXAS MUNICIPAL COURTS EDUCATION CENTER
FACULTY ROSTER

12-Hour Judges/Clerks Program

Austin Hilton Airport

Mr. W. Clay Abbott
DWI Resource Prosecutor
Texas District and County
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(512) 474-2436

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City of Kerrville
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Kerrville, TX 78028
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Municipal Judge
City of Houston
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Houston, TX 77002
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(832) 282-0908 (m)
(713) 247-8747

Ms. Candace Chappell
Senior Prosecutor and City
Attorney II
City of Irving
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(972) 721-3599

Mr. Martin Cirkiel
Mental Health Magistrate
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Honorable Linda Frank
Municipal Judge, Plano &
Chief Municipal Court
Prosecutor, Arlington
City Attorneys Office
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(817) 459-6897 (f)

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City of Round Rock
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(512) 218-7079

Mr. Julian Grant
Assistant Attorney General
Attorney General's Office –
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Court Administrator
City of Crowley
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Assistant City Attorney
City of El Paso
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Honorable Brian S. Holman
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City of Lewisville
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Honorable Scott Kurth
Municipal Judge
Red Oak & De Soto
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ABOUT THE SPEAKERS

W. CLAY ABBOTT

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

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

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

ILSE BAILEY

Ilse Bailey is an Assistant City Attorney for the City of Kerrville. She attended Rice University and both the University of Texas and the University of Houston Law Schools. She served as a briefing attorney for Justice James Wallace of the Supreme Court of Texas and was briefly in private practice before becoming a prosecutor in 1986.

Ilse has been a prosecutor for Bexar, Brazos and Kerr Counties. She has also served as an Assistant Attorney General for the State of Texas on a statewide task force which is attempting to address problems created throughout Texas by the "Republic of Texas" (ROT), an anti-government group that believes the state of Texas is still a sovereign nation because it was not properly brought into the U.S. in the 1800s. Ilse has lectured coast to coast on the sovereign citizen movement and the Republic of Texas.

W.E.B. BLACKMON

W.E.B. Blackmon is a municipal court judge for the City of Houston. Judge Blackmon earned his Juris Doctor from Texas Southern School of Law in 1982. He formerly served as a Assistant District Attorney in the Lubbock County Criminal District Attorney's Office. He practiced law while a member of the United States Armed Forces and is licensed to practice in Michigan and Nebraska.

CANDACE CHAPPELL

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

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

MARTIN J. CIRKIEL

Martin Cirkiel is the former Municipal Judge of the City of Hutto, and the current Magistrate in Mental Health Court, Probate Court #1 for Travis County.

Judge Cirkiel is a partner in the law firm of Cirkiel and Associates in Round Rock, Texas. He is an adjunct instructor at University of Texas School of Social Work in Austin. He is a certified mediator and teaches alternative dispute resolution at Southern Methodist University and has a part-time mediation practice. Judge Cirkiel is a special master for the Travis County Mental Health Court.

He received his Masters of Social Work from the University of Texas at Austin and his Juris Doctor from St. Mary's University School of Law, San Antonio.

He is the Chair of the State Bar of Texas Disabilities Issues Committee. He is a board member of the Bluebonnet MHMR Network Advisory Committee, Jewish Family Services, and the Round Rock Health Clinic.

LINDA FRANK

Linda Frank is currently an Associate Municipal Judge for the City of Plano. She is also the Chief Municipal Prosecutor for the City of Arlington. She is the former Chief Municipal Prosecutor for the City of Plano.

Judge Frank is a graduate of the University of Oklahoma. She received her juris doctor from the Georgetown University Law Center in Washington, D.C. She received her license to practice law in Texas in 1981.

Judge Frank has served as faculty for the TMCEC since 1998. She has two daughters, both graduates of the University of Texas.

TRACIE GLAESER, CMCC

Tracie Glaeser is the Court Administrator for the City of Round Rock. She began her appointment as a Deputy Court Clerk in 1985 and was promoted to the Clerk of the Court in 1986 after attending her first 40 hour TMCEC program in Midland, Texas.

Ms. Glaeser has been active in the Texas Court Clerk's Association and her local Central Texas Chapter for many years holding the positions of Chapter President, Secretary, and Treasurer. She has participated in the Central Texas Chapter Youth Scholarship award team for 3 years.

Ms. Glaeser is active as an instructor at the City of Round Rock during the Citizens Police Academy and Effective Team Meetings as well as TMCEC. Additionally, she has completed Leading, Educating And Developing (LEAD), a 40 hour program sponsored by Weldon Cooper and held at the University of Virginia, Leadership Institute.

Ms. Glaeser achieved a level I certification in 1998, her level II certification in 2002 and completed Level III in 2003. She was the 11th clerk in the state of Texas to become a Certified Municipal Court Clerk.

JULIAN GRANT

Julian Grant is currently the Assistant Attorney General for the State of Texas. Grant received his BA from Harvard in 1989, and his Juris Doctor from The University of Texas School of Law in 1992.

Previously, Mr. Grant has served as the Deputy Attorney for the City of Temple, the Briefing Attorney for Austin Court of Appeals and the Hearing Judge for the Texas Workforce Commission.

LEISA HARDIN

Leisa Hardin is the Court Administrator of the city of Crowley. She joined the city in 1981 and has served in the court for the past 18 years. She is the President of the TCCA and has been on the TCCA Board for the past 10 years. Ms. Hardin served as the Education Chairperson for the past 4 years and was instrumental in the development of the Ceritifcation Program. She has served on numerous committees through the TCCA and the TMCA.

Ms. Hardin was honored with the highest award given by the Texas Court Clerks Association -- in 1998 she received the Award of Excellence. The Texas Municipal Courts Association presented her with the Clerk of the Year 2000.

LISA ACEVES HAYES

Lisa Aceves Hayes is the Environmental Prosecutor for the City of San Antonio. She has been working for the City of San Antonio since moving from her native El Paso in October of 2001. Prior to relocating, she was employed with the El Paso County Attorney for 4 years, where she held assignments as a juvenile prosecutor, appellate attorney, and bond forfeiture attorney. She also acted as substitute trustee for the El Paso County Bail Bond Board.

Ms. Hayes graduated from St. Mary's University in San Antonio with a degree in Political Science in 1994. She went on to attend law school at the University of Texas at Austin, graduating in 1997. She has been licensed to practice since November of 1997.

RENE HENRY

Rene Henry, CPA, is currently the Collections Project Manager in the Research & Court Services Section at the Office of Court Administration. He has been there since October 1997. Prior to that, he worked at the Comptroller's Office for 20 years, 14 of which he spent working directly with cities and counties.

Mr. Henry holds a B.B.A. degree in accounting from the University of Texas at Austin and is a licensed certified public accountant.

BRIAN S. HOLMAN

Brian Holman is the Presiding Judge for the City of Lewisville and the Town of Lakewood Village as well as the Prosecuting Attorney for the Town of Northlake. Prior to taking the bench full-time, he had a solo law practice for 11 years in Denton, Texas, with an emphasis in family and criminal law.

Judge Holman was born and raised in San Diego, California and attended Brigham Young University where he received a B.A. in Political Science. Judge Holman went on to receive his Juris Doctorate degree from the University of Arkansas. While living in Spain, Judge Holman developed a fluency in

the Spanish language which he continues to use as judge. He currently resides in Denton with his wife and two daughters.

SCOTT KURTH

Scott Kurth is a Municipal Judge for the City of Red Oak and the City of De Soto. He earned his Juris Doctor from Baylor University in 1982. Judge Kurth also maintains an active federal and state private practice.

HOPE LOCHRIDGE

Hope Lochridge has served as the Executive Director of the Texas Municipal Courts Education Center since 1991. Prior to that she was the Director of the Public Service/Law-Related Education Department of the State Bar of Texas and the Executive Director of Law Focused Education, Inc., a 501(c)(3) non-profit corporation dedicated to educating young people about the law. She earned a B.A. in Government from Beloit College, Wisconsin and a Masters in Human Resource Development from the University of Texas at Austin. A native Texan, she has an 18 year old daughter, Molly, and enjoys outdoor recreation and travel.

DONALD McKINLEY

Don McKinley is an Assistant Collection Specialist in the Research and Court Services Division in the Office of Court Administration. Prior to his OCA position, Don supervised court collections and front cashier staff for the City of Austin Municipal Court. Don also worked as a supervisor for the City of Fort Worth Municipal Court in Court Operations. He has an undergraduate degree in Finance and Economics. He is a Board Member of GCAT (Governmental Collectors Association of Texas), and a founding member of the Saginaw Valley State University Economic Society. A native of Saginaw, Michigan, Mr. McKinley enjoys collections, court management, and the Detroit Red Wings.

HILDA PHARISS

Hilda Phariss is a 1976 graduate from Sul Ross State University, Alpine, Texas. She graduated with a Bachelor of Science degree with a major in Biology and a minor in Chemistry. She has five (5) years experience teaching in public high schools. She joined the City of Bryan in 1983. She is the court administrator and has been since 1985.

Hilda is an active member of the Texas Court Clerks Association, and she is a former President of the Association.

MARGARET ROBBINS

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

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

GARY A. SCOTT

Gary Scott is currently the Associate Municipal Judge for the City of Montgomery as well as the Assistant City Attorney for the City of Conroe.

Judge Scott received his BA in Political Science from Texas A&M University in 1992, and his Juris Doctor from the South Texas College of Law in Houston in 1996. From 1997 to 2000, served as an Assistant City Attorney for the City of Abilene, and has also served as the Assistant City Attorney for the City of Dallas. Judge Scott is a member of the Texas City Attorneys Association, the United States District Court, Northern District of Texas, and the American Bar Association.

WINFIELD W. SCOTT

Winfield Scott has been an Associate Judge with the City of University Park since 1991. He graduated from Southern Methodist University in 1962 with a major in Economics and from the Southern Methodist University School of Law in 1965. He has served at an Assistant City Attorney for the City of Dallas and as Assistant District Attorney for Dallas County. Professional accomplishments include involvement in 20 death penalty trials, and his private practice is now primarily focused in Juvenile Courts. Judge Scott has been a lifetime resident of Dallas.

BARRY D. SHARP

Barry Sharp is an education specialist in the Office of Tobacco Prevention and Control in the Bureau of Disease and Injury Prevention at the Texas Department of Health. In this role, he coordinates the Texas Youth Tobacco Awareness Program, a legislatively mandated educational program for minors who are cited for tobacco possession. This includes oversight of curriculum development, instructor training/certification, investigation of complaints and violations of the state law dealing with the awareness class and continuously working to increase the awareness of the public about the law and the classes.

Mr. Sharp has also worked as a health educator in the state health department's clinical prevention program, community and worksite wellness program and in the public health promotion division. He is a nationally certified health educator with a Bachelor's Degree in health promotion and fitness from the University of Texas at Austin and a Master's Degree in healthcare human resources from Southwest Texas State University. Prior to entering the public health field, Mr. Sharp had an accomplished career as a journalist and editor, winning regional and state awards for his news and column writing and photojournalism.

GREGORY S. SISCO

Gregory S. Sisco was raised in Lubbock, Texas and pursued his undergraduate coursework at Northwestern University in Evanston, Illinois, receiving a Bachelor of Arts. in political science in June 1988. After several years of graduate coursework in political science at Texas Tech University in Lubbock, he transferred to the School of Law in 1992, receiving his Juris Doctor in May of 1995, passing the Bar exam in November of that year.

Before coming to the Texas Lawyers' and Judges' Assistance Program, Mr. Sisco practiced civil litigation and commercial transactional law in Austin, Texas, where his practice focused primarily on bankruptcy law and commercial collections issues. He has been a Program Attorney with the Texas Lawyers' and Judges' Assistance Program since February 2003.

ROBIN D. SMITH

Judge Robin D. Smith is the Presiding Judge of the City of Midland Municipal Court. He has served in that position since November of 1984. Prior to that appointment, he practiced law as a prosecutor for the City of Midland in 1982-83 and operated as a solo practitioner in 1983-84.

Judge Smith's educational accomplishments include a Bachelor's degree in Economics and Psychology from Oklahoma State University and his Juris Doctorate from Texas Tech University.

His professional Association work includes serving as Chair of the State Bar of Texas Municipal Judges Section in 1989-90 and President of the Texas Municipal Courts Association in 1991-92. He served on the TMCA Board of directors from 1986-1997 and again in 2001 to the present. In August 1997, he completed a term as the Chair of the American Bar Association's National Conference of Specialized Court Judges. In 1997, Judge Smith was appointed by Chief Justice Tom Phillips to serve on the Texas Judicial Council where he served until 2001.

In 2002, Judge Smith was selected as the National Highway Transportation Safety Administration Judicial Fellow. As Judicial Fellow, Judge Smith provides input for the United States Department of Transportation on policy and publications. Judge Smith is also called upon to speak on traffic safety issues for the Administration. His tenure as Judicial Fellow will expire in 2004.

Among honors, the Texas Municipal Courts Association named Judge Smith *Judge of the Year* in June 1998 and the State Bar of Texas Municipal Judges Section presented Judge Smith with the *Michael J. O'Neal Outstanding Jurist Gavel Award* in 2002. In 2001, Judge Smith was presented the American Bar Association's National Conference of Specialized Court Judges' *Education Award.* Judge Smith also was recognized by the Texas Junior Chamber of Commerce as one of *Five Outstanding Young Texans* in 1994 and is a four-time winner of the *City of Midland Management Awards.*

He is a frequent speaker for several groups including the National Judicial College and the Texas Municipal Courts Education Center. In addition, he has spoken at judicial training seminars in several states. He is considered to have expertise in the areas of search and seizure, constitutional criminal procedure and juvenile law.

In addition to his activities and position at the Midland Municipal Court, he edits and publishes the *Texas Municipal Court - Justice Court News* which has more than 800 monthly subscribers.

RYAN KELLUS TURNER

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

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

SEANA B. WILLING

Seana Willing is the Executive Director of the State Commission on Judicial Conduct.

Ms. Willing earned a Bachelor of Arts in Economics from Holy Cross College in Worcester, Massachusetts, in 1985, and a Juris Doctor. from St. Mary's University School of Law in San Antonio, Texas, in 1993. Ms. Willing was licensed to practice law in Texas in November 1993, and admitted to practice before the United States District Court for the Western District of Texas in May 1994. In July 2001, Ms. Willing was admitted to practice before the United States Supreme Court.

After graduating from law school, Ms. Willing worked for the law firm of B. Thomas Hallstead, P.C., in San Antonio, where she practiced primarily in the area of business litigation. In March 1998, Ms. Willing became an attorney for the San Antonio Regional Office of the Chief Disciplinary Counsel for the State Bar of Texas, where she prosecuted disciplinary actions against attorneys throughout the region. In September 1999, Ms. Willing began working as a staff attorney for the State Commission on Judicial Conduct where she investigated and prosecuted disciplinary actions against judges. The following year, she was promoted to Senior Commission Counsel. In 2001, Ms. Willing became General Counsel for the Commission. In November 2003, she was appointed Executive Director by the Commission.

TED WOOD

Ted Wood is Special Counsel for Trial Courts at the state Office of Court Administration (OCA). Prior to joining OCA, Mr. Wood served for nearly eight years as Randall County Judge. He has taught state and federal government classes at Amarillo College and worked as a briefing attorney for the Seventh Court of Appeals. Mr. Wood is a 1991 graduate of Baylor Law School where he was a Notes and Comments Editor on the Baylor Law Review. He earned an undergraduate degree in Business at the University of Wisconsin.

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BEFORE TAKING THE BENCH . . .

ALL Municipal Court judges and appointed Clerks of Municipal Courts must file two sworn documents: a Statement of Appointed or Elected Officer and an Oath of Office, both to be filed with your city.

The Statement is no longer filed with the Secretary of State to due a 2001 amendment to the Texas Constitution.

AFTER appointment and BEFORE taking the Oath of office, each judge and appointed clerk must file a Statement with his or her city.

THE TEXAS CONSTITUTION REQUIRES THAT THE STATEMENT OF APPOINTED/ELECTED OFFICER MUST BE FILED BEFORE THE OATH IS TAKEN. If you are using a form that has the Statement of Appointed/Elected Officer and the Oath of Office on the same page, execute the Statement but leave the Oath blank when you submit it to your city. If both are filled out, your city may reject it. Execute the Oath of Office after you submit the Statement of Appointed/Elected Officer.

After the Statement is filed with your city, the Oath of Office must be administered to all judges and appointed clerks. This oath is also filed with your city.

Judges and clerks should execute both a new Statement and a new Oath of Office at the beginning of each new term.

We suggest that you personally confirm that the Statement is filed. If you cannot keep the original Statement or Oath of Office, we suggest you keep a certified copy.

Following is a copy of each of these statements.

In the name and by the authority of

THE STATE OF TEXAS

OATH OF OFFICE

I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect and defend the Constitution and the laws of the United States and of this State, so help me God.

_____
Affiant

Sworn to and subscribed before me by affiant on this _____ day of _____, 20___.

_____
Signature of Person Administering Oath
(Notary Public in and for the State of Texas
or Judge of a Court of Record)

(municipal court seal)

_____
Printed Name

_____
Title

File with your city before filing the Oath of Office.

STATEMENT OF APPOINTED/ELECTED OFFICER (Pursuant to Tex. Const. Art. XVI, Sec. 1(c), amended 2001)

THE STATE OF TEXAS

Statement of Appointed/Elected Officer
(Please type or print legibly)

"I,_____, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money thing of value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected or as a reward to secure my appointment or confirmation, whichever the case may be, so help me God."

_____
Affiant

_____
Office to Which Appointed

_____
City

Sworn to and subscribed before me by affiant on this _____ day of _____, 20___.

_____
Signature of Person Administering Oath
(Notary Public in and for the State of Texas
or Judge of a Court of Record)

(municipal court seal)

_____
Printed Name

_____
Title

File with your city before filing the Oath of Office.

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Qty	Cost	Title	Extended Price
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_____	5.00	Role of Municipal Court in City Government	_____
_____	20.00	The Judge/Mock Trial videotape	_____
_____	20.00	2004 Bench Book for Municipal Court Judges	_____
_____	5.00	2004 CD-ROM Bench Book for Municipal Court Judges	_____
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		TOTAL	

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

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Send order to:

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

Name: _____

Court: _____

Court Address: _____

City, State, Zip: _____

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

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The following items will be available for purchase at the TMCEC Registration desk. Sales will be conducted during breaks and lunch during the first day of the conference only.

TMCEC is working to make some of these items available for purchase online. Log onto our website at www.tmcec.com this spring for more details.

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

Ceramic Mugs $7

CAFÉ MUGS $8

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- CHILDRENS $11
- SIZES S, M, L, XL $13
- XXL & XXXL $15

Long Sleeve T-Shirts

- SIZES S, M, L, XL $18
- XXL & XXXL $20

Golf Shirts $25

Caps $12

Maroon/Canvas Bag $15

Ties $15

Tie Tack/Lapel Pin $5

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Juveniles: Minor Alcohol Offenses

OBJECTIVES

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

1. Describe the elements of the alcohol offenses falling under the jurisdiction of municipal court.
2. Define the differences between juveniles, minors and adults.
3. Apply the statutory punishment provisions for minor alcohol offenders.

Juvenile: Alcohol Offenses Involving Minors

WHY DO WE HAVE THESE LAWS?????

- MATURITY
- DEATHS FROM AUTO ACCIDENTS INVOLVING DRINKING GO UP DRAMATICALLY WHEN THE AGE IS LOWERED
- GATEWAY OFFENSES

Gateway Offenses

- Earliest Chance for Rehabilitation
- Sets Expectation of Law Enforcement
- Sets Expectation of Criminal Justice System

Fatalities

- 2003: Texas: 1709 of 3675 auto fatalities were due to alcohol
- Number one in the United States in terms of number of fatalities: CA 2nd and FL 3rd
- Motor vehicle crashes-leading cause of death-15-20 year olds (NCHS)

MINORS

- Drivers between 15 and 20 years old are more often involved in alcohol-related crashes than any other comparable age group (NHTSA)
- 1982-18 min. age: 55% of auto fatalities of minors alcohol related
- 2002: 21 min. age: 29% alcohol related (NHTSA)

GROWING AREA

- **2002: 44,242 Juvenile/Minor Alc. Cases**
- **2003: 75,599 Juvenile/Minor Alc. Cases**

ALCOHOL OFFENSES

- Possession of Alcohol
- Purchasing Alcohol
- Consuming Alcohol
- Attempted Purchase of Alcohol
- Misrepresentation of Age

Statutes

- MIP: Sec. 106.05 ABC
- No definition of "possession" in these statutes PC definitions apply to other laws:
  PC sec. 103(b)
- Possession defined in PC section 1.07(a)(39)
- "Possession" means actual care, custody, control or management.

Statutes

- PC sec. 6.01. Requirement of Voluntary Act or Omission
- "(a) Person commits an offense only if he voluntarily engages in conduct...including possession."
- "(b) Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control."

Case Law

- Direct or circumstantial evidence equally valid
- Strong suspicion is not proof
- State must prove facts that affirmatively link defendant to substance
- Possession can be exclusive or joint
- Mere presence not sufficient (affirmative links)

DEFENSES

- PURCHASE: Supervision Peace Officer
- CONSUMPTION: Visible Presence of Adult Parent, Guardian, or Spouse
- POSSESSION: Employment; Visible Presence Adult Parent, Guardian, or Spouse; Supervision Peace Officer

Penalty

- - 1st Offense
  - $1 - $500 Fine
  - Alcohol Awareness Course
  - Mandatory Community Service of 8-12 hours related to education about or prevention of misuse of alcohol
  - Automatic 30 day driver's license suspension (not on Deferred)
- 2nd Offense
  - $1 - $500 Fine
  - Discretionary Alcohol Awareness Course
  - Mandatory Community Service of 20 to 40 hours
  - Automatic Driver's License Suspension of 60 days

Penalty - 3rd Offense

- Penalty
  - Up to 180 Days in Jail
  - $250-2000 Fine
  - 20-40 Hours of CS
  - 180 day DL Suspension
- Age 17 or Older
  - Filed in County Court
- Under 17
  - Filed in Juvenile Court

Public Intoxication

- Penal Code Section 49.02
- Elements: Person, Public Place, Intoxicated to degree Person Endangers Him/Herself or Another
- Alcohol Awareness required-Same Pun. 106.71 TABC.
- No Jurisdiction Under 17 (Penal Code 8.07)

Driving Under the Influence

Alcoholic Beverage Code Section 106.041

- Status Offense (under 21)
- operates a motor vehicle
- in a public place
- having ANY detectable amount of alcohol in the minor's system

Penalty -

- 1st Offense
  - $1 - $500 Fine
  - Alcohol Awareness Course
  - Mandatory Community Service of 20-40 hours related to education about or prevention of misuse of alcohol
  - Automatic 60 day driver's license suspension (Court does not order)
- 2nd Offense
  - $1 - $500 Fine
  - Discretionary Alcohol Awareness Course
  - Mandatory Community Service of 40 to 60 hours
  - Automatic Driver's License Suspension of 120 days (Court does not order)

Penalty - 3rd Offense

- Penalty
  - Up to 180 Days
  - $500-2000 Fine
  - 40-60 Hours of CS
- Age 17 or Older
  - Filed in County Court
- Under 17
  - Filed in Juvenile Court

Alcohol Awareness Course

- Failure to attend results in 180 day driver's license suspension
- completion within 90 days but may be extended 90 days more
- fine may be reduced up to 1/2 of the originally assessed fine
- Directory of courses -TCADA- 800/832-9623

Community Service

- Contempt appears to be the primary, if not only, enforcement mechanism

Calculating Offenses

- Any previous conviction of one alcohol related offense can be used to enhance others
- Deferred disposition that is successfully completed is still considered a conviction for enhancement

Sale to Minor "Stings"

There is no offense committed by a minor if the minor purchases alcohol or tobacco under the immediate supervision of a licensed peace officer

Reports

- JUVENILE COURT
  - When case filed
  - When case resolved
- Alcoholic Beverage Commission
  - may request in a form they designate
- Department of Public Safety
  - convictions
  - deferred orders
  - in a form they designate which must include the minor's driver's license number (if they have one)

Driver's License Suspension

- The minor is NOT eligible for an occupational license for the first one half of the suspension period

Deferred Disposition for Alcohol Offenses

- Community service required
- Eight to 12 hours - First Offense
- 20 to 40 hours - Subsequent offense
- Alcohol awareness program required

REMEMBER

(TABC 106.10)

- No Minor May Plead Guilty To An Offense Under TABC Except
  - In Open Court
  - Before A Judge

PARENT/GUARDIAN

- Under 18: Parent/Guardian Must Be Present
- If Parent/Guardian Resides In Jurisdiction-Summon
- Outside Jurisdiction-Written Notice

In your opinion, which is the most important /effective as a punishment option:

20% 1. Victim Impact Class
20% 2. Alcohol Awareness Course
20% 3. Fine/Bond amount
20% 4. Alcohol related community service
20% 5. Driver's License Suspension

0%
0 of 0

Approximately what percentage of your defendants perform Community Service related to education about or prevention of misuse of alcohol?

20% 1. 100%
20% 2. 80%
20% 3. 50%
20% 4. 20%
20% 5. Less than 20%

Which best describes how you approach a Minor In Possession of Alcohol, second offense, differently from a first offense?

25% 1. Higher Fine
25% 2. Rarely Give Deferred Disposition
25% 3. Varies Widely based on the age of the defendant
25% 4. Other

Do you inform defendants about the possibility of expunction?

50% 1. Yes
50% 2. No

Do you commonly inform defendants about the laws regarding the enhancement penalties for subsequent offenses?

50% 1. Yes
50% 2. No

Are third offenses filed as class B Misdemeanors by the State in your city?

50% 1. Yes
50% 2. No

Sentencing Quiz

1. In your opinion, which is the most important/effective as a punishment option:

2. Approximately what percentage of your defendants perform Community Service related to education about or prevention of misuse of alcohol?

3. Of those with providers in the area, what kind of Community Service programs related to education about or prevention of misuse of alcohol do you send your defendants?

4. Which best describes how you approach a Minor In Possession of Alcohol, second offense, differently from a first offense?

A. Higher Fine
B. Rarely Give Deferred Disposition
C. Varies Widely based on the age of the defendant
D. Other

5. Do you inform defendants about the possibility of expunction?

6. Do you commonly inform defendants about the laws regarding the enhancement penalties for subsequent offenses?

7. Are third offenses filed as class B Misdemeanors by the State in your city?

Selected Statutes

Alcoholic Beverage Code

106.01. DEFINITION.
In this code, "minor" means a person under 21 years of age.

§ 106.02. PURCHASE OF ALCOHOL BY A MINOR.

a) A minor commits an offense if the minor purchases an alcoholic beverage. A minor does not commit an offense if the minor purchases an alcoholic beverage under the immediate supervision of a commissioned peace officer engaged in enforcing the provisions of this code.

(b) An offense under this section is punishable as provided by Section 106.071.

§ 106.025. ATTEMPT TO PURCHASE ALCOHOL BY A MINOR.
a) A minor commits an offense if, with specific intent to commit an offense under Section 106.02 of this code, the minor does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.

(b) An offense under this section is punishable as provided by Section 106.071.

§ 106.04. CONSUMPTION OF ALCOHOL BY A MINOR.
a) A minor commits an offense if he consumes an alcoholic beverage.

(b) It is an affirmative defense to prosecution under this section that the alcoholic beverage was consumed in the visible presence of the minor's adult parent, guardian, or spouse.

(c) An offense under this section is punishable as provided by Section 106.071.

d) A minor who commits an offense under this section and who has been previously convicted twice or more of offenses under this section is not eligible for deferred disposition. For the purposes of this subsection:

(1) an adjudication under Title 3, Family Code, that the minor engaged in conduct described by this section is considered a conviction of an offense under this section; and

(2) an order of deferred disposition for an offense alleged under this section is considered a conviction of an offense under this section.

§ 106.041. DRIVING UNDER THE INFLUENCE OF ALCOHOL BY MINOR.
(a) A minor commits an offense if the minor operates a motor vehicle in a public place while having any detectable amount of alcohol in the minor's system.

(b) Except as provided by Subsection (c), an offense under this section is a Class C misdemeanor.

(c) If it is shown at the trial of the defendant that the defendant is a minor who is not a child and who has been previously convicted at least twice of an offense under this section, the offense is punishable by:

(1) a fine of not less than $500 or more than $2,000;

(2) confinement in jail for a term not to exceed 180 days; or

(3) both the fine and confinement.

(d) In addition to any fine and any order issued under Section 106.115, the court shall order a minor convicted of an offense under this section to perform community service for:

(1) not less than 20 or more than 40 hours, if the minor has not been previously convicted of an offense under this section; or

(2) not less than 40 or more than 60 hours, if the minor has been previously convicted of an offense under this section.

(e) Community service ordered under this section must be related to education about or prevention of misuse of alcohol.

(f) A minor who commits an offense under this section and who has been previously convicted twice or more of offenses under this section is not eligible for deferred disposition.

(g) An offense under this section is not a lesser included offense under Section 49.04, Penal Code.

(h) For the purpose of determining whether a minor has been previously convicted of an offense under this section:

(1) an adjudication under Title 3, Family Code, that the minor engaged in conduct described by this section is considered a conviction under this section; and

(2) an order of deferred disposition for an offense alleged under this section is considered a conviction of an offense under this section.

(i) A peace officer who is charging a minor with committing an offense under this section is not required to take the minor into custody but may issue a citation to the minor that contains written notice of the time and place the minor must appear before a magistrate, the name and address of the minor charged, and the offense charged.

(j) In this section:

(1) "Child" has the meaning assigned by Section 51.02, Family Code.

(2) "Motor vehicle" has the meaning assigned by Section 32.34(a), Penal Code.

(3) "Public place" has the meaning assigned by Section 1.07, Penal Code.

§ 106.05. POSSESSION OF ALCOHOL BY A MINOR.
(a) Except as provided in Subsection (b) of this section, a minor commits an offense if he possesses an alcoholic beverage.

(b) A minor may possess an alcoholic beverage:

(1) while in the course and scope of the minor's employment if the minor is an employee of a licensee or permittee and the employment is not prohibited by this code;

(2) if the minor is in the visible presence of his adult parent, guardian, or spouse, or other adult to whom the minor has been committed by a court; or

(3) if the minor is under the immediate supervision of a commissioned peace officer engaged in enforcing the provisions of this code.

(c) An offense under this section is punishable as provided by Section 106.071.

§ 106.07. MISREPRESENTATION OF AGE BY A MINOR.
(a) A minor commits an offense if he falsely states that he is 21 years of age or older or presents any document that indicates he is 21 years of age or older to a person engaged in selling or serving alcoholic beverages.

(b) An offense under this section is punishable as provided by Section 106.071.

§ 106.071. PUNISHMENT FOR ALCOHOL-RELATED OFFENSE BY MINOR.
(a) This section applies to an offense under Section 106.02, 106.025, 106.04, 106.05, or 106.07.

(b) Except as provided by Subsection (c), an offense to which this section applies is a Class C misdemeanor.

(c) If it is shown at the trial of the defendant that the defendant is a minor who is not a child and who has been previously convicted at least twice of an offense to which this section applies, the offense is punishable by:

(1) a fine of not less than $250 or more than $2,000;

(2) confinement in jail for a term not to exceed 180 days; or

(3) both the fine and confinement.

(d) In addition to any fine and any order issued under Section 106.115:

(1) the court shall order a minor placed on deferred disposition for or convicted of an offense to which this section applies to perform community service for:

(A) not less than eight or more than 12 hours, if the minor has not been previously convicted of an offense to which this section applies; or

(B) not less than 20 or more than 40 hours, if the minor has been previously convicted once of an offense to which this section applies; and

(2) the court shall order the Department of Public Safety to suspend the driver's license or permit of a minor convicted of an offense to which this section applies or, if the minor does not have a driver's license or permit, to deny the issuance of a driver's license or permit for:

(A) 30 days, if the minor has not been previously convicted of an offense to which this section applies;

(B) 60 days, if the minor has been previously convicted once of an offense to which this section applies; or

(C) 180 days, if the minor has been previously convicted twice or more of an offense to which this section applies.

(e) Community service ordered under this section must be related to education about or prevention of misuse of alcohol if programs or services providing that education are available in the community in which the court is located. If programs or services providing that education are not available, the court may order community service that it considers appropriate for rehabilitative purposes.

(f) For the purpose of determining whether a minor has been previously convicted of an offense to which this section applies:

(1) an adjudication under Title 3, Family Code, that the minor engaged in conduct described by this section is considered a conviction under this section; and

(2) an order of deferred disposition for an offense alleged under this section is considered a conviction of an offense under this section.

(g) In this section, "child" has the meaning assigned by Section 51.02, Family Code.

(h) A driver's license suspension under this section takes effect on the 11th day after the date the minor is convicted.

(i) A defendant who is not a child and who has been previously convicted at least twice of an offense to which this section applies is not eligible to receive a deferral of final disposition of a subsequent offense.

§ 106.10. PLEA OF GUILTY BY MINOR.

No minor may plead guilty to an offense under this chapter except in open court before a judge.

§ 106.11. PARENT OR GUARDIAN AT TRIAL.
(a) Except as provided in Subsection (d) of this section, no person under 18 years of age may be convicted of an offense under this chapter unless his parent or legal guardian is present in court.

(b) If the parent or legal guardian of a person under 18 years of age accused of a violation of this chapter resides within the jurisdiction of the court before whom the case is to be heard, the court shall summon the parent or legal guardian to appear in court and shall require him to be present at all proceedings in the case.

(c) If the parent or legal guardian of a person under 18 years of age accused of a violation of this chapter resides outside the jurisdiction of the court before whom the case is to be heard, the court shall give written notice of the charge against the person to the parent or legal guardian.

(d) If the court is unable to locate or to compel the presence of the person's parent or legal guardian after diligent effort, the court may waive the requirement of presence of a parent or legal guardian.

§ 106.115. ATTENDANCE AT ALCOHOL AWARENESS COURSE; LICENSE SUSPENSION.
(a) On the placement of a minor on deferred disposition for an offense under Section 49.02, Penal Code, or under Section 106.02, 106.025, 106.04, 106.041, 106.05, or 106.07, the court shall require the defendant to attend an alcohol awareness program approved by the Texas Commission on Alcohol and Drug Abuse. On conviction of a minor of an offense under one or more of those sections, the court, in addition to assessing a fine as provided by those sections, shall require a defendant who has not been previously convicted of an offense under one of those sections to attend the alcohol awareness program. If the defendant has been previously convicted once or more of an offense under one or more of those sections, the court may require the defendant to attend the alcohol awareness program. If the defendant is younger than 18 years of age, the court may require the parent or guardian of the defendant to attend the program with the defendant. The Texas Commission on Alcohol and Drug Abuse:

(1) is responsible for the administration of the certification of approved alcohol awareness programs;

(2) may charge a nonrefundable application fee for:

(A) initial certification of the approval; or

(B) renewal of the certification;

(3) shall adopt rules regarding alcohol awareness programs approved under this section; and

(4) shall monitor, coordinate, and provide training to a person who provides an alcohol awareness program.

(b) When requested, an alcohol awareness program may be taught in languages other than English.

(c) The court shall require the defendant to present to the court, within 90 days of the date of final conviction, evidence in the form prescribed by the court that the defendant, as ordered by the court, has satisfactorily completed an alcohol awareness program or performed the required hours of community service. For good cause the court may extend this period by not more than 90 days. If the defendant presents the required evidence within the prescribed period, the court may reduce the assessed fine to an amount equal to no less than one-half of the amount of the initial fine.

(d) If the defendant does not present the required evidence within the prescribed period, the court:

(1) shall order the Department of Public Safety to suspend the defendant's driver's license or permit for a period not to exceed six months or, if the defendant does not have a license or permit, to deny the issuance of a license or permit to the defendant for that period; and

(2) may order the defendant or the parent, managing conservator, or guardian of the defendant to do any act or refrain from doing any act if the court determines that doing the act or refraining from doing the act will increase the likelihood that the defendant will present evidence to the court that the defendant has satisfactorily completed an alcohol awareness program or performed the required hours of community service.

(e) The Department of Public Safety shall send notice of the suspension or prohibition order issued under Subsection (d) by first class mail to the defendant. The notice must include the date of the suspension or prohibition order, the reason for the suspension or prohibition, and the period covered by the suspension or prohibition.

§ 106.116. REPORTS OF COURT TO COMMISSION.
Unless the clerk is otherwise required to include the information in a report submitted under Section 101.09, the clerk of a court, including a justice court, municipal court, or juvenile court, shall furnish to the commission on request a notice of a conviction of an offense under this chapter or an adjudication under Title 3, Family Code, for conduct that constitutes an offense under this chapter. The report must be in the form prescribed by the commission.

§ 106.117. REPORT OF COURT TO DEPARTMENT OF PUBLIC SAFETY.
(a) Each court, including a justice court, municipal court, or juvenile court, shall furnish to the Department of Public Safety a notice of each:

(1) adjudication under Title 3, Family Code, for conduct that constitutes an offense under this chapter;

(2) conviction of an offense under this chapter;

(3) order of deferred disposition for an offense alleged under this chapter; and

(4) acquittal of an offense under Section 106.041.

(b) The notice must be in a form prescribed by the Department of Public Safety and must contain the driver's license number of the defendant, if the defendant holds a driver's license.

(c) The Department of Public Safety shall maintain appropriate records of information in the notices and shall provide the information to law enforcement agencies and courts as necessary to enable those agencies and courts to carry out their official duties. The information is admissible in any action in which it is relevant. A person who holds a driver's license having the same number that is contained in a record maintained under this section is presumed to be the person to whom the record relates. The presumption may be rebutted only by evidence presented under oath.

(d) The information maintained under this section is confidential and may not be disclosed except as provided by this section. A provision of Chapter 58, Family Code, or other law limiting collection or reporting of information on a juvenile or other minor or requiring destruction of that information does not apply to information reported and maintained under this section.

§ 106.12. EXPUNGEMENT OF CONVICTION OF A MINOR.
(a) Any person convicted of not more than one violation of this code while a minor, on attaining the age of 21 years, may apply to the court in which he was convicted to have the conviction expunged.

(b) The application shall contain the applicant's sworn statement that he was not convicted of any violation of this code while a minor other than the one he seeks to have expunged.

(c) If the court finds that the applicant was not convicted of any other violation of this code while he was a minor, the court shall order the conviction, together with all complaints, verdicts, sentences, and other documents relating to the offense, to be expunged from the applicant's record. After entry of the order, the applicant shall be released from all disabilities resulting from the conviction, and the conviction may not be shown or made known for any purpose.

Penal Code

§ 8.07. AGE AFFECTING CRIMINAL RESPONSIBILITY.
(a) A person may not be prosecuted for or convicted of any offense that the person committed when younger than 15 years of age except:

(1) perjury and aggravated perjury when it appears by proof that the person had sufficient discretion to understand the nature and obligation of an oath;

(2) a violation of a penal statute cognizable under Chapter 729, Transportation Code, except for:

(A) an offense under Section 521.457, Transportation Code;

(B) an offense under Section 550.021, Transportation Code;

(C) an offense punishable as a Class B misdemeanor under Section 550.022, Transportation Code;

(D) an offense punishable as a Class B misdemeanor under Section 550.024, Transportation Code; or

(E) an offense punishable as a Class B misdemeanor under Section 550.025, Transportation Code;

(3) a violation of a motor vehicle traffic ordinance of an incorporated city or town in this state;

(4) a misdemeanor punishable by fine only other than public intoxication;

(5) a violation of a penal ordinance of a political subdivision;

§ 49.02. PUBLIC INTOXICATION.
(a) A person commits an offense if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another.

(b) It is a defense to prosecution under this section that the alcohol or other substance was administered for therapeutic purposes and as a part of the person's professional medical treatment by a licensed physician.

(c) Except as provided by Subsection (e), an offense under this section is a Class C misdemeanor.

(d) An offense under this section is not a lesser included offense under Section 49.04.

(e) An offense under this section committed by a person younger than 21 years of age is punishable in the same manner as if the minor committed an offense to which Section 106.071, Alcoholic Beverage Code, applies.

Code of Criminal Procedure

Art. 45.0215. Plea by Minor and Appearance of Parent

(a) If a defendant is younger than 17 years of age and has not had the disabilities of minority removed, the judge or justice:

(1) must take the defendant's plea in open court; and

(2) shall issue a summons to compel the defendant's parent, guardian, or managing conservator to be present during:

(A) the taking of the defendant's plea; and

(B) all other proceedings relating to the case.

(b) If the court is unable to secure the appearance of the defendant's parent, guardian, or managing conservator by issuance of a summons, the court may, without the defendant's parent, guardian, or managing conservator present, take the defendant's plea and proceed against the defendant.

(c) If the defendant resides in a county other than the county in which the alleged offense occurred, the defendant may, with leave of the judge of the court of original jurisdiction, enter the plea, including a plea under Article 45.052, before a judge in the county in which the defendant resides.

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Language Interpreters

OBJECTIVES

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

1. Recognize situations where a court interpreter is required.
2. Describe procedures whereby court interpreters are appointed to serve.
3. List the requirements to serve as a court interpreter in Municipal Court.
4. Explain the consequences of non-compliance.

Flowchart For Court Interpreters In Municipal Courts
October 2004

Step-by-Step Commentary

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Box 1. Contact between person and court.

As a starting point, a person has some sort of contact with the municipal court or the municipal judge.

Proceed to Box 2.

Box 2. Is person arrested and taken to judge acting as a magistrate?

Generally, a person who has been arrested is to be taken before a magistrate within 48 hours of arrest. TEX. CRIM. PROC. CODE ANN. art. 14.06 (Vernon Supp. 2004). In many situations, the magistrate will be a municipal judge.

If a person comes in contact with the municipal judge because the person has been arrested and is taken before the judge in the judge's capacity as a magistrate, then go to Box 3.

If the person comes in contact with the municipal court or the municipal judge for some other reason, then advance to Box 12.

Box 3. Judge must perform magistration duties as required by CCP art. 15.17.

Pursuant to TEX. CRIM. PROC. CODE ANN. art. 15.17(a) (Vernon Supp. 2004), the judge is to inform the arrested person of the accusation against him or her. The judge is also required to inform the arrested person of certain rights. Additionally, the judge shall admit the person to bail if allowed by law.

Move to Box 4.

Box 4. Does judge learn that person is deaf or hard of hearing?

If the person appearing before the judge is deaf or hard of hearing, then continue on to Box 5.

If the person is not deaf or hard of hearing, then move ahead to Box 19.

Box 5. Judge must appoint "interpreter for the deaf" (or provide "auxiliary aid") for magistration proceeding.

A deaf person is entitled to have an interpreter during the magistration proceedings before the judge. The Code of Criminal Procedure makes this entitlement very specific as follows:

> When a deaf accused is taken before a magistrate under this article or Article 14.06 of this Code, an interpreter appointed by the magistrate qualified and sworn as provided in Article 38.31 of this Code shall interpret the warning required by those articles in a language that the accused can understand, including but not limited to sign language.

TEX. CRIM. PROC. CODE ANN. art. 15.17(c) (Vernon Supp. 2004).

Additionally, the Code of Criminal Procedure declares that if the accused is deaf, the magistrate shall inform the person in a manner consistent with Article 38.31. TEX. CRIM. PROC. CODE ANN. art. 15.17(a) (Vernon Supp. 2004). Article 38.31 requires the appointment of an interpreter to assist deaf defendants. TEX. CRIM. PROC. CODE ANN. art. 38.31 (Vernon Supp. 2004).

As noted above, an accused person who is deaf is entitled to receive the required warnings "in a language that the accused can understand, including but not limited to sign language." Not all individuals who are deaf or hard of hearing communicate in sign language. Many individuals will prefer to make use of an auxiliary aid such as oral interpreters, "real-time captioning," or amplified sound equipment. If this is the case, then such an auxiliary aid should be provided instead of a court interpreter who uses sign language. *See* 28 C.F.R. § 35.104, 35.160 (2004).

Move forward to Box 6.

Box 6. "Interpreter for the Deaf" must be a "certified court interpreter."

When a judge appoints an "interpreter for the deaf," the judge must appoint a "certified court interpreter." Op. Tex. Att'y Gen. No. JC-0584 (2002) (construing Section 57.002(a) of the Government Code to require the appointment of a "certified court interpreter" when a judge appoints an interpreter for the deaf).

In 2001, the Texas Legislature enacted new provisions concerning court interpreters that are codified as Chapter 57 of the Government Code. As noted above, one of these provisions requires the appointment of a "certified court interpreter" when the judge appoints an interpreter for the deaf. Section 57.001 defines "certified court interpreter" as follows:

> "Certified court interpreter" means an individual who is a qualified interpreter as defined in Article 38.31, Code of Criminal Procedure, or Section 21.003, Civil Practice and Remedies Code, or certified under Subchapter B by the Texas Commission for the Deaf and Hard of Hearing to interpret court proceedings for a hearing-impaired individual.

TEX. GOV'T CODE ANN. § 57.001 (Vernon Supp. 2004).

Certified court interpreters include both sign language interpreters and oral interpreters. The Texas Commission for the Deaf and Hard of Hearing maintains a list of certified court interpreters and will provide the list to any court upon request. TEX. GOV'T CODE ANN. § 57.021 (Vernon Supp. 2004). The list can be accessed on the Internet at www.tcdhh.state.tx.us/beiterpsearch.htm.

A person becomes a certified court interpreter in one of three ways.

First, a person can become a certified court interpreter by passing an examination prescribed by the Texas Commission for the Deaf and Hard of Hearing. TEX. GOV'T CODE ANN. § 57.022 (Vernon Supp. 2004).

Second, a person is considered to be a certified court interpreter if the person is a "qualified interpreter" as that term is defined in Article 38.31 of the Code of Criminal Procedure or Section 21.003 of the Civil Practice and Remedies Code. TEX. GOV'T CODE ANN. § 57.001 (Vernon Supp. 2004). Article 38.31 defines a "qualified interpreter" as

> an interpreter for the deaf who holds a current Reverse Skills Certificate, Comprehensive Skills Certificate, or Legal Skills Certificate issued by the National Registry of Interpreters for the Deaf or a current Level III, IV, or V

> Certificate issued by the Board for Evaluation of Interpreters.

TEX. CRIM. PROC. CODE ANN. art. 38.31(g)(2) (Vernon Supp. 2004).

Third, a person practicing as an interpreter for the deaf prior to September 1, 2001, may be certified without examination upon proof of the person's experience. TEX. GOV'T CODE ANN. § 57.001 (Vernon Supp. 2004) (Historical and Statutory Notes).

Please note that the judge may, but is not required to, select an interpreter from an interpreter service under contract with the municipality. *See* Op. Tex. Att'y Gen. No. JC-0584 (2002).

If the person who is deaf or hard of hearing prefers to use real-time captioning (sometimes known as Communication Access Real-Time Transcription of CART), then the judge should appoint a specialist in real-time captioning (often known as a CART provider). Section 57.021(d) makes reference to specialists in real-time captioning being certified by the Court Reporters Certification Board (CRCB). The statute also makes reference to the Texas Commission for the Deaf and Hard of Hearing (TCDHH) maintaining a list of specialists in real-time captioning who have been certified. In reality, however, the CRCB does not actually certify specialists in real-time captioning and therefore the TCDHH maintains no such list. *See* Op. Tex. Att'y Gen. No. JC-0573 (2002). However, the Texas Court Reporters Association (TCRA) does maintain a list of specialists in real-time captioning who are certified by the TCRA. This list can be accessed on the Internet at www.tcra-online.com/cart.htm.

If the person who is deaf or hard of hearing prefers to use an auxiliary aid such as amplified sound equipment, then the requirement for a "certified court interpreter" is inapplicable.

Go to Box 7.

Box 7. If interpreter is interpreting for a Δ, interpreter must be in a position within 10 feet and in full view of Δ.

The Code of Criminal Procedure provides that

> [a] proceeding for which an interpreter is required to be appointed under this Article may not commence until the appointed interpreter is in a position not exceeding ten feet from and in full view of the deaf person.

TEX. CRIM. PROC. CODE ANN. art. 38.31(d) (Vernon Supp. 2004). This requirement definitely applies to sign language interpreters and oral interpreters. The requirement probably does not apply to specialists in real-time captioning. Go to Box 8.

Box 8. Judge must administer oath to interpreter.

The Code of Criminal Procedure requires that the judge administer an oath to an interpreter for the deaf.

> The interpreter appointed under the terms of this Article shall be required to take an oath that he will make a true interpretation to the person accused or being examined, which person is deaf, of all the proceedings in his case in a language that he understands; and that he will repeat said deaf person's answer to questions of counsel, court, or jury, in the English language, in his best skill and judgment.

TEX. CRIM. PROC. CODE ANN. art. 38.31(e).

Proceed to Box 9.

Box 9. Generally, interpreter is to be paid by municipality.

Article 38.31 of the Code of Criminal Procedure is silent as to how interpreters for the deaf are paid but an opinion of the attorney general has concluded that

> interpreters appointed by the court under article 38.31 to interpret for deaf persons in criminal proceedings are entitled to receive payment of their fees and expenses from the general fund of the county.

Op. Tex. Att'y Gen. No. JM-113 (1983). A recent opinion of the attorney general cited the1983 opinion's conclusion with approval. Op. Tex. Att'y Gen. No. JC-0584 (2002).

Obviously, the 1983 opinion did not contemplate municipal judges. A logical extension of the opinion's conclusion, however, is that municipalities must shoulder the burden of paying for interpreters in the municipal courts.

Note that the general rule is that municipalities must pay when a municipal judge appoints an interpreter for the deaf. An exception may exist in some situations where the municipal judge, acting as a magistrate, has appointed an interpreter for the deaf. In such exceptional circumstances, the county may pay for the interpreter.

Note also that the government shoulders the cost of any auxiliary aids. Federal law requires public entities to furnish appropriate auxiliary aids. 28 C.F.R. § 35.160(b)(1) (2004). Additionally, Texas law specifies that in the case of jurors who are deaf or hard of hearing "[t]he city shall pay the cost [of an auxiliary aid or service] unless the auxiliary aid or service will result in a fundamental alteration of the municipal court proceeding or

in undue financial or administrative burdens." TEX. GOV'T CODE ANN. § 62.1041(e) (Vernon 1998).

Go to Box 10.

Box 10. Interpreter is entitled to a reasonable fee.

Interpreters for the deaf

> are entitled to a reasonable fee determined by the court after considering the recommendations of the Texas Commission for the Deaf and Hard of Hearing.

TEX. CRIM. PROC. CODE ANN. art. 38.31(f) (Vernon Supp. 2004).

The recommended rates are as follows:

> 1) $65/hour -- Scheduled assignments during business hours
> 2) $90/hour -- Emergency and evening rate (after business hours)
>
> -- two-hour minimum

Advance to Box 11.

Box 11. Interpreter is to be reimbursed for expenses at state employee rate for travel, lodging & meals.

When travel of an interpreter for the deaf is involved, then

> all the actual expenses of travel, lodging, and meals incurred by the interpreter pertaining to the case he is appointed to serve shall be paid at the same rate applicable to state employees.

TEX. CRIM. PROC. CODE ANN. art. 38.31(f) (Vernon Supp. 2004).

The Texas Comptroller establishes rules and rates for the travel expenses of state employees. TEX. GOV'T CODE ANN. § 660.021 (Vernon Supp. 2004). Current travel reimbursement rates are as follows:

Lodging: up to $80 per day
Meals: up to $30 per day
Automobile Mileage: 35 cents per mile
Airfare: actual cost (with limitations)

More detailed information is available on the comptroller's website at www.window.state.tx.us/fm/pubs/travallow.

Stop at this point.

Box 12. Is person charged with a crime handled by municipal court?

This question should be answered affirmatively not only if the person is charged with a crime but also if the person is the parent of a minor charged with a crime and the court may possibly impose conditions or sanctions against the parent. *See* Op. Tex. Att'y Gen. No. JC-0584 (2002)(If the court contemplates imposing conditions or sanctions against a parent, then the court should treat the parent as a witness or a party and provide an interpreter for the parent if the parent cannot communicate without one.)

If the individual has been charged with a crime within the jurisdiction or the municipal court (or is a parent as described above), then advance to Box 13.

Otherwise, move to Box 20.

Box 13. Person is a Δ in a criminal case before the municipal court.

Individuals generally come in contact with the municipal court because they have been charged with some violation of the law within the jurisdiction of the municipal court.

Proceed to Box 21.

Box 14. Does court staff or judge learn that Δ is deaf or hard of hearing?

If the defendant is deaf or hard of hearing, then move on to Box 15.

If the defendant is not deaf or hard of hearing, then proceed to Box 22.

Box 15. Δ has right to "interpreter for the deaf" (or "auxiliary aid") while at counter making plea and during any other criminal proceedings.

Both the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Texas Constitution grant a criminal defendant the right to be confronted with

the witnesses against him or her. As explained by the Texas Court of Criminal Appeals, this right of confrontation includes the right of a criminal defendant to be present in the courtroom during his or her trial. *Garcia v. State*, ___ S.W.3d ___, 2004 Tex. Crim. App. LEXIS 519, at 12-13, 2004 WL 574554 (Tex. Crim. App. March 24, 2004). A defendant's right to be present at trial includes the right to understand the testimony of the witnesses. *Id.* Accordingly, providing an interpreter to a defendant who otherwise cannot understand the testimony of the witnesses is constitutionally required. *Id.*

The Government Code requires the appointment of an interpreter not only at trial but in any "criminal proceeding." TEX. GOV'T CODE ANN. § 57.002 (Vernon Supp. 2004). Upon being asked whether the process of making a plea at the counter of a justice court constituted a "criminal proceeding" for purposes of the appointment of an interpreter, the attorney general concluded that such a process does constitute a "criminal proceeding." Op. Tex. Att'y Gen. No. JC-0584 (2002). The opinion flatly states that "[a] defendant's plea in a criminal misdemeanor is a step in a 'criminal proceeding in the court' subject to chapter 57." *Id.*

Additionally, the Code of Criminal Procedure mandates the appointment of an interpreter for the deaf at any "arraignment, hearing, examining trial, or trial." TEX. CRIM. PROC. CODE ANN. art. 38.31(a) (Vernon Supp. 2004).

Please note that not all persons who are deaf or hard of hearing can communicate in sign language. Many of these persons will prefer to make use of an auxiliary aid such as oral interpreters, "real-time captioning," or amplified sound equipment. If this is the case, then an auxiliary aid should be provided instead of a court interpreter who uses sign language. *See* 28 C.F.R. § 35.104, 35.160 (2004).

Advance to Box 16.

Box 16. Court staff or judge must inform Δ in unmistakably clear manner that Δ has right to "interpreter for the deaf" (or auxiliary aid) at government expense while at counter making plea and during any subsequent criminal proceedings.

The recent case of *Garcia v.* State, ___ S.W.3d ___, 2004 Tex. Crim. App. LEXIS 519, 2004 WL 574554 (Tex. Crim. App. March 24, 2004), dealt with the right to an interpreter for a criminal defendant who does not understand English. The case is applicable to deaf criminal defendants. The Court of Criminal Appeals approved the following statement from *United States v. Carrion*, 488 F.2d 12, 15 (1st Cir. 1973):

> [The trial court should] make unmistakably clear to a defendant who may have a language difficulty

that he has a right to a court-appointed interpreter
if the court determines that one is needed . . . .

Move ahead to Box 17.

Box 17. Does Δ waive right to interpreter or aid while at counter making plea.

A deaf criminal defendant can waive his or her right to an interpreter. But as the Court of Criminal Appeals has recently explained, such a waiver cannot be made knowingly, voluntarily and intelligently unless the defendant has been informed of his or her right to have an interpreter. *Garcia v. State*, ___ S.W.3d ___ , 2004 Tex. Crim. App. LEXIS 519, 2004 WL 574554 (Tex. Crim. App. March 24, 2004). A waiver will not be assumed.

Assuming that the right to an interpreter for the deaf has been communicated to a deaf defendant, the defendant may waive that right and choose to go ahead and enter a plea at the counter.

If the defendant waives the right to an interpreter at the counter, then move ahead to Box 18.

If the defendant does not waive the right to an interpreter at the counter, then go to Box 25.

Box 18. Does Δ enter plea of guilty or nolo contendere?

If the defendant pleads guilty or nolo contendere (no contest) then the case will end. If this is the situation then jump ahead to Box 40.

If the defendant does not guilty plead guilty or nolo contendere, then go to Box 26.

Box 19. Does judge learn that person doesn't understand English?

Once put on notice that a person may not understand English, the judge must determine whether the person has a significant language difficulty that necessitates the appointment of a spoken language interpreter. *See Garcia v. State*, ___ S.W.3d ___, 2004 Tex. Crim. App. LEXIS 519, at 28, 2004 WL 574554 (Tex. Crim. App. March 24, 2004). The Court of Criminal Appeals quoted the following passage from *United States v. Carrion*, 488 F.2d 12, 15 (1st Cir. 1973):

> [The trial court should] make unmistakably clear to a defendant who may have a language difficulty that he has a right to a court-appointed interpreter if the court determines that one is needed, and, whenever put on notice that there may be some significant language difficulty, the court should make such a determination of need.

Garcia v. State, LEXIS 519 at 28 (emphasis added).

The judge may learn of the potential language difficulty from any source, including his or her own observation. When the issue of an arrested person's ability to speak English is raised to some extent, "it becomes necessary for the court, in the exercise of [its] discretion, to make inquiry to ascertain whether [the] accused's rights would be safeguarded in the absence of an interpreter." *Baltierra v. State*, 586 S.W.2d 553, 559 (Tex. Crim. App. 1979) (quoting *Garcia v. State*, 151 Tex. Crim. 593, 210 S.W.2d 574, 581 (1948).

The attorney general has opined that the Legislature intended for courts to have discretion to determine whether a party requires a spoken language interpreter. Op. Tex. Att'y Gen. No. JC-0584 (2002).

Please note that the mere fact that a defendant may be more fluent in a foreign language than in English does not in and of itself require the appointment of an interpreter for a defendant who speaks and understands English. *Flores v. State*, 509 S.W.2d 580, 581 (Tex. Crim. App. 1974).

If the judge determines that the arrested person does not understand English, then proceed to Box 27. Otherwise, go to Box 40.

Box 20. Person is not in contact with court as an arrested person or as a Δ.

Generally, persons who come in contact with the court in some way other than as an arrested person or a defendant do not require the appointment of an interpreter. If the person is a witness or a juror then an interpreter may be required but this possibility will be explored by following other steps. This is the final step here.

Box 21. Does Δ appear at court counter to enter plea or get more information?

In municipal court, individuals generally enter a plea at the court's counter.

If this is the situation, then advance to Box 14. Otherwise, move to Box 28.

Box 22. Does court staff or judge learn that Δ doesn't understand English?

Once put on notice that a person may not understand English, the judge must determine whether the person has a significant language difficulty that necessitates the appointment of a spoken language interpreter. *See Garcia v. State*, ___ S.W.3d ___, 2004 Tex. Crim. App. LEXIS 519, at 28, 2004 WL 574554 (Tex. Crim. App. March 24, 2004). The Court of Criminal Appeals quoted the following passage from *United States v. Carrion*, 488 F.2d 12, 15 (1st Cir. 1973):

> [The trial court should] make unmistakably clear to a defendant who may have a language difficulty that he has a right to a court-appointed interpreter if the court determines that one is needed, and, whenever put on notice that there may be some significant language difficulty, the court should make such a determination of need.

Garcia v. State, LEXIS 519 at 28 (emphasis added).

The judge may learn of the potential language difficulty from any source, including his or her own observation. When the issue of an arrested person's ability to speak English is raised to some extent, "it becomes necessary for the court, in the exercise of [its] discretion, to make inquiry to ascertain whether [the] accused's rights would be safeguarded in the absence of an interpreter." *Baltierra v. State*, 586 S.W.2d 553, 559 (Tex. Crim. App. 1979) (quoting *Garcia v. State*, 151 Tex. Crim. 593, 210 S.W.2d 574, 581 (1948).

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Please note that the mere fact that a defendant may be more fluent in a foreign language than in English does not in and of itself require the appointment of an interpreter for a defendant who speaks and understands English. *Flores v. State*, 509 S.W.2d 580, 581 (Tex. Crim. App. 1974).

If the judge determines that the defendant does not understand English, then advance to Box 23. Otherwise go to Box 29.

Box 23. Δ has right to "spoken language interpreter" while at counter making plea and during any other criminal proceedings.

Both the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Texas Constitution grant a criminal defendant the right to be confronted with the witnesses against him or her. As explained by the Texas Court of Criminal Appeals, this right of confrontation includes the right of a criminal defendant to be present in the courtroom during his or her trial. *Garcia v. State*, ___ S.W.3d ___, 2004 Tex. Crim. App. LEXIS 519, at 12-13, 2004 WL 574554 (Tex. Crim. App. March 24, 2004). A defendant's right to be present at trial includes the right to understand the testimony of the witnesses. *Id.* Accordingly, providing an interpreter to a defendant who otherwise cannot understand the testimony of the witnesses is constitutionally required. *Id.*

The Government Code requires that the appointment of an interpreter not only at trial but in any "criminal proceeding." TEX. GOV'T CODE ANN. § 57.002 (Vernon Supp. 2004). Upon being asked whether the process of making a plea at the counter of a justice court constituted a "criminal proceeding" for purposes of the appointment of an interpreter, the attorney general concluded that such a process does constitute a "criminal proceeding." Op. Tex. Att'y Gen. No. JC-0584 (2002). The opinion flatly states that "[a] defendant's plea in a criminal misdemeanor is a step in a 'criminal proceeding in the court' subject to chapter 57." *Id.*

In *Garcia v. State*, the Court of Criminal Appeals made the following declaration:

> We conclude that, when a trial judge is aware that the defendant has a problem understanding the English language, the defendant's right to have an interpreter translate the trial proceedings into a language which the defendant understands is a category-two *Marin* right [*i.e.*, a right that must be implemented by the system unless expressly waived]. In these circumstances, the judge has an independent duty to implement this right in the absence of a knowing and voluntary waiver by the defendant.

Garcia v. State, LEXIS 519 at 29.

The attorney general has also stated that

> given a defendant's constitutional right to confront witnesses and understand the proceedings, a court must appoint an interpreter if the court is aware that the defendant does not speak English and cannot understand the proceedings, unless the defendant waives that right.

Op. Tex. Att'y Gen No. JC-0584 (2002). Advance to Box 24.

Box 24. Court staff or judge must inform Δ in umistakably clear manner that Δ has right to "spoken language interpreter" at government expense while at counter making plea and during any subsequent criminal proceedings.

The recent case of *Garcia v.* State, ___ S.W.3d ___, 2004 Tex. Crim. App. LEXIS 519, 2004 WL 574554 (Tex. Crim. App. March 24, 2004), dealt with the right to an interpreter for a criminal defendant who does not understand English. The Court of Criminal Appeals approved the following statement from *United States v. Carrion*, 488 F.2d 12, 15 (1st Cir. 1973):

> [The trial court should] make unmistakably clear to a defendant who may have a language difficulty that he has a right to a court-appointed interpreter if the court determines that one is needed . . . .

Move ahead to Box 30.

Box 25. Judge must appoint "interpreter for the deaf" or provide aid to assist Δ in making plea and in all other criminal proceedings.

As noted in Box 15, a deaf defendant has the right to an interpreter (or an auxiliary aid) during all criminal proceedings including the entering of a plea. The judge must appoint an interpreter for the deaf or provide an auxiliary aid to assist the deaf defendant in entering a plea and in all other criminal proceedings.

Go to Box 6.

Box 26. Δ enters plea of not guilty or some sort of special plea.

A list of a defendant's possible pleadings is set out in Article 27.02 of the Code of Criminal Procedure.

Advance to Box 32.

Box 27. Judge must appoint "spoken language interpreter" for magistration proceeding.

Pursuant to Article 15.17 of the Code of Criminal Procedure, a judge is required to inform arrested individuals of certain rights during a magistration proceeding. If the

arrested person does not speak and understand the English language, the judge is to inform the person in a manner consistent with Article 38.30. TEX. CRIM. PROC. CODE ANN. art. 15.17(a) (Vernon Supp. 2004). Article 38.30 requires the appointment of an interpreter to assist defendants who cannot speak and understand English. TEX. CRIM. PROC. CODE ANN. art. 38.30 (Vernon Supp. 2004).

Move to Box 34.

Box 28. Δ has addressed criminal charge by mail, internet, etc., or hasn't yet responded.

Not all defendants charged with a crime within the jurisdiction of the municipal court will appear at the court counter to enter a plea. Some will pay a ticket (which involves a guilty plea) through the mail or over the internet. Some will not appear at all. In these situations, the issue of whether an interpreter is required does not arise.

Stop at this point.

Box 29. Δ is presumed to have no communication barrier. No interpreter is appointed for Δ.

This particular box is reached if neither court staff nor the judge has any reason to believe that a defendant is deaf or is unable to speak and understand English. A judge has a duty to "implement" a defendant's right to an interpreter but only if the judge is aware of a possible language barrier. *Garcia v. State*, ___ S.W.3d ___, 2004 Tex.Crim.App. LEXIS 519, at 25-26, 2004 WL 574554 (Tex. Crim. App. March 24, 2004).

While there is no need for the appointment of an interpreter for a criminal defendant, there may possibly be a need to appoint an interpreter for a witness or a juror. Accordingly, proceed to Box 35.

Box 30. Does Δ waive right to interpreter while at counter making plea?

A criminal defendant who does not speak and understand English can waive his or her right to an interpreter. But as the Court of Criminal Appeals has recently explained, such a waiver cannot be made knowingly, voluntarily and intelligently unless the defendant has been informed of his or her right to have an interpreter. *Garcia v. State*, ___ S.W.3d ___ , 2004 Tex. Crim. App. LEXIS 519, 2004 WL 574554 (Tex. Crim. App. March 24, 2004). A waiver will not be assumed.

Assuming that the right to a "spoken language interpreter" has been communicated to the defendant, the defendant may waive that right and choose to go ahead and enter a plea at the counter.

If the defendant waives the right to an interpreter at the counter, then move ahead to Box 31.

If the defendant does not waive the right to an interpreter at the counter, then proceed to Box 38.

Box 31. Does Δ enter plea of guilty or nolo contendere?

If the defendant pleads guilty or nolo contendere (no contest) then the case will end. If this is the situation, then go to Box 40.

If the defendant does not plead guilty or nolo contendere, then go to Box 39.

Box 32. Does Δ waive interpreter or aid for subsequent criminal proceedings?

A deaf defendant may well choose to waive his or her right to an interpreter for assistance in entering a plea but go ahead and plead not guilty. The defendant may very likely wish to have the assistance of an interpreter for the deaf at trial and any other subsequent proceedings.

If the defendant waives his or her right to the assistance of an interpreter, then go to Box 33.

If the defendant wishes to have the assistance of an interpreter, then move ahead to Box 41.

Box 33. Δ waives his or her constitutional right to an interpreter or aid.

A deaf criminal defendant can waive his or her right to an interpreter. But as the Court of Criminal Appeals has recently explained, such a waiver cannot be made knowingly and voluntarily unless the defendant has been informed of his or her right to have an interpreter. *Garcia v. State*, ___ S.W.3d ___ , 2004 Tex. Crim. App. LEXIS 519, 2004 WL 574554 (Tex. Crim. App. March 24, 2004). A waiver will not be assumed.

No interpreter will be appointed for the deaf defendant and the case will proceed without any interpreter for the defendant, even if the case involves a hearing or a trial.

While there is no need for the appointment of an interpreter for the deaf defendant, there may possibly be a need to appoint an interpreter for a witness or a juror. Accordingly, proceed to Box 35.

Box 34. Does county in which municipal court is located have population of less than 50,000?

Having reached this box, a determination has been made that the judge must appoint a "spoken language interpreter." The required qualifications of the spoken language interpreter depend upon the population of the county in which the municipal court is located. Accordingly, this question is necessary.

If the county has a population of less than 50,000 then advance to Box 50.

If the county has a population of 50,000 or more then proceed to Box 42.

Box 35. Case proceeds.

Beginning with this box, a determination can be made as to whether an interpreter will need to be appointed for a witness or a juror.

Proceed to Box 44.

Box 36. Is any witness in the case deaf or hard of hearing?

If any witness is deaf or hard of hearing, move to Box 37.

If no witnesses in the case are deaf or hard of hearing, advance to Box 45.

Box 37. Judge must appoint "interpreter for the deaf" to interpret testimony of witness.

A 1983 opinion of the attorney general explains that a criminal defendant has a constitutional right to the have the testimony of a deaf witness interpreted:

> The constitutional guarantees of due process in criminal trials include the right of a defendant to confront witnesses against him and the right to assist in his own defense. See U.S. Const. amend. 6; Tex. Const. art. I, § 10; Pointer v. Texas, 85 S.Ct. 1065 (1965). In

> Ferrell v. Estelle, 568 F.2d 1128 (5th Cir. 1978), the Fifth Circuit agreed that a defendant can not exercise the right of cross-examination unless in some manner he is afforded knowledge of the testimony of the witness. We believe that the right to due process also requires the ability to communicate with a deaf witness.

Op. Tex. Att'y Gen. No. JM-113 (1983).

Article 38.31 of the Code of Criminal Procedure also calls for the interpretation of the testimony of a deaf witness.

Go to Box 6.

Box 38. Judge must appoint "spoken language interpreter" to assist Δ in making plea and in all other criminal proceedings.

As noted in Box 23, a defendant who does not understand the English language has the right to an interpreter during all criminal proceedings including the entering of a plea. The judge must appoint a "spoken language interpreter" to assist a defendant who does not understand English in entering a plea.

Go to Box 34.

Box 39. Δ enters plea of not guilty or some sort of special plea.

A list of a defendant's possible pleadings is set out in Article 27.02 of the Code of Criminal Procedure.

Move to Box 48.

Box 40. Interpreter will not be needed.

No interpreter will need to be appointed. Stop at this point.

Box 41. Judge must appoint "interpreter for the deaf" (or provide auxiliary aid) for Δ in all further criminal proceedings.

As noted in Box 15, a deaf defendant has the right to an interpreter during all criminal proceedings. The interpreter must interpret all of the testimony of the

witnesses. *See Garcia v. State*, ___ S.W.3d ___, 2004 Tex. Crim. App. LEXIS 519, 2004 WL 574554 (Tex. Crim. App. March 24, 2004). Additionally, the Code of Criminal Procedure calls for the interpretation of communications between the defendant and defense counsel upon the motion of the defendant. TEX. CRIM. PROC. CODE ANN. art. 38.31(b) (Vernon Supp. 2004). Such interpretation may be constitutionally required and should probably be offered even in the absence of a motion.

Go to Box 6.

Box 42. Is there a "licensed court interpreter" for the foreign language?

The Texas Department of Licensing and Regulation (TDLR) licenses spoken language court interpreters. The TDLR maintains a list of "licensed court interpreters." This list can be accessed at www.license.state.tx.us/LicenseSearch. A person can conduct a search at this website for a licensed court interpreter for a particular language. Most of these "licensed court interpreters" live in Texas but some live outside the state.

For the Spanish language, there are many "licensed court interpreters." In fact, as of October 2004, there were over 600 Spanish interpreters. But for other languages there are far fewer "licensed court interpreters" and for some languages there are no "licensed court interpreters" at all. For example, the TDLR's October 2004 list shows no "licensed court interpreters" for Norwegian, Swedish or Navajo. The same list shows seven Portugese interpreters, two Italian interpreters and just a single interpreter for Greek and Japanese. (The Greek interpreter lives in El Paso and the Japanese interpreter lives in California.)

This question asks whether there are any "licensed court interpreters" for the foreign language at issue in the particular case.

If there is a "licensed court interpreter" for the particular foreign language, then move to Box 43.

If there are not any "licensed court interpreters" for the particular foreign language, then go to Box 50.

Box 43. Judge must appoint interpreter who is a "licensed court interpreter."

When a municipal judge appoints a "spoken language interpreter" where the judge's court is located in a county with a population of 50,000 or more, then the interpreter must be a "licensed court interpreter." Op. Tex. Att'y Gen. No. JC-0584

(2002)(construing Section 57.002(a) of the Government Code to to require the appointment of a "licensed court reporter" when a judge appoints a spoken language interpreter in counties with populations of 50,000 or more).

In 2001, the Texas Legislature enacted new provisions concerning court interpreters that are codified as Chapter 57 of the Government Code. As noted above, one of these provisions requires the appointment of a "licensed court interpreter" when the judge appoints a "spoken language interpreter" and the judge's court is located in a county with a population of 50,000 or more. Section 57.001 defines "licensed court interpreter" as follows:

> "Licensed court interpreter" means an individual licensed under Subchapter C by the Texas Commission of Licensing and Regulation to interpret court proceedings for an individual who can hear but who does not comprehend English or communicate in English.

TEX. GOV'T CODE ANN. § 57.001 (Vernon Supp. 2004).

A person becomes a "licensed court interpreter" by passing an examination prescribed by the executive director of the Texas Department of Licensing and Regulation. TEX. GOV'T CODE ANN. § 57.043 (Vernon Supp. 2004). However, a person who was practicing as a "spoken language interpreter" prior to September 1, 2001, may be licensed without taking an examination. TEX. GOV'T CODE ANN. § 57.001 (Vernon Supp. 2004) (Historical and Statutory Notes).

Please note that the judge may, but is not required to, select an interpreter from an interpreter service under contract with the municipality. Op. Tex. Att'y Gen. No. JC-0584 (2002).

If the only person who is licensed to interpret in a particular language resides in a distant location, that person must still be appointed. *Id.* Thus, if the municipal court in El Paso needs a licensed interpreter for an uncommon language and the only licensed interpreter of that language lives in Houston, the judge in El Paso must appoint the Houston interpreter. Even if the only "licensed court interpreter" lives outside Texas, the the El Paso judge is still required to appoint the licensed out-of-state interpreter.

Advance to Box 52.

Box 44. Does case involve any hearing, examining trial, or trial?

If the answer to this question is "no" there will be no need to appoint an interpreter for a witness or a juror because the case will not involve any witnesses or jurors. Move to Box 40.

If, however, the case will involve a hearing, examining trial, or trial, there may possibly be a need to appoint an interpreter for a witness or a juror. Advance to Box 36.

Box 45. Is any witness in the case unable to speak English?

If any witness in the case is unable to speak English, then go to Box 46. Otherwise, advance to Box 53.

Box 46. Judge must appoint "spoken language interpreter" to interpret testimony of witness.

Criminal defendants have a constitutional right to confront the witnesses against them and to assist in their own defense. *See* discussion under Box 37. These constitutional rights would be of little practical importance if the defendant could not understand the testimony of the witness because the witness does not speak English. Accordingly, there seems to be a constitutional requirement that an interpreter be appointed to interpret the testimony of a witness who does not speak English.

Article 38.30 of the Code of Criminal Procedure requires the appointment of an interpreter for a witness who does not understand and speak the English language. TEX. CRIM. PROC. CODE ANN. art. 38.30(a) (Vernon Supp. 2004). The statute speaks of appointing an interpreter upon the motion of any party or the court. *Id.* Given a defendant's constitutional rights described above, a municipal judge would be well-advised to always appoint an interpreter for a witness who cannot testify in English.

Go to Box 34.

Box 47. Judge must appoint "spoken language interpreter" for Δ in all further criminal proceedings.

As noted in Box 23, a defendant who cannot speak and understand English has the right to an interpreter during all criminal proceedings. The interpreter must interpret all of the testimony of the witnesses. *See Garcia v. State*, ___ S.W.3d ___, 2004 Tex. Crim. App. LEXIS 519, 2004 WL 574554 (Tex. Crim. App. March 24, 2004). A judge would be well-advised to have the interpreter interpret communications between the defendant and defense counsel if defense counsel does not speak the defendant's language.

Go to Box 34.

Box 48. Does Δ waive interpreter for subsequent criminal proceedings?

A defendant who does not speak and understand English may well choose to waive his or her right to an interpreter for assistance in entering a plea but go ahead and plead not guilty. The defendant may very likely wish to have the assistance of a spoken language interpreter at trial and any other subsequent proceedings.

If the defendant waives his or her right to the assistance of an interpreter, then move on to Box 49.

If the defendant wishes to have the assistance of an interpreter, then go to Box 47.

Box 49. Δ waives his or her constitutional right to an interpreter.

A criminal defendant who cannot speak and understand English can indeed waive his or her right to an interpreter. But as the Court of Criminal Appeals has recently explained, such a waiver cannot be made knowingly and voluntarily unless the defendant has been informed of his or her right to have an interpreter. *Garcia v. State*, ___ S.W.3d ___, 2004 Tex. Crim. App. LEXIS 519, 2004 WL 574554 (Tex. Crim. App. March 24, 2004). A waiver will not be assumed.

No interpreter will be appointed for the defendant and the case will proceed without any interpreter for the defendant, even if the case involves a hearing or a trial.

While there is no need for the appointment of an interpreter for the defendant, there may possibly be a need to appoint an interpreter for a witness or a juror. Accordingly, go to Box 35.

Box 50. Interpreter need not be a "licensed court interpreter."

In a municipal court located in a county with a population of less than 50,000, the judge has the option of appointing a "spoken language interpreter" who is not a "licensed court interpreter." TEX. GOV'T CODE ANN. § 57.002(c) (Vernon Supp. 2004). Please note that this exception for municipal courts located in counties with a population of less than 50,000 applies only to spoken language interpreters. Interpreters for the deaf must always be "certified court interpreters."

Additionally, the judge of any municipal court (no matter how great the population of the county in which the court is located) is not required to appoint a "licensed court reporter" if there is no "licensed court reporter" for the spoken language in question. As noted by the attorney general,

> if there is no interpreter licensed . . . to interpret in a particular language, a court will have no option other than to appoint an interpreter who is not licensed. Indeed, such a course may be necessary in order to protect the rights of a party or witness to a proceeding . . . .

Op. Tex. Att'y Gen. No. JC-0584 (2002).

Proceed to Box 51.

Box 51. Interpreter must be qualified by judge as an expert, must be at least 18 years old, and must not be a party to the proceeding.

Even if a "licensed court interpreter" does not need to be appointed, a "spoken language interpreter" must (1) be qualified by the judge as an expert under the rules of evidence; (2) be at least 18 years of age; and (3) not be a party to the proceeding. TEX. GOV'T CODE ANN. § 57.002(c) (Vernon Supp. 2004).

Go to Box 52.

Box 52. Judge must administer oath to interpreter.

The Code of Criminal Procedure provides that a spoken language interpreter "must be sworn" to interpret for a defendant who does not speak and understand English. TEX. CRIM. PROC. CODE ANN. art. 38.30(a) (Vernon Supp. 2004). The San Antonio Court of Appeals interpreted this language to mean that "an interpreter, like a witness, must be sworn under oath before being allowed to interpret testimony." *Solis v. State*, 647 S.W.2d 95, 98 (Tex. App.—San Antonio 1983, no pet.).

Proceed to Box 57.

Box 53. Does case involve a jury trial?

If the case will involve a jury trial, then move ahead to Box 54.

If the case will not involve a jury trial, then go to Box 40.

Box 54. Is any juror deaf or hard of hearing?

If any juror is deaf or hard of hearing then advance to Box 55.

Otherwise, go to Box 40.

Box 55. Does judge believe that juror's hearing loss renders juror unfit to serve in the case?

A deaf or hard-of-hearing person is not disqualified from serving as a juror solely because of the person's hearing loss. TEX. GOV'T CODE ANN. § 62.1041 (Vernon 1998). However, if the judge determines that the deaf or hard-of-hearing person's hearing loss renders the person unfit to serve as a juror in the particular case, then the person is disqualified to serve as a juror in the case. *Id.* If this is the case, go to Box 56.

Otherwise, go to Box 60.

Box 56. Juror will not serve in the case.

Because the judge has determined that the deaf or hard-of-hearing juror's hearing loss renders the juror unfit to serve in the particular case, the juror will not serve. Go to Box 40.

Box 57. Generally, interpreter is to be paid by municipality.

Article 38.30 of the Code of Criminal Procedure declares that spoken language interpreters are to be paid "from the general fund of the county." TEX. CRIM. PROC. CODE ANN. art. 38.30(a) (Vernon Supp. 2004). The statute does not contemplate municipal judges. A logical corollary to the statute is the idea that spoken language interpreters appointed by municipal court judges are to be paid by the municipality.

Note that the general rule is that municipalities must pay when a municipal judge appoints a spoken language interpreter. An exception may exist in some situations where the municipal judge, acting as a magistrate, has appointed a spoken language interpreter. In such exceptional circumstances, the county may pay for the interpreter.

Go to Box 58.

Box 58. Guideline for payment is between $15 and $100 per day but city can pay more.

The Code of Criminal Procedure states that generally spoken language interpreters

> shall be paid not less than $15 nor more than $100 a day at the discretion of the judge presiding.

TEX. CRIM. PROC. CODE ANN. art. 38.30(b) (Vernon Supp. 2004). However, an exception to the general rule exists. The exception is that a

> county commissioners court may set a payment schedule and expend funds for the services of interpreters in excess of the daily amount of not less than $15 or more than $100.

TEX. CRIM. PROC. CODE ANN. art. 38.30(c) (Vernon Supp. 2004).

A logical corollary of the exception giving commissioners courts authority to pay more than $100 per day for the services of an interpreter would be authority for city councils to set a payment schedule allowing for the payment of more than $100 per day for spoken language interpreters. In any event, a city council probably has inherent authority to establish a payment schedule calling for the payment of more than $100 per day for spoken language interpreters.

The statutory amounts of $15 to $100 per day should be treated as a guideline -- albeit a guideline that may be somewhat outdated.

Advance to Box 59.

Box 59. Interpreter is to be reimbursed for expenses at state employee rate for travel, lodging & meals.

In regard to reimbursement for travel expenses, spoken language interpreters are to receive

> all the actual expenses of travel, lodging, and meals incurred by the interpreter pertaining to the case he is appointed to serve . . . at the same rate applicable to state employees.

TEX. CRIM. PROC. CODE ANN. art. 38.30(b) (Vernon Supp. 2004).

The Texas Comptroller establishes rules and rates for the travel expenses of state employees. TEX. GOV'T CODE ANN. § 660.021 (Vernon Supp. 2004). Current travel reimbursement rates are as follows:

Lodging: up to $80 per day
Meals: up to $30 per day
Automobile Mileage: 35 cents per mile
Airfare: actual cost (with limitations)

More detailed information is available on the comptroller's website at www.window.state.tx.us/fm/pubs/travallow.

Stop at this point.

Box 60. Judge must appoint "interpreter for the deaf" (or provide "auxiliary aid") for juror.

A deaf or hard-of-hearing juror is entitled to an interpreter. TEX. GOV'T CODE ANN. § 62.1041 (Vernon 1998). "An interpreter who is assisting a deaf or hard-of-hearing person serving as a juror may accompany the juror during all proceedings and deliberations in the case." *Id.*

A city must honor a deaf or hard-of-hearing juror's request for an auxiliary aid or service unless the city can demonstrate that another effective means of communication exists. TEX. GOV'T CODE ANN. § 62.1041(e) (Vernon Supp. 2004).

Go to Box 6.

Language Interpreters in Texas Municipal Courts

Presented by:

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Enabling Legislation

- Chapter 57, Government Code
- Article 15.17, Code of Criminal Procedure
- Article 38.30, Code of Criminla Procedure
- Article 38.31, Code of Criminal Procedure
- Texas Attorney General Opinions
- 6th Amendment, U. S. Constitution
- Article 1, Section 10, Texas Constitution
- Case Law (Leading case Garcia v. State)

Chapter 57, Government Code

- Tex. Gov't Code § 57.002 (2004)

(a) A court shall appoint a certified court interpreter or a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness in a civil or criminal proceeding in the court.

(b) A court may, on its own motion, appoint a certified court interpreter or a licensed court interpreter.

Chap. 57, Gov't Code (Cont.)

- (c) In a county with a population of less than 50,000, a court may appoint a spoken language interpreter who is not a certified or licensed court interpreter and who:

  (1) is qualified by the court as an expert under the Texas Rules of Evidence;

  (2) is at least 18 years of age; and

  (3) is not a party to the proceeding.

Article 15.17, C.C.P.

- Art 15.17. Duties of arresting officer and magistrate

  (a) In each case enumerated in this Code, the person making the arrest or the person having custody of the person arrested shall without unnecessary delay, but not later than 48 hours after the person is arrested,

- take the person arrested or have him taken before some magistrate of the county where the accused was arrested or, if necessary to provide more expeditiously to the person arrested the warnings described by this article, before a magistrate in a county bordering the county in which the arrest was made…

- If the person does not speak and understand the English language or is deaf, the magistrate shall inform the person in a manner consistent with Articles 38.30 and 38.31, as appropriate…

- (c) When a deaf accused is taken before a magistrate under this article or Article 14.06 of this Code, an interpreter appointed by the magistrate qualified and sworn as provided in Article 38.31 of this Code shall interpret the warning required by those articles in a language that the accused can understand, including but not limited to sign language…

Article 38.30, C.C.P.

- Art 38.30. [733] [816] [796] Interpreter

(a) When a motion for appointment of an interpreter is filed by any party or on motion of the court, in any criminal proceeding, it is determined that a person charged or a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him.

- Any person may be subpoenaed, attached or recognized in any criminal action or proceeding, to appear before the proper judge or court to act as interpreter therein, under the same rules and penalties as are provided for witnesses.

- In the event that the only available interpreter is not considered to possess adequate interpreting skills for the particular situation or the interpreter is not familiar with use of slang, the person charged or witness may be permitted by the court to nominate another person to act as intermediary between himself and the appointed interpreter during the proceedings.

- (b) Except as provided by Subsection (c) of this article, interpreters appointed under the terms of this article will receive from the general fund of the county for their services a sum not to exceed $100 a day as follows:

- interpreters shall be paid not less than $15 nor more than $100 a day at the discretion of the judge presiding, and when travel of the interpreter is involved all the actual expenses of travel, lodging, and meals incurred by the interpreter pertaining to the case he is appointed to serve shall be paid at the same rate applicable to state employees.

- (c) A county commissioners court may set a payment schedule and expend funds for the services of interpreters in excess of the daily amount of not less than $15 or more than $100 established by Subsection (b) of this article.

Article 38.31, C.C.P.

- Art 38.31. [733a] Interpreters for deaf persons

(a) If the court is notified by a party that the defendant is deaf and will be present at an arraignment, hearing, examining trial, or trial, or that a witness is deaf and will be called at a hearing, examining trial, or trial, the court shall appoint a qualified interpreter to interpret the proceedings in any language that the deaf person can understand, including but not limited to sign language.

- On the court's motion or the motion of a party, the court may order testimony of a deaf witness and the interpretation of that testimony by the interpreter visually, electronically recorded for use in verification of the transcription of the reporter's notes. The clerk of the court shall include that recording in the appellate record if requested by a party under Article 40.09 of this Code.

- (b) Following the filing of an indictment, information, or complaint against a deaf defendant, the court on the motion of the defendant shall appoint a qualified interpreter to interpret in a language that the defendant can understand, including but not limited to sign language, communications concerning the case between the defendant and defense counsel.

- The interpreter may not disclose a communication between the defendant and defense counsel or a fact that came to the attention of the interpreter while interpreting those communications if defense counsel may not disclose that communication or fact.

- (c) In all cases where the mental condition of a person is being considered and where such person may be committed to a mental institution, and where such person is deaf, all of the court proceedings pertaining to him shall be interpreted by a qualified interpreter appointed by the court.

- (d) A proceeding for which an interpreter is required to be appointed under this Article may not commence until the appointed interpreter is in a position not exceeding ten feet from and in full view of the deaf person.

- (e) The interpreter appointed under the terms of this Article shall be required to take an oath that he will make a true interpretation to the person accused or being examined, which person is deaf, of all the proceedings of his case in a language that he understands; and that he will repeat said deaf person's answer to questions to counsel, court, or jury, in the English language, in his best skill and judgment.

- (f) Interpreters appointed under this Article are entitled to a reasonable fee determined by the court after considering the recommendations of the Texas Commission for the Deaf and Hard of Hearing.

- When travel of the interpreter is involved all the actual expenses of travel, lodging, and meals incurred by the interpreter pertaining to the case he is appointed to serve shall be paid at the same rate applicable to state employees.

- (g) In this Code:

  (1) "Deaf person" means a person who has a hearing impairment, regardless of whether the person also has a speech impairment, that inhibits the person's comprehension of the proceedings or communication with others.

- (2) "Qualified interpreter" means an interpreter for the deaf who holds a current Reverse Skills Certificate, Comprehensive Skills Certificate, Master's Comprehensive Skills Certificate, or Legal Skills Certificate issued by the National Registry of Interpreters for the Deaf or a current Level III, IV, or V Certificate issued by the Board for Evaluation of Interpreters.

Attorney General Opinions

- Atty. Gen. Opinion No. JC-0584 (11/26/02)

  Chapter 57 of the Government Code applies to a plea in a misdemeanor case in justice (or municipal) court, but a clerk who merely converses with a defendant in a language other than English does not "act as a licensed court interpreter" within the meaning of Chapter 57.

- Whether a party has filed a motion for or a witness has requested the appointment of an interpreter will depend upon the facts and is a question for the trial court in the first instance.
- The court may grant or deny such a motion or request.

- In a criminal case, the court must also take into account the defendant's constitutional right to an interpreter and Article 38.30 of the Code of Criminal Procedure.
- Chapter 57 establishes qualifications for interpreters appointed in criminal cases under the authority of Article 38.30.

- If the only person who is licensed to interpret in a particular language resides in a distant location, a court in a populous county would be required to appoint that person.
- On the other hand, if there is no interpreter licensed to interpret in a particular language, the appointment of an unlicensed person may be within a court's inherent power.

U. S. Constitution

- Sixth Amendment – "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense".

Texas Constitution

- Article 1, Section 10 - In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof.

Texas Constitution (Cont.)

- He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor…

Case Law

- ***Garcia v. State***, 2004 Tex. Crim. App. LEXIS 519 (March 24, 2004).
- Can a Mexican citizen who speaks and understands little English be tried without benefit of translation, without knowledge he had a right to translation, and without affirmative waiver of the right to have the proceedings translated?

- "Citizens of Mexico brought before the courts of this State charged with crimes against the laws of this State are entitled to be tried according to the Constitution and laws of this State (and the United States).

- "This, of necessity, means they are entitled to be confronted by the witnesses under the same conditions as apply to all others. Equal justice so requires. The constitutional right of confrontation means something more than merely beinging the accused and the witness face to face; it embodies and carries with it the valuable right of cross-examination of the witness".

- The court requires more than the mere presence of a person who speaks both languages to preserve the Defendant's 6th Amendment right of confrontation – "one is not necessarily competent to translate legal proceedings because he or she is bilingual".

- "Courtroom interpretation is a sophisticated art, demanding not only a broad vocabulary, instant recall, and continuing judgment as to the speaker's intended meaning, but also the ability to reproduce tone and nuance, and a good working knowledge of both legal terminology and street slang".

- Although the right to an interpreter can be waived, it is not deemed waived if the trial court is aware that an accused does not speak and understand the English language.

- ***State v. Natividad***, 526 P. 2d 730 (Ariz. 1974).
- Being present at a trial without understanding the language of the witnesses would be as though a defendant were forced to observe the proceedings from a soundproof booth or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state has put his freedom in jeopardy.

- ***United States ex rel. Negron v. New York***, 434 F. 2d 386 (2d Cir. 1970).
- Habeas relief granted to Negron because he was tried without an interpreter. Negron understood no English, counsel spoke no Spanish, and there was no translation during trial.

- Court states that "most of the trial must have been a babble of voices" to Negron.
- Court concluded that "regardless of the probabilities of his guilt, Negron's trial lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment".
- Court stated, "Negron deserved more than to sit in total incomprehension as the trial proceeded".

- ***Baltierra v. State***, 586 SW 2d 553 (Tex. Crim. App. 1979)
- The right to be present during the trial includes the right to understand the testimony of the witnesses.
- Providing an interpreter to an accused who does not understand English is required by the Confrontation Clause of the Sixth Amendment.

- ***Marin v. State***, 851 SW 2d 275 (1993)
- Three distinct categories of rules in Courts:
- 1. Absolute requirements and prohibitions;
- 2. Rights of litigants which must be implemented by the system unless expressly waived; and
- 3. Rights of litigants which are to be implemented upon request.

- ***Guerrero v. State***, 2003 Tex. App. LEXIS 6443 (Tex. App. - Waco July 23, 2003)
- Right to an interpreter is a category-two *Marin* right, a right that must be implemented by the system unless expressly waived.

Responsibility of Court

- ***Cantu v. State***, 993 SW 2d 712 (1999) The onus is upon the trial court to inquire whether the accused's rights would be safeguarded in the absence of an interpreter when the ability of the defendant to speak and understand English is raised to some extent.
- ***Vasquez v. State***, 819 SW 2d 932 (1991) In the absence of facts to show that appellant could not understand English, we find no error.

- ***Martins v. State***, 52 SW 3d 459 (2001) – Mere fact that a defendant may better express himself in Spanish than English does not require that the trial court appoint an interpreter even where it has been requested.
- ***Texas Atty. Gen. Op. No. JM-113*** (1983) A court has discretion in deciding whether to appoint a language interpreter for a non-English speaking defendant, but has no discretion in deciding whether to appoint an interpreter for the deaf.

- ***Garcia*** holding:
- "When a trial judge is aware that the defendant has a problem understanding the English language, the defendant's right to have an interpreter translate the trial proceedings into a language which the defendant understands is a category-two Marin right.

- "In these circumstances, the judge has an independent duty to implement this right in the absence of a knowing and voluntary waiver by the defendant. The judge may become aware of the defendant's language problem either by being informed of it by one or both parties or by noticing the problem sua sponte."

Licensed vs. Certified

- Spoken Language interpreters must be licensed interpreter under Chapter 57 and Article 38.30.
- Deaf interpreter must be certified court interpreter under Chapter 57 and Article 38.31.

- Legislative history indicates that "certification of court interpreters to aid non-English speaking and hearing-impaired individuals within the judicial system" was the goal of the statutes – in short, standardization.

Conclusion

- Absent a motion by either side in the case, it is the duty of the judge of the court to determine whether an interpreter, either spoken-language or deaf interpreter, is needed.
- It is the duty of the judge of the court to appoint such an interpreter whenever it is determined that the defendant needs one.

- Failure of the court to appoint an interpreter when either an interpreter is requested or it is determined that the defendant needs an interpreter will result in reversible error.

- Judge should pay particular attention to the defendant's demeanor and comprehension, and should be ready to appoint an interpreter whenever it appears that an interpreter is needed, even in the middle of the trial.

- The ultimate goal of the criminal justice system, and the trial, is to ensure that justice is done.

- "They deafened my ears with their gabble." – Franz Kafka, "***The Trial***" (Penguin Books, 1953).

Thank you for your kind attention.
Call on me if you need me.

C. Victor Lander
Presiding Judge, Municipal Court No. 7
City of Dallas Municipal Court
Dallas, Texas
Telephone: 214/670-5573
Facsimile: 214/670-6947

November 26, 2002

The Honorable Florence Shapiro
Chair, Senate Committee on State Affairs
Texas State Senate
P.O. Box 12068
Austin, Texas 78711-2068

Opinion No. JC-0584

Re: Whether chapter 57 of the Government Code requires the appointment of licensed court interpreters in certain circumstances, and related questions (RQ-0558-JC)

Dear Senator Shapiro:

You ask about chapter 57 of the Government Code, a recently enacted statute that establishes qualifications for court interpreters for hearing-impaired individuals (interpreters for the deaf) and individuals who do not communicate in English (spoken-language interpreters) and requires courts to appoint qualified court interpreters. Your questions focus on the appointment of spoken-language interpreters and the payment of their fees in justice court proceedings.[1]

We conclude that chapter 57 applies to a plea in a misdemeanor case in justice court, but that a court clerk who merely converses with a defendant in a language other than English does not "act as a licensed court interpreter" within the meaning of chapter 57. In either a civil or criminal proceeding, whether a party has filed a motion for or a witness has requested the appointment of an interpreter will depend upon the facts and is a question for the trial court in the first instance. The court may grant or deny such a motion or request. In a criminal proceeding, a court must also take into account the defendant's constitutional right to an interpreter and article 38.30 of the Code of Criminal Procedure. Chapter 57 establishes qualifications for interpreters appointed in criminal cases under the authority of article 38.30. If the only person who is licensed to interpret in a particular language resides in a distant location, a court in a populous county would be required to appoint that person. On the other hand, if there is no interpreter licensed to interpret in a particular language, the appointment of an unlicensed person may be within a court's inherent power. Finally, we conclude that chapter 57 does not alter preexisting law on the payment of appointed court interpreters. It does not require counties to pay for spoken-language interpreters in civil cases. Courts retain their authority under the Rules of Civil Procedure and the Civil Practice and Remedies Code to fix an interpreter's compensation and to direct how an interpreter will be paid in civil cases. A county may not require a court to select an interpreter from an interpreter service under contract with the county, although a court may choose to select such an interpreter.

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[1]Letter from Honorable Florence Shapiro, Chair, Senate Committee on State Affairs, to Honorable John Cornyn, Texas Attorney General (May 29, 2002) (on file with Opinion Committee) [hereinafter Request Letter].

I. Legal Framework

A. Statutes Predating Government Code Chapter 57

Your questions relate not only to chapter 57 but also to numerous other provisions providing for the appointment and payment of court interpreters. Therefore, before turning to your questions, we briefly review the legal framework regarding court interpreters. First, we examine a number of provisions that predate chapter 57. Although your questions deal with chapter 57's application to spoken-language interpreters as opposed to interpreters for the deaf, we include in our review provisions relating to interpreters for the deaf as those provisions are relevant to our later analysis of chapter 57.

1. Appointment and Payment of Interpreters in Civil Cases

With regard to the appointment of interpreters in civil cases generally, Rule 183 of the Texas Rules of Civil Procedure provides that a court "may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation." TEX. R. CIV. P. 183. Rule 183 is not specific as to the type of interpreter and authorizes courts to appoint both spoken-language interpreters and interpreters for the deaf. This rule is generally applicable in civil cases, including civil matters in justice court. *See* TEX. R. CIV. P. 523 ("All rules governing the district and county courts shall also govern the justice courts, insofar as they can be applied, except where otherwise specifically provided by law or these rules.").

With respect to payment, Rule 183 further provides that an interpreter's "compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court." TEX. R. CIV. P. 183. In addition, section 31.007 of the Civil Practice and Remedies Code authorizes the "judge of any court" to include interpreter costs in any order or judgment. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.007(b)(3) (Vernon 1997); *see also* TEX. R. CIV. P. 559 (In justice court, "[t]he successful party in the suit shall recover his costs, except in cases where it is otherwise expressly provided."). Finally, some statutes expressly provide for the payment of court interpreters as costs in specific matters, such as certain mental-health and probate cases.[2]

Subchapter A of chapter 21 of the Civil Practice and Remedies Code requires the appointment of interpreters for the deaf in civil cases, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 21.002(a) (Vernon 1997) ("In a civil case or in a deposition, a deaf person who is a party or witness is entitled to have the proceedings interpreted by a court-appointed interpreter."), and establishes

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[2]*See* TEX. HEALTH & SAFETY CODE ANN. § 571.017(a) (Vernon 1992) ("The court shall order the payment of reasonable compensation to attorneys, physicians, language interpreters, sign interpreters, and masters appointed under this subtitle."), (b) ("The compensation paid shall be taxed as costs in the case."); TEX. PROB. CODE ANN. § 665A (Vernon Supp. 2002) ("The court shall order the payment of a fee set by the court as compensation to the attorneys, mental health professionals, and interpreters appointed under Section 646 or 687 of this code, as applicable, to be taxed as costs in the case.").

qualifications for interpreters for the deaf, *see id.* § 21.003 (to be eligible for appointment, an interpreter must hold "a current Reverse Skills Certificate, Comprehensive Skills Certificate, Master's Comprehensive Skills Certificate, or Legal Skills Certificate issued by the National Registry of Interpreters for the Deaf or a current Level III, IV, or V Certificate issued by the Board for Evaluation of Interpreters"). In contrast to Rule 183, subchapter A also provides for the payment of interpreters with county funds. *See id.* § 21.006(a) ("The interpreter shall be paid a reasonable fee determined by the court after considering the recommended fees of the Texas Commission for the Deaf and Hard of Hearing."), (c) ("The interpreter's fee and expenses shall be paid from the general fund of the county in which the case was brought.").

No statute predating chapter 57 of the Government Code requires the appointment of spoken-language interpreters in civil cases or addresses their qualifications.

2. Appointment of Interpreters in Criminal Matters

The United States and Texas Constitutions provide defendants in criminal cases with the right to confront witnesses against them. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. That right includes the right to have trial proceedings interpreted to a defendant in a language he or she can understand. *See Baltierra v. State*, 586 S.W.2d 553, 558 (Tex. Crim. App. 1979).

Articles 38.30 and 38.31 of the Code of Criminal Procedure provide for the appointment of interpreters in criminal cases. *See* TEX. CODE CRIM. PROC. ANN. arts. 38.30 (Vernon Supp. 2002) (spoken-language interpreters), 38.31 (interpreters for the deaf). Article 38.30 provides for the appointment of spoken-language interpreters:

> When a motion for appointment of an interpreter is filed by any party or on motion of the court, in any criminal proceeding, it is determined that a person charged or a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him.

Id. art. 38.30(a). Article 38.30 has been construed in light of a defendant's constitutional right to an interpreter. *See Baltierra*, 586 S.W.2d at 558. Thus, although article 38.30(a) requires a party to file a motion for appointment of an interpreter, "[t]he onus is upon the trial court to inquire whether the accused's rights would be safeguarded in the absence of an interpreter when the ability of the defendant to speak and understand English is raised to some extent." *Cantu v. State*, 993 S.W.2d 712, 721-22 (Tex. App.–San Antonio 1999, pet. ref'd) (citing *Baltierra*, 546 S.W.2d at 558-59 n.9); *see also Vasquez v. State*, 819 S.W.2d 932, 938 (Tex. App.–Corpus Christi 1991, pet. ref'd). A defendant waives his right to an interpreter, however, when he does not object or file a motion for an interpreter, unless the trial court is otherwise aware that he needs one. When a defendant fails to object or to file a motion at the trial-court level, a reviewing court will examine the record on appeal to determine whether the trial court should have inquired into the matter on its own. *See, e.g., Cantu*, 993 S.W.2d at 721-22 (reviewing record to evaluate defendant's claim that his plea was not voluntary or knowing based on a lack of an interpreter and determining that claim negated by the

record); *Vasquez,* 819 S.W.2d at 938 ("In the absence of facts to show that appellant could not understand English, we find no error. . . ."). If a defendant moves for the appointment of an interpreter, it is within the trial court's discretion to determine whether the defendant requires an interpreter. *See Martins v. State,* 52 S.W.3d 459, 473 (Tex. App.–Corpus Christi 2001, no pet.) ("mere fact that a defendant may better express himself in Spanish than English does not require that the trial court appoint an interpreter even where it has been requested"); *see also* Tex. Att'y Gen. Op. No. JM-113 (1983) (concluding that a court has discretion in deciding whether to appoint a language interpreter for a non-English speaking defendant, but has no discretion in deciding whether to appoint an interpreter for the deaf).

Article 38.30 provides for the payment of interpreters with county funds. *See.* TEX. CODE CRIM. PROC. ANN. art. 38.30(b)-(c) (Vernon Supp. 2002); *see also* Tex. Att'y Gen. Op. No. DM-245 (1993) at 4 ("Article 38.30 of the Code of Criminal Procedure requires interpreters in criminal cases to be paid from county funds. A judge of a county court-at-law may not assess interpreters' fees either as costs or require payment as a condition of probation.").

Article 38.31 requires the appointment of interpreters for the deaf:

> If the court is notified by a party that the defendant is deaf and will be present at an arraignment, hearing, examining trial, or trial, or that a witness is deaf and will be called at a hearing, examining trial, or trial, the court shall appoint a *qualified interpreter* to interpret the proceedings in any language that the deaf person can understand, including but not limited to sign language.

TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 2002) (emphasis added). Article 38.31 uses the same interpreter qualifications prescribed in chapter 21, subchapter A of the Civil Practice and Remedies Code, and has similar payment provisions. *See id.* art. 38.31(f), (g)(2); TEX. CIV. PRAC. & REM. CODE ANN. §§ 21.003, .006 (Vernon 1997). Article 38.31 is silent with respect to how interpreters are paid, but a 1983 opinion of this office concludes that their fees and expenses are paid from the county general fund. *See* Tex. Att'y Gen. Op. No. JM-113 (1983).

3. Provisions Authorizing the Employment of Court Interpreters

The provisions discussed above govern the appointment and payment of court interpreters in particular cases. A separate category of statutes authorizes certain courts to employ interpreters on a full-time or part-time basis. Chapter 21, subchapter B of the Civil Practice and Remedies Code provides for the appointment of full-time or part-time Spanish language interpreters in district courts in certain counties. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 21.021-.023 (Vernon 1997). Subchapter C provides for the appointment of "official interpreters" in county courts at law. *See id.* §§ 21.031-.032. In addition, local laws provide for the appointment of court interpreters in specific

courts.[3] Unlike subchapter A, which establishes a party's "entitlement" to an interpreter for the deaf, these provisions do not address when interpreters must be used in particular cases.

Section 152.903 of the Local Government Code governs the compensation of interpreters employed by district courts: "[T]he commissioners court of a county may set the compensation of interpreters employed by the district courts in the county." TEX. LOC. GOV'T CODE ANN. § 152.903(a) (Vernon 1999); *see also id.* § 152.903(b) ("The salary of an interpreter shall be paid on warrants issued by the district court or the clerk of the court in favor of the interpreter."). Section 152.903 also provides that the salary of a Spanish language interpreter appointed under Civil Practice and Remedies Code chapter 21, subchapter B "is payable in equal monthly payments or by any other distribution at the option of the county." *See id.* § 152.903(c). The compensation of interpreters employed by other county courts is governed by subchapter B of chapter 152, which governs the setting of county employee salaries generally. *See id.* Revisor's Note; *see also id.* § 152.011 ("The commissioners court of a county shall set the amount of the compensation, office and travel expenses, and all other allowances for county and precinct officers and employees who are paid wholly from county funds."). Section 152.903 "does not apply to interpreters for deaf or deaf-mute persons appointed under Subchapter A, Chapter 21, Civil Practice and Remedies Code, or Article 38.31, Code of Criminal Procedure." *Id.* § 152.903(d).

Civil Practice and Remedies Code chapter 21, subchapter D provides for the collection of an interpreter fee as a court cost in civil cases. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 21.051 (Vernon 1997) ("The clerk of the court shall collect an interpreter fee of $3 as a court cost in each civil case in which an interpreter is used. The clerk shall collect the fee in the manner provided for other court costs and shall deposit the fee to the credit of the general fund of the county."). Presumably, this fee is used by counties to defray the salaries of interpreters who are employed by the courts and paid by the county. And presumably, this fee is not collected in cases involving interpreters who are appointed by a court to interpret on a one-time basis and who are paid by the parties.

B. Government Code Chapter 57

Now we turn to chapter 57 of the Government Code, the new law that is the focus of your query. It generally requires the appointment of a certified or licensed court interpreter, *see* TEX. GOV'T CODE ANN. § 57.002 (Vernon Supp. 2002), and provides for certification and licensing. It does not address the payment of interpreters.

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[3]*See, e.g.*, TEX. GOV'T CODE ANN. §§ 24.207(c) (Vernon 1988) ("The judge [of the 105th Judicial District], with the approval of the commissioners court, may appoint an official interpreter of the court in Nueces County who serves at the will of the judge."), 25.1102(g) (Vernon Supp. 2002) ("The official interpreter of the district courts of Hidalgo County serves as official interpreter of each county court at law. If the official interpreter is not available, the judge of a county court at law may appoint a temporary interpreter. The temporary interpreter shall be compensated at an amount not to exceed $5 a day paid out of the county's general fund on certificate of the judge. Subject to the commissioners court approval, the judge of a county court at law may appoint an official interpreter for the court as provided by law.").

For purposes of chapter 57, a "certified court interpreter" is an interpreter for the deaf "who is a qualified interpreter as defined in Article 38.31, Code of Criminal Procedure, or Section 21.003, Civil Practice and Remedies Code, or certified under Subchapter B by the Texas Commission for the Deaf and Hard of Hearing to interpret court proceedings for a hearing-impaired individual." *Id.* § 57.001(1). A "licensed court interpreter" is a spoken-language interpreter who is "licensed under Subchapter C by the Texas Commission of Licensing and Regulation to interpret court proceedings for an individual who can hear but who does not comprehend English or communicate in English." *Id.* § 57.001(5). Subchapter B provides for the certification of court interpreters to interpret court proceedings for hearing-impaired individuals by the Texas Commission for the Deaf and Hard of Hearing. *See id.* §§ 57.021-.025. And subchapter C provides for the Commission of Licensing and Regulation to license spoken-language court interpreters to interpret court proceedings for individuals who do not communicate in English. *See id.* §§ 57.041-.048. A person who was practicing as a court interpreter prior to chapter 57's effective date may be licensed or certified without examination by submitting to the relevant commission the required fees and proof of the person's experience. *See* Act of May 28, 2001, 77th Leg., R.S., ch. 1139, § 5, 2001 Tex. Gen. Laws 2537, 2541.

It is an offense under chapter 57 for an uncertified or unlicensed person to hold one's self out as or to act as a certified or licensed court interpreter. *See* TEX. GOV'T CODE ANN. §§ 57.026 (Vernon Supp. 2002) ("A person may not advertise, represent to be, or act as a certified court interpreter unless the person holds an appropriate certificate under this subchapter."), 57.049 ("A person may not advertise, represent to be, or act as a licensed court interpreter unless the person holds an appropriate license under this subchapter."). A person who commits this offense is subject to administrative penalties and to prosecution for a Class A misdemeanor. *See id.* §§ 57.027(a) ("A person commits [a Class A misdemeanor] offense if the person violates this subchapter or a rule adopted under this subchapter."), (b) ("A person who violates this subchapter or a rule adopted under this subchapter is subject to an administrative penalty assessed by the [Commission for the Deaf and Hard of Hearing]."), 57.050(a) ("A person commits [a Class A misdemeanor offense] if the person violates this subchapter or a rule adopted under this subchapter."), (b) ("A person who violates this subchapter or a rule adopted under this subchapter is subject to an administrative penalty assessed by the [Commission of Licensing and Regulation] as provided by Subchapter F, Chapter 51, Occupations Code.").

Significantly, section 57.002 requires a court to appoint a certified or licensed court interpreter upon the motion of a party or the request of a witness:

> (a) A court shall appoint a certified court interpreter or a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness in a civil or criminal proceeding in the court.

Id. § 57.002(a). In addition, a court may, on its own motion, appoint a certified court interpreter or a licensed court interpreter. *Id.* § 57.002(b). Under subsection (c) of this provision, smaller counties have more flexibility with regard to the qualifications of spoken-language interpreters (but not with

regard to interpreters for the deaf): "In a county with a population of less than 50,000, a court may appoint a spoken language interpreter who is not a certified or licensed court interpreter and who: (1) is qualified by the court as an expert under the Texas Rules of Evidence; (2) is at least 18 years of age; and (3) is not a party to the proceeding." *Id.* § 57.002(c).

Although section 57.002 clearly modifies the authority of a court to determine the qualifications of an interpreter, we do not construe section 57.002 to strip a court of its authority to determine whether a party or witness is able to communicate in English and requires an interpreter. Section 57.002(a) provides that "[a] court *shall* appoint a certified court interpreter or a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness." *Id.* § 57.002(a) (emphasis added). The word "shall" generally imposes a mandatory duty, *see id.* § 311.016(c) (Vernon 1998) (Code Construction Act), but we must look at a statute as a whole to determine the nature of that duty. *See D.R. v. J.A.R.*, 894 S.W.2d 91, 95 (Tex. App.–Fort Worth 1995, writ denied) (noting that while the word "shall" is generally construed to be mandatory, "[t]here is no absolute test by which it may be determined whether a statutory provision is mandatory or directory. . . . In determining whether the Legislature intended the particular provision to be mandatory or merely directory, consideration should be given to the entire act, its nature and object, and the consequences that would follow from each construction."). We construe section 57.002(a) to impose on a court the mandatory duty to appoint a *certified* or *licensed* interpreter when the court appoints an interpreter. *See* TEX. GOV'T CODE ANN. § 57.002(a) (Vernon Supp. 2002) ("[a] court *shall* appoint a *certified* court interpreter or a *licensed* court interpreter") (emphasis added). However, we believe section 57.002(a)'s conditional clause – "if a *motion* for the appointment of an interpreter is filed by a party or *requested* by a witness," *id.* § 57.002(a) (emphasis added) – indicates that the legislature intended for courts to have discretion to determine whether the party or witness requires an interpreter. *See D.R.*, 894 S.W.2d at 94-95 (in statute providing that "[i]f the court finds that a motion to modify under Section 14.081 . . . is filed frivolously or is designed to harass a party, the court shall tax attorney's fees as costs against the offending party as provided by Section 11.18 of this code," the word "shall" merely directs the trial court to award the attorney fees as costs under section 11.18 but does not make the awarding of attorney fees mandatory). Furthermore, it would not be reasonable to construe section 57.002 to require a court to grant every motion or request for an interpreter. For example, the legislature would not have intended to require courts to appoint interpreters when the witness or party clearly does not require one or has requested the appointment of an interpreter in bad faith. *See* TEX. GOV'T CODE ANN. § 311.021 (Vernon 1998) (in enacting a statute, it is presumed that "a just and reasonable result is intended" and "a result feasible of execution is intended") (Code Construction Act).

II. Questions

Your questions deal with spoken-language interpreters as opposed to interpreters for the deaf. Thus, we do not consider whether the right to the appointment of a interpreter for the deaf under the Civil Practice and Remedies Code or the Code of Criminal Procedure is broader than the right to a

certified interpreter under chapter 57 of the Government Code.[4] Nor do we address any issues raised by the interplay between Texas law on the appointment and payment of interpreters for the deaf and the Federal Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000). *See* Tex. Att'y Gen. Op. No. DM-411 (1996) at 9 (concluding that to the extent interpreter services are required to make court mandated services available to deaf or hearing-impaired persons on a non-discriminatory basis as required by the Americans with Disabilities Act, the costs of such services may not be imposed on those persons by taxing them as court costs).

All of your questions appear to pertain to the appointment of interpreters in justice courts. Because you mention Dallas County specifically, we assume that you are not asking about courts in counties with populations of less than 50,000 that have more flexibility with respect to the appointment of spoken-language interpreters under chapter 57. *See* TEX. GOV'T CODE ANN. § 57.002(c) (Vernon Supp. 2002) (exception for less populous counties). Given your interest in how court interpreters will be paid, we also assume that you do not ask about interpreters who are employed by courts on a full- or part-time basis and whose salaries are paid with county funds under chapter 152 of the Local Government Code. *See* discussion *supra* pp. 4-5.

To the extent your questions require us to interpret statutes, we must attempt to give effect to the legislature's intent. *See* TEX. GOV'T CODE ANN. §§ 311.021, .023 (Vernon 1998); *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 (Tex. 1997). To do so, we construe a statute according to its plain language. *See RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607-08 (Tex. 1985); *Bouldin v. Bexar County Sheriff's Civil Serv. Comm'n*, 12 S.W.3d 527, 529 (Tex. App.–San Antonio 1999, no pet.). Words and phrases that have acquired a technical or particular meaning, by legislative definition or otherwise, must be construed accordingly. *See* TEX. GOV'T CODE ANN. § 311.011(b) (Vernon 1998). Otherwise, words and phrases must be read in context and construed according to the rules of grammar and common usage. *Id.* § 311.011(a). Finally, when a statute is ambiguous, we may consider, among other things, the object sought to be attained, the circumstances under which a statute was enacted, legislative history, and the consequences of a particular construction. *See id.* § 311.023; *see also id.* § 311.021 (in enacting a statute, it is presumed that "a just and reasonable result is intended" and "a result feasible of execution is intended").

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[4]*Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 21.002(a) (Vernon 1997) ("In a civil case or in a deposition, a deaf person who is a party or witness *is entitled* to have the proceedings interpreted by a court-appointed interpreter.") (emphasis added) and TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 2002) ("If the court is notified by a party that the defendant is deaf and will be present at an arraignment, hearing, examining trial, or trial, or that a witness is deaf and will be called at a hearing, examining trial, or trial, the court *shall* appoint a qualified interpreter") (emphasis added), *with* TEX. GOV'T CODE ANN. § 57.002(a) (Vernon Supp. 2002) ("A court shall appoint a certified court interpreter or a licensed court interpreter *if a motion for the appointment of an interpreter is filed by a party or requested by a witness* in a civil or criminal proceeding in the court.") (emphasis added).

A. Appointment of Interpreter for Plea in a Misdemeanor Case

First, you ask a multi-part question about chapter 57's application when a defendant enters a plea in a misdemeanor case:

> What is a "proceeding in the court"? If an individual who appears to enter a plea in a misdemeanor case in a justice court (most pleas in justice courts are made at the counter by having the defendant fill out a plea sheet) and who does not speak English asks for assistance from a clerk of the court, is this a proceeding in the court and would the court be required to appoint a licensed interpreter under the provisions of Ch. 57 Texas Government Code?

Request Letter, *supra* note 1, at 2 (question 1(a)). You also ask whether "a clerk of the court assisting such an individual [would] be in violation of this law if the clerk is not licensed or certified as an interpreter" and whether "the court [would] be in jeopardy of violating the law by allowing a clerk under these circumstances to assist an individual?" *Id.* (question 1(b)). Your query goes to several different issues – what constitutes a "criminal proceeding in the court"; when chapter 57's appointment and criminal provisions apply; what constitutes a motion for the appointment of an interpreter; and the relationship between chapter 57's requirements and article 38.30 of the Code of Criminal Procedure.

A defendant's plea in a criminal misdemeanor case is a step in a "criminal proceeding in the court" subject to chapter 57. Section 57.002(a) provides that "[a] court shall appoint a certified court interpreter or a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness in a civil or *criminal proceeding in the court*." TEX. GOV'T CODE ANN. § 57.002(a) (Vernon Supp. 2002) (emphasis added). A misdemeanor action in justice court is a criminal proceeding. *See* TEX. CONST. art. V, § 19 ("Justice of the peace courts shall have original jurisdiction in *criminal matters of misdemeanor cases* punishable by fine only, exclusive jurisdiction in civil matters where the amount in controversy is two hundred dollars or less, and such other jurisdiction as may be provided by law.") (emphasis added). We construe the language "in the court" not to require that the proceeding occur in the courtroom but rather that the particular proceeding be before the court to which the motion or request for appointment of an interpreter is made. In Attorney General Opinion JC-0579 (2002), this office concluded that chapter 57 requires the appointment of interpreters in grand jury proceedings, proceedings that take place outside a courtroom, *see* TEX. CODE CRIM. PROC. ANN. arts. 20.01 (Vernon 1997) (grand jury room), 20.011 (Vernon Supp. 2002) (limiting who may attend grand jury proceedings in grand jury room), but that are subject to a court's jurisdiction, *see, e.g., id.* arts. 19.07, 19.22, 19.26 (Vernon Supp. 2002), 19.35 (Vernon 1997), 20.06, 20.21-.22 (Vernon Supp. 2002). In light of the statute's remedial purpose, we adopted a broad interpretation of the phrase "criminal proceeding" to include "all possible steps in an action from its commencement to its execution." Tex. Att'y Gen. Op. No. JC-0579 (2002) at 2-3. This broad reading would include the taking of a plea.

But our conclusion that a plea in a misdemeanor case is within the scope of section 57.002(a) does not mean that a court clerk who assists a defendant in filing a plea by conversing with the defendant in a language other than English necessarily violates chapter 57. Chapter 57 does not preclude a court clerk from conversing with a defendant in another language, provided that the clerk is not acting as a translator between the defendant and a third person. Under the relevant criminal provision, section 57.049, a person may not "advertise, represent to be, or act as a licensed court interpreter unless the person holds an appropriate license under this subchapter." TEX. GOV'T CODE ANN. § 57.049 (Vernon Supp. 2002). Chapter 57 defines the term "licensed court interpreter," *see id.* § 57.001(5), but it does not define what it means to act as a licensed court interpreter. Under the Code Construction Act, "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." *Id.* § 311.011(a) (Vernon 1998). "Court interpreter," or "interpreter," is a technical legal term that refers to a person "sworn at a trial to accurately translate the testimony of a witness who is deaf or who speaks a foreign language." BLACK'S LAW DICTIONARY 824 (7th ed. 1999). The duties of a court interpreter are also spelled out by statutes requiring interpreters for the deaf to take an oath that they will make a true translation to the deaf person of the proceedings and repeat the deaf person's answers to questions to counsel, court, and jury using the interpreter's "best skill and judgment." TEX. CIV. PRAC. & REM. CODE ANN. § 21.005(a) (Vernon 1997); TEX. CODE CRIM. PROC. ANN. art. 38.31(e) (Vernon Supp. 2002); *see also* TEX. R. EVID. 604 ("An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation."). Thus, to "act as a court interpreter" means to translate proceedings for a party or witness or to translate a party's or witness's testimony to others in the proceedings, serving as a conduit of information between the party or witness and other parties to the proceedings. This is the conduct for which chapter 57 requires a person to have a license or certificate. Section 57.049 does not apply when a court clerk merely converses with a defendant in another language, even if the clerk assists the defendant, provided that the clerk is not acting as a translator between the defendant and the court or another third person.

You also ask what constitutes a motion under section 57.002 in the context of a misdemeanor action in justice court. According to the plain language of section 57.002, the defendant, who is a party to the proceeding, must move for the appointment of an interpreter in order for chapter 57's appointment requirement to apply. *See* TEX. GOV'T CODE ANN. § 57.002(a) (Vernon Supp. 2002) (requiring the appointment of an interpreter "if a *motion* for the appointment of an interpreter is *filed* by *a party* or requested by a witness") (emphasis added). In criminal proceedings in justice court, "[a]ll pleading of the defendant . . . may be oral or in writing as the court may direct." TEX. CODE CRIM. PROC. ANN. art. 45.021 (Vernon Supp. 2002). Thus, whether or not a defendant in justice court "who does not speak English" and who "asks for assistance from a clerk of the court" to enter a plea has moved for appointment of an interpreter will depend upon the circumstances and, in the first instance, is a matter for the court taking the plea. And, as we have noted, the court may grant or deny a motion for an interpreter based on the court's assessment of the defendant's ability to communicate in English. *See* discussion *supra* p. 7.

In the situation you describe, a court must also consider the requirements of article 38.30 of Code of the Criminal Procedure and the defendant's constitutional rights. As provisions providing

for the appointment of interpreters fall under the general rubric of evidentiary rules, *see* TEX. CODE CRIM. PROC. ANN. ch. 38 (Vernon Supp. 2002) (entitled "Evidence in Criminal Actions"); TEX. R. EVID. 604 ("An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation."), article 38.30 applies in criminal proceedings in justice court, *see* TEX. CODE CRIM. PROC. ANN. art. 45.011 (Vernon Supp. 2002) ("The rules of evidence that govern the trials of criminal actions in the district court apply to a criminal proceeding in a justice or municipal court.").

Article 38.30 requires the appointment of a spoken-language interpreter when "it is determined that a person charged or a witness does not understand and speak the English language." *Id.* art. 38.30(a). In addition, given a defendant's constitutional right to confront witnesses and understand the proceedings, a court must appoint an interpreter if the court is aware that the defendant does not speak English and cannot understand the proceedings, unless the defendant waives that right. *See* cases cited *supra* pp. 3-4. A defendant who enters a guilty plea waives the right to confront witnesses. Thus, when taking a guilty plea, the court must consider whether the defendant requires an interpreter in order to intelligently and voluntarily waive his right to confrontation. *See Briones v. State*, 595 S.W.2d 546, 547-48 (Tex. Crim. App. 1980) ("The question involved in the case at bar is not whether the failure to appoint an interpreter denied the appellant's right to confrontation. Rather the question is whether the failure to appoint an interpreter prevented the appellant from intelligently and voluntarily waiving his right to confrontation and entering a plea of nolo contendere."). Whether a defendant requires the assistance of an interpreter to enter a guilty plea is a question of fact for the trial court in the first instance.

Finally, your first question raises the relationship between article 38.30 of the Code of Criminal Procedure and chapter 57 of the Government Code. When a court appoints a spoken-language interpreter in a criminal case, we conclude that chapter 57 establishes the requisite interpreter qualifications. Therefore, the interpreter must be licensed under chapter 57 unless the section 57.002(c) exception applies.

Unlike article 38.31, which establishes qualifications for interpreters for the deaf, article 38.30 does not establish qualifications for spoken-language interpreters. *Compare* TEX. CODE CRIM. PROC. ANN. art. 38.30(a) (Vernon Supp. 2002) ("Any person may be subpoenaed, attached or recognized in any criminal action or proceeding, to appear before the proper judge or court to act as interpreter therein, under the same rules and penalties as are provided for witnesses."), *with id.* art. 38.31(g)(2) (specific qualifications for interpreters for the deaf). Prior to the enactment of chapter 57, a spoken-language interpreter appointed in a criminal case was "not required to have specific qualifications or training." *Kan v. State*, 4 S.W.3d 38, 41 (Tex. App.–San Antonio 1999, pet. ref'd) ("The competency of an individual to act as an interpreter is a question for the trial court, and absent a showing of abuse of discretion, that determination will not be disturbed on appeal.").

While chapter 57 does not expressly state that spoken-language interpreters appointed under article 38.30 must be licensed interpreters, we construe chapter 57 to govern the qualifications of interpreters appointed under article 38.30 because the legislature intended chapter 57's licensing requirements to apply in all civil and criminal proceedings. Section 57.049, which provides that "[a]

person may not advertise, represent to be, or act as a licensed court interpreter unless the person holds an appropriate license under this subchapter," TEX. GOV'T CODE ANN. § 57.049 (Vernon Supp. 2002); *see also id.* § 57.050, indicates that the legislature intended chapter 57's licensing requirements to apply to anyone who acts as a spoken-language court interpreter in a civil or criminal proceeding in Texas. This intent is also evident in the special provision for the certification or licensing of persons acting as court interpreters prior to chapter 57's effective date. *See* Act of May 28, 2001, 77th Leg., R.S., ch. 1139, § 5, 2001 Tex. Gen. Laws 2537, 2541. Furthermore, chapter 57's qualifications for interpreters for the deaf are consistent with the qualifications for interpreters for the deaf appointed under chapter 21 of the Civil Practice and Remedies Code and article 38.31 of the Code of Criminal Procedure. *See* TEX. GOV'T CODE ANN. § 57.001(1) (Vernon Supp. 2002) (A "[c]ertified court interpreter" is an interpreter for the deaf "who is a qualified interpreter as defined in Article 38.31, Code of Criminal Procedure, or Section 21.003, Civil Practice and Remedies Code, or certified under Subchapter B by the Texas Commission for the Deaf and Hard of Hearing to interpret court proceedings for a hearing-impaired individual."). The legislative history of chapter 57 indicates that the legislature intended to standardize qualifications for both interpreters for the deaf and spoken-language interpreters throughout the Texas judicial system. *See* HOUSE COMM. ON JUDICIAL AFFAIRS, BILL ANALYSIS, Tex. H.B. 2735, 77th Leg., R.S. (2001) ("House Bill 2735 provides a program for certification of court interpreters to aid non-English speaking and hearing-impaired individuals."); SENATE COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 2735, 77th Leg., R.S. (2001) ("The Texas judicial system does not have a statewide standard for interpreters who assist these participants. H.B. 2735 sets forth provisions for the establishment and administration of programs for the certification of court interpreters to aid non-English speaking and hearing-impaired individuals within the judicial system.").

B. Appointment of Interpreter in Certain Juvenile Proceedings

You also ask about the appointment of interpreters for parents in proceedings involving juveniles under article 45.0215 and article 45.054 of the Code of Criminal Procedure. Under article 45.0215, a justice of the peace must issue a summons to compel a juvenile defendant's parent, guardian, or managing conservator to be present during the taking of the defendant's plea and other proceedings. *See* TEX. CODE CRIM. PROC. ANN. art. 45.0215(a)(2) (Vernon Supp. 2002). If the court is not able to secure the appearance of the defendant's parent, guardian, or managing conservator, "the court may . . . take the defendant's plea and proceed against the defendant." *Id.* art. 45.0215(b). Article 45.054 authorizes a justice court that makes a finding that an individual has failed to attend school under section 25.094 of the Education Code to enter an order that imposes certain conditions on the individual's parents and to require the parents' attendance at a hearing. *See id.* § 45.054(a)(3) (authorizing order that individual and parent attend class), (b) (providing that order under subsection (a)(3) enforceable by contempt), (c) (authorizing court to summon parent to hearing), (d) (parent who fails to attend hearing after receiving notice commits class C misdemeanor). In light of these two provisions you ask:

> If the parent or guardian, who may or may not be a witness but is required to be in attendance and subject to sanctions, cannot speak

> English must the court appoint a licensed interpreter before proceeding with the respondent juvenile's hearing?

Request Letter, *supra* note 1, at 2 (question 1(c)). Our answer to this question assumes that the parent cannot communicate in English and requires an interpreter.

Again, chapter 57 requires a justice court to appoint "a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness in a civil or criminal proceeding in the court." TEX. GOV'T CODE ANN. § 57.002(a) (Vernon Supp. 2002). A juvenile proceeding under chapter 45 of the Code of Criminal Procedure constitutes a criminal proceeding within the meaning of chapter 57. *See* Tex. Att'y Gen. Op. No. JC-0579 (2002) at 2-3.

A court must appoint a licensed interpreter for a parent who is a witness in a proceeding and who requests the appointment of a spoken-language interpreter. *See* TEX. GOV'T CODE ANN. § 57.002(a) (Vernon Supp. 2002). A court also must appoint a licensed interpreter for a parent under chapter 57 if the parent is a party to the proceeding and he or she files a motion for the appointment of a spoken-language interpreter. *See id.* Unless the court has specifically named the parent as a party, a parent does not appear to be a party to the proceedings about which you ask. Chapter 57 does not define the term "party." The term "party" is a technical legal term that refers to "[o]ne by or against whom a lawsuit is brought." BLACK'S LAW DICTIONARY 1144 (7th ed. 1999); *see also* TEX. GOV'T CODE ANN. § 311.011(b) (Vernon 1998) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."). This office construed the term "party" in section 21.002 of the Civil Practice and Remedies Code, which requires the appointment of an interpreter in a civil case for a party who is deaf, to include only a person who has been named as a party by the court or who is deemed a party by statute. *See* Tex. Att'y Gen. Op. No. DM-411 (1996) at 9 (concluding that "[a] custodial relative not included within [Family Code] section 51.02(10)'s list of parties who is not a witness to the proceedings is not entitled as a matter of law to the services of an interpreter" under section 21.002 of the Civil Practice and Remedies Code).

Unlike the Family Code's juvenile justice provisions, which expressly define the term "party" to include a juvenile's parent, *see* TEX. FAM. CODE ANN. § 51.02(10) (Vernon 2002), chapter 45 of the Code of Criminal Procedure does not define the term. And neither of the two provisions you ask about names a juvenile's parent as a party to the proceeding. However, while article 45.0215 merely requires that a court summon a parent to attend a proceeding involving his or her child, article 45.054 authorizes a court to impose conditions and sanctions against a parent. If a court contemplates imposing conditions or sanctions against a parent, then we believe the court should treat the parent as a witness or a party. As noted above, spoken-language interpreters appointed for parties or witnesses under article 38.30 of the Code of Criminal Procedure are paid with county funds. *See* TEX. CODE CRIM. PROC. ANN. art. 38.30(b) (Vernon Supp. 2002); *see also id.* art. 38.30(a) ("When a motion for appointment of an interpreter is filed by any party *or on motion of the court, in any criminal proceeding, it is determined that a person charged or a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him.*") (emphasis added).

C. Appointment of Interpreter When there is No Person Licensed to Interpret in a Particular Language

In a related question, you ask what a court may do when a spoken-language interpreter in a particular language is not available or there is no individual licensed to interpret in that language:

> What may a court do when a court is required to appoint a licensed interpreter and no licensed interpreter for the needed language exists in Texas? To what lengths must a court go to find and appoint a licensed interpreter? As an example, if the only licensed interpreter for a particular language lives in El Paso, would a court in Dallas be required under this law to appoint that interpreter and pay or require the parties to a civil suit to pay for the interpreter's costs? If no licensed interpreter for a particular language exists in Texas, could a court allow a non licensed individual to interpret? Or, would the individual interpreting be in violation of Chapter 57 and possibly be committing a Class A misdemeanor?

Request Letter, *supra* note 1, at 3 (question 3).

Chapter 57 of the Government Code, in requiring the appointment of a *licensed* interpreter, modifies a court's authority under Rule 183 of the Rules of Civil Procedure or article 38.30 of the Code of Criminal Procedure to select a spoken-language interpreter. Significantly, chapter 57 requires the appointment of a licensed interpreter, with only one exception. *See* TEX. GOV'T CODE ANN. § 57.002(a), (c) (Vernon Supp. 2002). That exception specifically permits the appointment of an unlicensed interpreter, but only in a county with a population of less than 50,000. *See id.* § 57.002(c). Thus, if the only person who is licensed to interpret in a particular language under Government Code chapter 57, subchapter C resides in a distant location, a court in a populous county would still be required to appoint that person. As discussed more extensively below, *see infra* Part II.F, a court in a civil case would direct payment of the interpreter under the Civil Practice and Remedies Code and the Rules of Civil Procedure or other applicable law.

On the other hand, if there is no interpreter licensed under subchapter C to interpret in a particular language, a court will have no option other than to appoint an interpreter who is not licensed. Indeed, such a course may be necessary in order to protect the rights of a party or witness to a proceeding and thus within a court's inherent power. *See* TEX. GOV'T CODE ANN. § 21.001 (Vernon Supp. 2002) (inherent power and duty of courts). We presume that an unlicensed person who acts as an interpreter pursuant to an appointment under the section 57.002(c) exception (and who does not hold him- or herself out as a licensed court interpreter) does not violate chapter 57, *see id.* § 57.049 ("A person may not advertise, represent to be, or act as a *licensed* court interpreter unless the person holds an appropriate license under this subchapter.") (emphasis added), even though this exception is not expressly referenced in section 57.049, *see id.* By analogy, we believe that if a court makes a finding that there is no interpreter licensed under subchapter C to interpret in a particular language and if the person who is appointed to interpret in these circumstances does not

represent him- or herself to be a licensed interpreter, that person would not violate section 57.049. *See id.*

D. What Constitutes a Motion or Request for an Interpreter in a Civil Proceeding

You ask whether, in a civil proceeding, a party's or witness's statement in court that "I don't speak English" "constitute[s] a motion or request for purposes of Ch. 57.002(a) Texas Government Code?" Request Letter, *supra* note 1, at 2 (question 2(b)). While we can provide some guidance with respect to this question, whether a witness has requested the appointment of an interpreter or a party has filed a motion for the appointment of an interpreter is ultimately a question that must be resolved by the court.

In the context of a civil action, chapter 57 appears to require that a party file a written motion for the appointment of an interpreter. Again, section 57.002 requires the appointment of a licensed court interpreter "if a *motion* for the appointment of an interpreter is *filed* by a party." TEX. GOV'T CODE ANN. § 57.002(a) (Vernon Supp. 2002) (emphasis added). In using the terms "motion" and "filed," section 57.002 appears to contemplate written motions. In justice court, however, "pleadings shall be oral, except where otherwise specially provided." TEX. R. CIV. P. 525. Furthermore, nothing precludes a court from granting a party's oral motion or request for appointment of an interpreter, or from appointing an interpreter on its own motion. *See* TEX. GOV'T CODE ANN. § 57.002(b) (Vernon Supp. 2002) ("A court may, on its own motion, appoint . . . a licensed court interpreter."); *see also* TEX. R. CIV. P. 183 (authorizing a court to appoint an interpreter).

A witness may request the appointment of an interpreter in an oral statement. With respect to witnesses, section 57.002's appointment requirement is triggered "if . . . requested by a witness." TEX. GOV'T CODE ANN. § 57.002(a) (Vernon Supp. 2002). In contrast to a "motion," which is "filed" by a party, *see id.*, the term "request" does not appear to specify a written pleading. Whether a witness's statement in court that "I don't speak English" constitutes a request for the appointment of an interpreter will depend upon the circumstances and must be determined by the trial court in the first instance.

In either case, the court may grant or deny a motion or request for the appointment of an interpreter based on the court's assessment of the party's or witness's ability to communicate in English. *See* discussion *supra* p. 7.

E. Appointment of Interpreter Requested by Parties in a Civil Case

With respect to civil proceedings, you also ask whether a court may "appoint a licensed interpreter who the parties . . . have agreed upon and who [the parties] have made arrangements for the payment of" when the parties "submit the interpreter's name to the court for appointment of the interpreter by the court." Request Letter, *supra* note 1, at 3 (question 2(f)).

A court may appoint a licensed interpreter who has been agreed upon and requested by the parties in a civil case and whom the parties have arranged to pay. Rule 183 of the Rules of Civil

Procedure authorizes a court to appoint an interpreter of its own selection and to direct payment of the interpreter. Section 57.002 of the Government Code modifies that authority by requiring a court to appoint a licensed interpreter. Neither the statute nor the rule preclude a court from choosing to appoint a licensed interpreter requested by the parties whom the parties have arranged to pay.

F. Payment of Interpreters

Finally, we address your questions about payment of interpreters under chapter 57. You ask several general questions about payment of spoken-language interpreters in civil proceedings:

> In civil proceedings, when "a motion for the appointment of an interpreter is filed by a party or requested by a witness" may the court require the movant or the requesting party to pay an amount to the court as security for the cost of the interpreter which the court will appoint? Does it make a difference if the movant or the requesting party is a defendant or witness for the defendant or a plaintiff or witness for the plaintiff?
>
> If a defendant movant or witness for the defendant who requests an interpreter in a civil matter declares an inability to pay the costs, is the County responsible for the costs of an interpreter? Or may the court require the plaintiff to pay for an interpreter's services as costs of court and leave it to the plaintiff to collect from the defendant should the plaintiff prevail?
>
> If a plaintiff movant or witness for plaintiff who requests an interpreter in a civil matter declares an inability to pay the costs, is the County responsible for the costs of an interpreter?

Request Letter, *supra* note 1, at 2 (question 2(c)-(e)). As noted above, we assume you intend to ask about interpreters appointed to serve in particular cases and not interpreters who are employed by the county and paid by the county under chapter 152 of the Local Government Code.

Chapter 57 of the Government Code modifies the law with respect to when an interpreter must be appointed and prescribes interpreter qualifications, but it does not address the payment of interpreters. The law in this area is unchanged. A court retains its authority under the Rules of Civil Procedure and the Civil Practice and Remedies Code to fix an interpreter's compensation and to direct how an interpreter will be paid. Rule 183 of the Texas Rules of Civil Procedure provides that "[t]he compensation [of an interpreter] shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court." TEX. R. CIV. P. 183. In addition, the Civil Practice and Remedies Code authorizes the "judge of any court" to "include in any order or judgment all costs, including . . . interpreters . . . and . . . such other costs and fees as may be permitted by these rules and state statutes." TEX. CIV. PRAC. & REM. CODE ANN. § 31.007 (Vernon 1997). A special justice court rule provides that "[t]he

successful party in the suit shall recover his costs, except in cases where it is otherwise expressly provided." TEX. R. CIV. P. 559.

Whether a county may ultimately be responsible for paying an interpreter's fees will depend upon the nature of the civil action. As a general matter, counties are not responsible for paying spoken-language interpreters' fees in civil actions. Chapter 57 does not expressly impose this obligation on counties, and the legislative history does not indicate that the legislature intended chapter 57 to have that effect. *See* FISCAL NOTE, Tex. H.B. 2735, 77th Leg., R.S. (2001) ("No significant fiscal implication to units of local government is anticipated."). We note, however, that specific provisions that predate chapter 57 may require a county to pay interpreter fees as costs in certain kinds of actions in particular situations. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 571.017 (Vernon 1992), .018 (Vernon Supp. 2002) (mental health proceedings); TEX. PROB. CODE ANN. § 665A (Vernon Supp. 2002) ("If after examining the proposed ward's assets the court determines the proposed ward is unable to pay for services provided by an attorney, a mental health professional, or an interpreter appointed under Section 646 or 687 of this code, as applicable, the county is responsible for the cost of those services.").

With respect to payment, you also ask a question about a specific situation. You explain that justice courts in Dallas County "have been instructed by the Dallas County Commissioners Court to use interpreters from the County's contract vendor which provides language interpreters for the courts." Request Letter, *supra* note 1, at 2. You also state that "[b]ecause of this contractual relationship with the County, this vendor will always look to the County for payment when its interpreters are requested." *Id.* You ask, "[i]n light of the language contained in Rule 183, can a court be required by a commissioners court to only appoint interpreters under a contract between the county and an interpreter service?" *Id.* (question 2(a)). Again, we assume you do not intend to ask about the payment of interpreters who are court employees and whose salaries are paid by the county.

In short, we conclude that a commissioners court is not authorized to require a court to appoint interpreters from an interpreter service under contract with the county. A commissioners court's authority is limited to exercising "such powers and jurisdiction over all county business" as is conferred by the constitution and statutes. TEX. CONST. art. V, § 18(b). The authority of the commissioners court to contract on behalf of the county is limited to that conferred either expressly or by necessary implication by the constitution and laws of this state. *See Jack v. State*, 694 S.W.2d 391, 397 (Tex. App.–San Antonio 1985, writ ref'd n.r.e.) (citing *Childress County v. State*, 92 S.W.2d 1011, 1016 (Tex. 1936); *Wilson v. County of Calhoun*, 489 S.W.2d 393, 397 (Tex. Civ. App.–Corpus Christi 1972, writ ref'd n.r.e.)). Again, chapter 57 of the Government Code does not address the payment of interpreters. Rule 183 of the Rules of Civil Procedure and article 38.30 of the Code of Criminal Procedure control.

In the civil context, Rule 183 of the Texas Rules of Civil Procedure expressly provides that a court may appoint an interpreter of its own selection. *See* TEX. R. CIV. P. 183 ("The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation."). No statute gives a commissioners court the authority to direct a court to appoint a specific interpreter or to otherwise limit a court's discretion to appoint an interpreter of its own selection in civil cases

generally. We also note that Rule 183 does not, as a general matter, provide that a county will pay the costs of an interpreter. *See id.* ("The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."). *But see* statutes cited *supra* p. 17.

In the criminal context, article 38.30(a) of the Code of Criminal Procedure does not expressly state that a court may select a spoken-language interpreter of its own choosing, *see* TEX. CODE CRIM. PROC. ANN. art. 38.30(a) (Vernon Supp. 2002), but we conclude that it gives a court this authority. First, subsection (a)'s statement that "[*a*]*ny person* may be subpoenaed, attached or recognized in any criminal action or proceeding, to appear before the proper judge or court to act as interpreter therein," *id.* (emphasis added), suggests that judges have the discretion to select interpreters. In addition, although subsection (b) of article 38.30 provides that interpreters will be paid from county general funds, it gives a commissioners court no authority with respect to the selection of interpreters. *See id.* art. 38.30(b). It also establishes that an interpreter shall be paid not less than $15 nor more than $100 a day "at the discretion of the judge presiding." *Id.* Furthermore, subsection (c), which authorizes a commissioners court to set a payment schedule and to expend funds for the services of court interpreters in excess of the range established by subsection (b), does not authorize a commissioners court to select interpreters. Accordingly, we conclude that article 38.30 vests a court with the discretion to select an interpreter in a criminal case and requires a county to pay an interpreter selected by a court.

Finally, we note that neither Rule 183 nor article 38.30 precludes a court from selecting an interpreter from an interpreter service under contract with the county if the court chooses to do so. In either case, the appointment must comply with chapter 57 of the Government Code.

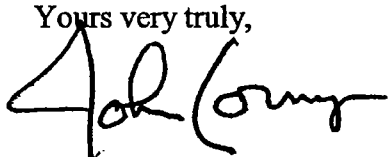
SUMMARY

Chapter 57 of the Government Code applies to a plea in a misdemeanor case in justice court. A court clerk who merely converses with a defendant in a language other than English does not "act as a licensed court interpreter" within the meaning of chapter 57. In either a civil or criminal proceeding, whether a party has filed a motion for or a witness has requested the appointment of an interpreter will depend upon the facts and is a question for the trial court in the first instance. The court may grant or deny such a motion or request. In a criminal proceeding, a court must also take into account the defendant's constitutional right to an interpreter and article 38.30 of the Code of Criminal Procedure. Chapter 57 establishes qualifications for spoken-language interpreters appointed in criminal cases under the authority of article 38.30.

If the only person who is licensed to interpret in a particular language resides in a distant location, a court in a populous county would be required to appoint that person. On the other hand, if there is no interpreter licensed to interpret in a particular language, the appointment of an unlicensed person may be within a court's inherent power.

Chapter 57 does not alter preexisting law on the payment of appointed court interpreters. It does not require counties to pay for spoken-language interpreters in civil cases. Courts retain their authority under the Rules of Civil Procedure and the Civil Practice and Remedies Code to fix an interpreter's compensation and to direct how an interpreter will be paid in civil cases. A county may not require a court to select an interpreter from an interpreter service under contract with the county, although a court may choose to do so.

Yours very truly,



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JOSE MEDRANO GARCIA, Appellant v. THE STATE OF TEXAS

NO. 489-03

COURT OF CRIMINAL APPEALS OF TEXAS

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March 24, 2004, Delivered

NOTICE: [*1] PUBLISH

PRIOR HISTORY: ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS. BRAZORIA COUNTY. Garcia v. State, 2002 Tex. App. LEXIS 8126 (Tex. App. Houston 14th Dist., Nov. 14, 2002)

DISPOSITION: Sustained Garcia's first ground for review and dismissed the remaining grounds; reversed the Court of Appeals' judgment and remanded the case to that court for an assessment of harm.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: FOR APPELLANT: JOHN J. DAVIS, ANGLETON.

FOR STATE: JEFFREY D. KYLE, ASSIST. DA, ANGLETON. MATTHEW PAUL, STATE'S ATTORNEY, AUSTIN.

JUDGES: Keasler, J., delivered the opinion of the Court joined by Meyers, Price, Womack, Johnson, Hervey, Holcomb, and Cochran, JJ. Keller, P.J., filed a concurring opinion in which Womack, J., joined.

OPINIONBY: Keasler

OPINION:

Jose Medrano Garcia does not speak English. His jury trial had mostly English-speaking witnesses and court personnel, and the proceedings were not translated. He did not affirmatively waive his right to translation and was apparently unaware of that right. We must decide whether Garcia's conviction violates the Confrontation Clause of the Sixth Amendment to the United States Constitution. We conclude that it does.

Facts and Procedural History

Garcia was born in Matehuala, Mexico, and attended school there through the ninth grade. He eventually came to the United States with a "green card." He does not speak, read, or write English to any appreciable degree.

In January [*2] 2001, Garcia was introduced to the American legal system when he was charged with a sexual assault that had occurred several months earlier. He pleaded not guilty, was released on bond, and hired attorney Ken Bishop to help him maneuver through the system. Bishop spoke no Spanish, so the two communicated solely through Bishop's bilingual legal assistant, Herminia Montoya.

Pretrial

That summer, proceedings began with a pretrial hearing on July 23, 2001. The hearing encompassed pretrial motions as well as voir dire issues. The court reporter's record reflects that Aida Aluizo was "duly sworn as English/Spanish interpreter by Deputy District Clerk" for that hearing. The clerk's record also contains a document, dated July 23, 2001, in which Aluizo swears that she "will truly interpret for the witness, Joe Medrano Garcia, the testimony for which he/she may give in the cause now on trial."

During voir dire, defense counsel prepared the panel for the presence of an interpreter during the trial. He told them that Garcia "doesn't speak English, so we've got some interpreters here." He asked if that might matter to anyone. One venireperson asked whether Garcia was a United States citizen, [*3] and counsel responded, "I think that - he's not a citizen, but he's here on what we call a, 'Green Card' legally."

Regarding Garcia's testifying, defense counsel told the panel that Garcia did not have to testify, but that he would: "I can tell you right now that Mr. Garcia is going to testify. He wants to testify, to tell you his version of this incident, so you will be hearing from him. Now it will be through a translator. So this is one reason I asked the question a little bit earlier and mentioned about the method by which we're going to do it because he's just

not quite fluent enough in English to be able to understand the questions possibly and/or respond without having a translator . . . ."

Trial

Trial began the next day. There is no mention in either the court reporter's record or the clerk's record of an interpreter translating the testimony throughout the trial. After the indictment was read and the court asked how the defendant would plead, Garcia did not answer. Defense counsel responded, "Not guilty, Your Honor."

The court then introduced Montoya to the jury as defense counsel's legal assistant. The judge said, "She translates pretty frequently in the courts, so [*4] she's hired by the Court."

The State presented testimony from seven witnesses. Most relevant to the issue before us today was the testimony of the complainant, the complainant's mother, and the police officer. The complainant, Erica Mendoza, testified that she is Garcia's cousin. She said that Garcia had asked her to go to the unemployment office with him so that she could translate for him. She agreed to do so, but when he came over, she said she would not be able to go after all. It was then, she said, that he sexually assaulted her.

Mendoza's mother, Rosalina Seladon, testified later, and the court reporter's record reflects that she "testified through the duly sworn interpreter." There were some breaks during her testimony at which point there were "discussions between interpreter and witness in Spanish." The judge eventually instructed Aluizo to "wait until the witness is through speaking" before translating. The "clerk's worksheet" in the clerk's record reflects that, during the testimony of "Angelina Celedon" (who is apparently the same person as Rosalina Seladon), "[Aluizo] translated for her."

The police officer who served the arrest warrant on Garcia testified. During [*5] cross- examination, defense counsel asked the officer if he was "aware that Jose Garcia only spoke Spanish?" The officer responded, "I [was] told that, but from speaking to him I could tell that he could speak a little English."

The defense presented the testimony of the complainant and Garcia. The court reporter's record reflects that Garcia was sworn in "through the interpreter" and testified "through the duly sworn interpreter." He testified that he did not assault Mendoza; instead, she approached him and consented to sexual contact between them.

When the prosecutor cross-examined Garcia and asked if he had heard his attorney questioning the victim, Garcia replied, "No, because I don't understand a lot of English." On re-direct, defense counsel asked if Garcia had understood all of the questions that the prosecutor had asked him, and Garcia said, "I wasn't able to understand well, very well."

The jury found Garcia guilty of sexual assault, and the parties reached an agreement on punishment. There was some concern about whether the punishment agreement constituted a guilty plea, and the judge said, "Well, I think what I need to do is give him all the admonitions any way." So [*6] Garcia approached the bench and at that time Aluizo was "called as the Spanish/English interpreter for the defendant, having been duly sworn as the Spanish/English Interpreter on 7/23/01."

The agreement was that Garcia would serve eight years in prison and waive his right to appeal. The court then came to the sex offender registration requirements. The judge discussed having Aluizo "read those" to Garcia. He told defense counsel to "go over that" with Aluizo and "make sure he understands those and then I'll come back before you and then we'll finish the thing." The judge then said that "the record will reflect that the supplemental admonitions to defendant for sex offender registration requirements have been read by the translator . . . ."

Motion for New Trial

Garcia filed a motion for new trial arguing that his waiver of appeal had not been knowing and voluntary because "his comprehension of the English language and American judicial system was insufficient." He also claimed that he received ineffective assistance of counsel at trial, and he claimed generally that the verdict was contrary to the law and the evidence. A hearing was held on the motion on September 28, 2001. [*7]

At the hearing, Garcia's sister-in-law testified that Garcia does not speak English.

Aluizo testified that she was sworn in as the interpreter for this case. But she was not called upon to interpret the English-speaking testimony for Garcia. Rather, she interpreted Garcia's Spanish testimony for the jury. When asked why she did not simultaneously interpret the testimony for Garcia, she said, "I don't - I don't really remember why I didn't sit beside him. Normally I do. I sat at the probation table by the counselor table and - but I really don't know why I didn't sit beside him. I did tell [Montoya], Mr. Bishop's secretary, that normally I would sit beside the Defendant and I don't recall what she responded to me and, so, I just sat, you know, on the side table." She did not see Montoya interpreting for Garcia. And during punishment, she never translated what an appeal was, its importance, or possible appellate issues.

Montoya testified that Garcia always spoke Spanish and Bishop spoke English so she translated for them. But she did not perform any type of interpretation for Garcia during the trial. She sat in between Garcia and Bishop. Nobody instructed her to translate the witnesses' [*8] testimony for Garcia. She didn't do it because she was "afraid that I would be called down; and I didn't want to be called down." She was afraid a translation would disrupt the proceedings. Nobody else translated for Garcia. Before this case she had never been called upon to sit during a trial and give an ongoing translation, and she was not sworn in as an interpreter in this case. Garcia did not realize that he had been found guilty until they left the courtroom. Montoya told him he had been found guilty in the stairway outside the courtroom, and he was surprised and shocked.

Bishop testified that he speaks very little Spanish and Garcia speaks even less English. They had an interpreter every time they spoke. There was no translation by Montoya during trial. Bishop never advised Garcia that he had a right to an interpreter. Garcia could not understand the victim's testimony and therefore could not assist Bishop. Garcia did not understand that he had been found guilty until after the trial. Bishop never explained to Garcia what an appeal was. On cross-examination, Bishop admitted that Montoya had sat in between him and Garcia, and he could have asked her a question to ask Garcia, [*9] but he did not avail himself of this. He admitted that he never objected to the court or requested a translation for Garcia.

Garcia testified with the aid of an interpreter. The "clerk's worksheet" for the motion for new trial hearing states, "Rosario Rivera Interpreter," and states, "Presario Rivera translating to Defen." Garcia testified that nobody translated the trial for him and he did not understand any of the English testimony. He had no idea that he had a right to a translator and never told anyone that he did not want a translator.

After that hearing, the judge made a remark which he put on the record during the next hearing. On October 8, 2001, the hearing scheduled for argument on the motion, the judge said the following:

> Mr. Davis had talked to me about a remark that I had made after our last hearing, that was in the presence of Mr. Davis and the prosecutor, that . . . I think I said something to the effect that at some point in the trial I had happened to notice that Mr. Ken Bishop - he was seated over there at counsel table, on the inside; and then, [Montoya] was next; and then, the defendant and then [Aluizo], I think was on the outside. And sometime during the [*10] trial, I noticed that the testimony was not being translated. At what stage of the trial, seems like it was pretty well into the trial . . . it would have been sometime in the latter part or middle or two-third - I don't remember when - of the guilt- innocence stage. And I had mentioned to Mr. Davis that I don't recall what - who was testifying, who's testimony was significant testimony or insignificant testimony; but just don't recall. But I thought - I didn't remember whether I had remarked to anybody about it or not. If I did remark on the record, I guess it would be eventually on the record somewhere.

Defense counsel then urged a new trial due to the lack of translation and ineffective assistance of counsel. Counsel argued that the lack of translation violated, among other things, his client's Sixth Amendment right to confront the witnesses against him. The State responded that confrontation clause violations must be raised at trial.

The trial judge denied Garcia's motion for new trial. He noted that a written motion had never been filed for an interpreter - only an oral motion. The judge also noted that there was an oath in the record that Aluizo would interpret, but that was [*11] in response to the State's request for an interpreter. The judge considered the fact that the ultimate issue in the case was whether there was sexual contact, and that issue was fully explored at trial. The judge concluded by recognizing that an interpreter had been sworn, but "Bishop had two Spanish- speaking assistants with him flanking [Garcia] at the time of trial and during the entire time of the trial." Finally, the judge concluded that Garcia had not knowingly and intelligently waived his right to appeal.

Court of Appeals

On appeal to the Court of Appeals, Garcia argued that the lack of translation during his trial violated, among other things, the Sixth Amendment's Confrontation Clause. The State responded that Garcia failed to preserve error and any error would be harmless.

The Court of Appeals, in a memorandum opinion, stated that "if there is evidence an interpreter was present and available to help the defendant, a trial court does not err in failing to appoint one." n1 The court said that in this case, Bishop's legal assistant was fluent in both English and Spanish and sat next to Garcia during the trial. n2 The Court concluded that Garcia "had a translator available [*12] but did not make use of her," and as a result, the trial court did not err in failing to appoint a second interpreter. n3

n1 *Garcia v. State*, 2002 Tex. App. LEXIS 8126, *2, No. 14-01-00949-CR (Tex. App. - Houston [14th], November 14, 2002) (not designated for publication).

n2 *Ibid.*

n3 *Ibid.*

We granted all four grounds of Garcia's petition for discretionary review. The first ground asks whether "a Mexican citizen who speaks and understands little or no English [can] be tried without benefit of translation, without knowledge he had a right to translation, and without affirmative waiver of the right to have the proceedings translated" under the federal constitution. Because of our resolution of this ground, we need not reach the remaining grounds.

Analysis

The Sixth Amendment to the Constitution guarantees an accused in a criminal prosecution the right to be confronted with the witnesses against him. n4 One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's [*13] right to be present in the courtroom during his trial. n5 The right to be present includes the right to understand the testimony of the witnesses. n6 This is because, as Professor Wigmore notes, "no situation is more full of anguish than that of an innocent accused who cannot understand what is being testified against him." n7 We have previously acknowledged that providing an interpreter to an accused who does not understand English is required by the Confrontation Clause. n8 Indeed, we long ago recognized the prevalence of this particular problem in our state:

We know that in this State, especially along the Rio Grande border, our citizenship is comprised of Latin Americans who speak and understand only the Spanish language. These citizens, as also nationals of the Republic of Mexico (which was the status of appellant), when brought before the courts of this State charged with crimes against the laws of this State, are entitled to be tried according to the Constitution and laws of this State. This, of necessity, means they are entitled to be confronted by the witnesses under the same conditions as apply to all others. Equal justice so requires. The constitutional right of confrontation [*14] means something more than merely bringing the accused and the witness face to face; it embodies and carries with it the valuable right of cross-examination of the witness. Unless appellant was in some manner, either through his counsel or an interpreter, afforded knowledge of the testimony of the witness, the right of cross-examination could not be exercised by him. n9

The United States Supreme Court has also recognized that the right to confrontation and the right to be present at one's trial extend to foreign nationals. n10

n4 U.S. CONST. AMEND. VI; *Davis v. Alaska*, 415 U.S. 308, 315, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974).

n5 *Illinois v. Allen*, 397 U.S. 337, 338, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970). *See also United States v. Gagnon*, 470 U.S. 522, 526, 84 L. Ed. 2d 486, 105 S. Ct. 1482 (1985).

n6 *Baltierra v. State*, 586 S.W.2d 553, 556-57 (Tex. Crim. App. 1979). *See also Luu v. People*, 841 P.2d 271, 273 n.3 (Colo. 1992); *State v. Heredia*, 253 Conn. 543, 754 A.2d 114, 122 (Conn. 2000); *Martinez Chavez v. State*, 534 N.E.2d 731, 737 (Ind. 1989); *State v. Calderon*, 270 Kan. 241, 245, 13 P.3d 871 (Kan. 2000); 5 JOHN W. WIGMORE, EVIDENCE ß 1393 (Chadbourn Rev. Ed. 1974). [*15]

n7 WIGMORE, *supra* note 6.

n8 *See Baltierra*, 586 S.W.2d at 556-59; *Ex Parte Marez*, 464 S.W.2d 866, 867 (Tex. Crim. App. 1971).

n9 *Garcia v. State*, 151 Tex. Crim. 593, 601, 210 S.W.2d 574, 580 (1948). *See also Baltierra*, 586 S.W.2d at 557.

n10 *Wong Wing v. United States*, 163 U.S. 228, 238, 41 L. Ed. 140, 16 S. Ct. 977 (1896).

The Arizona Supreme Court explains that being present at a trial without understanding the language of the witnesses "would be as though a defendant were forced to observe the proceedings from a soundproof booth or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy." n11 And the United States Court of Appeals for the First Circuit notes that "the right to an interpreter rests most fundamentally . . . on the notion that no defendant should face the Kafkaesque n12 spectre of an incomprehensible ritual which may terminate in punishment." n13 Or as Judge Ferguson of the Ninth [*16] Circuit has said, "presence can have no meaning absent comprehension." n14

n11 *State v. Natividad*, 111 Ariz. 191, 526 P.2d 730, 733 (Ariz. 1974).

n12 *See* FRANZ KAFKA, THE TRIAL (Penguin 1953).

n13 *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973). *See also United States v. Quesada Mosquera*, 816 F. Supp. 168, 173 (E.D. N.Y. 1993); *Ko v. United States*, 722 A.2d 830, 834 (D.C. 1998); *People v. Escalante*, 256 Ill. App. 3d 239, 627 N.E.2d 1222, 1228, 194 Ill. Dec. 580 (Ill. App. 1994); *Martinez v. State*, 449 N.E.2d 307, 309 (Ind. App. 1983); *State v. Lopes*, 805 So. 2d 124, 126 n.2 (La. 2001); *Commonwealth v. Garcia*, 379 Mass. 422, 399 N.E.2d 460, 470 (Mass. 1980); *State v. Woo Won Choi*, 55 Wn. App. 895, 781 P.2d 505, 508 (Wash. App. 1989); *State v. Neave*, 117 Wis. 2d 359, 344 N.W.2d 181, 187 (Wisc. 1984).

n14 *Tejeda-Mata v. I.N.S.*, 626 F.2d 721, 728 (9th Cir. 1980) (Ferguson, J., dissenting).

[*17]

The leading case in this area, and a case strikingly similar to this one, is *United States ex rel. Negron v. New York.* n15 There, the Second Circuit affirmed the trial court's grant of habeas relief due to Negron's being tried without an interpreter. The government did not dispute that Negron understood no English, counsel spoke no Spanish, and there was no translation during trial. In granting habeas relief, the court noted that "most of the trial must have been a babble of voices" n16 to Negron. The court concluded that, "regardless of the probabilities of his guilt, Negron's trial lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment." n17 As the court explained, "Negron deserved more than to sit in total incomprehension as the trial proceeded." n18

n15 434 F.2d 386 (2d Cir. 1970). *See also Baltierra*, 586 S.W.2d at 556, 559.

n16 *Negron*, 434 F.2d at 388. *See also People v. Aguilar*, 35 Cal. 3d 785, 677 P.2d 1198, 1204, 200 Cal. Rptr. 908 (Cal. 1984); *People v. Avila*, 797 P.2d 804, 805 (Colo. App. 1990); *Ko*, 722 A.2d at 834; *Martinez*, 449 N.E.2d at 309; *State v. Karaarslan*, 262 N.J. Super. 123, 269 N.J. Super. 123, 619 A.2d 1346 (N.J. Super. 1993). [*18]

n17 *Negron*, 434 F.2d at 389.

n18 *Id.* at 390. *See also United States v. Si*, 333 F.3d 1041, 1042 (9th Cir. 2003); *Escalante*, 627 N.E.2d at 1227; *Neave*, 344 N.W.2d at 187.

In this case, as in *Negron*, the State does not dispute that Garcia does not speak English and there was no translation during trial. Indeed, it concedes in its brief that at the hearing on the motion for new trial, Garcia "established that he does not speak English and did not receive simultaneous translation of the witnesses' testimony." Garcia, like Negron, sat in "total incomprehension" n19 of his trial. He understood almost no English, and all of the witnesses but one testified in English. He received no translation of the testimony. To Garcia, like Negron, the trial must have been "a babble of voices." n20 Garcia experienced exactly what the Sixth Amendment protects against.

n19 *Negron*, 434 F.2d at 390.

n20 *See id.* at 388.

[*19]

No Interpreter vs. Ineffective Interpreter

Despite this, the State argues that Garcia was not actually deprived of an interpreter at all. Instead, he had an interpreter - Montoya - who simply did not interpret. According to the State, the judge acknowledged the presence of Montoya as Garcia's interpreter both during voir dire and at the beginning of trial. So the State contends that Garcia's actual claim in this appeal is that he had an ineffective interpreter, not that he was denied an interpreter. And since Garcia's claim concerns an ineffective interpreter, the State continues, Garcia was required to preserve the error by objecting at trial.

The State's characterization of the facts is not entirely accurate. Montoya was not even implicitly recognized as an interpreter during voir dire. On the contrary, the record reflects that Aluizo, not Montoya, was "duly sworn as English/Spanish interpreter by Deputy District Clerk" at that hearing.

As for trial, it is true that the judge told the jury at the beginning of trial that Montoya "translates pretty frequently in the courts, so she's hired by the Court." But Montoya testified at the hearing on the motion for new trial that she [*20] did not perform any type of interpretation for Garcia during the trial. Nobody instructed her to translate the witnesses' testimony for Garcia, and she did not do so. Indeed, she had never once been called upon to sit during a trial and give an ongoing translation, and she was not sworn in as an interpreter in this case.

The fact that Montoya was bilingual and sat next to Garcia did not automatically elevate her to the status of courtroom interpreter, regardless of the judge's statements to the jury. "One is not necessarily competent

to translate legal proceedings because he or she is bilingual." n21 On the contrary, "courtroom interpretation is a sophisticated art, demanding not only a broad vocabulary, instant recall, and continuing judgment as to the speaker's intended meaning, but also the ability to reproduce tone and nuance, and a good working knowledge of both legal terminology and street slang." n22

n21 Virginia E. Hench, *What Kind of Hearing? Some Thoughts on Due Process for the Non-English-Speaking Criminal Defendant*, 24 T. MARSHALL L. REV. 251 (1999), *citing Attorneys Guide to the Use of Court Interpreters, With An English and Spanish Glossary of Criminal Law Terms*, 8 U. CAL. DAVIS L. REV. 471, 479 (1975). [*21]

n22 *Id.*, *citing* Sanders, *Libertad and Justice for All: A Shortage of Interpreters is Leaving the Courts Speechless,* TIME MAGAZINE 65 (May 29, 1989), and *Attorneys Guide to the Use of Court Interpreters, With An English and Spanish Glossary of Criminal Law Terms*, *supra* note 21.

We disagree with the State. Garcia is not complaining about the effectiveness of Montoya as an interpreter because Montoya was not his court interpreter. She was not sworn in by the court to interpret the trial for Garcia, she was not told to interpret the trial for Garcia, and she did not interpret the trial for Garcia. Instead, Garcia is complaining that he was denied his right to confrontation because the proceedings were not translated for him.

Waiver

Nevertheless, we still must address the State's contention that Garcia waived error in his failure to object at trial to the lack of a translation. There is support for the State's contention that confrontation rights generally, and the right to an interpreter specifically, can be waived. We recognized that at least as far back as 1948. n23 [*22] And we repeated it in the interpreter/confrontation cases that followed, through 1971. n24 But in 1979 in *Baltierra*, we went a step further. There we explained that, although the right to an interpreter can be waived, it is not deemed waived if the trial court is aware "that an accused does not speak and understand the English language." n25 The State concedes in its brief that *Baltierra* "provides an exception to the objection requirement when the trial court is aware that an accused does not speak or understand English."

n23 *Garcia*, 210 S.W.2d at 579.

n24 *See Field v. State*, 155 Tex. Crim. 137, 232 S.W.2d 717, 718 (Tex. Crim. App. 1950) (op. on reh'g); *Marez*, 464 S.W.2d at 867.

n25 *Baltierra*, 586 S.W.2d at 559.

We elaborated on the *Baltierra* exception the following year in *Briones v. State*. n26 That case, unlike *Baltierra*, involved a guilty plea. We noted that the defendant in *Briones*, as part of his plea, [*23] had been informed in Spanish of his right to confrontation and he had waived that right. We concluded that his waiver was "voluntarily and intelligently entered" n27 and was "an intentional relinquishment or abandonment of a known right." n28 And we recognized that *Briones* was different from *Baltierra* and *Ex parte Nanes* n29 because, in those cases, the defendants pleaded not guilty and did not waive their rights to confrontation. They "could not fully exercise those rights because they did not understand the English language." n30

n26 595 S.W.2d 546 (Tex. Crim. App. 1980).

n27 *Briones*, 595 S.W.2d at 548.

n28 *Ibid.*

n29 558 S.W.2d 893 (Tex. Crim. App. 1977).

n30 *Briones*, 595 S.W.2d at 548.

Our leading error-preservation case today was handed down thirteen years after *Briones*. In *Marin v. State*, n31 we explained that "our system may be thought to contain rules of three distinct kinds: (1) absolute requirements [*24] and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request." n32

n31 851 S.W.2d 275 (Tex. Crim. App. 1993).

n32 *Id.* at 279.

Rights contained within the last category, we said, are subject to procedural default if the litigant does not

request them at trial. The "litigant's failure to speak up" is enough to render the right forfeited. But rights in the second category hand "do not vanish so easily. Although a litigant might give them up and, indeed, has a right to do so, he is never deemed to have done so in fact unless he says so plainly, freely, and intelligently, sometimes in writing and always on the record." n33 Regarding these rights, "the judge has an independent duty to implement them absent an effective waiver by him. As a consequence, failure of the judge to implement them at trial is an error which might be urged on appeal whether or not it was first [*25] urged in the trial court." n34

n33 *Id.* at 280.

n34 *Ibid.*

The Waco Court of Appeals recently concluded that the right to an interpreter is a category-two *Marin* right - a right that must be implemented by the system unless expressly waived. n35 This conclusion makes sense for two reasons.

n35 *See Guerrero v. State*, 2003 Tex. App. LEXIS 6443 *8, 2003 WL 21815380 *3 (Tex. App. - Waco, July 23, 2003).

First, placing the right to an interpreter in *Marin*'s second category is a logical extension of our caselaw on the subject. Before *Marin*, we had concluded that the right to an interpreter could be waived, but that it would not be deemed waived if the trial judge was aware that the defendant had a language problem. In other words, if the judge is aware of the defendant's language [*26] barrier, the judge has an independent duty to ensure that the proceedings are interpreted for the defendant, absent the defendant's knowing and intelligent waiver. A category-two placement is consistent with our pre-*Marin* caselaw.

Additionally, requiring the right to an interpreter to be implemented unless waived makes sense given the nature of the right. It would be illogical to require a non-English- speaking defendant to assert his right to an interpreter in a language he does not understand when he may very well be unaware that he has the right in the first place. The *Negron* court said it well:

Nor are we inclined to require that an indigent, poorly educated Puerto Rican thrown into a criminal trial as his initiation to our trial system, come to that trial with a comprehension that the nature of our adversarial processes is such that he is in peril of forfeiting even the rudiments of a fair proceeding unless he insists upon them. Simply to recall the classic definition of a waiver -- "an intentional relinquishment or abandonment of a known right,"-- is a sufficient answer to the government's suggestion that Negron waived any fundamental right by his passive acquiescence [*27] in the grinding of the judicial machinery and his failure to affirmatively assert the right. For all that appears, Negron, who was clearly unaccustomed to asserting "personal rights" against the authority of the judicial arm of the state, may well not have had the slightest notion that he had any "rights" or any "privilege" to assert them. n36

n36 *Negron*, 434 F.2d at 390 (internal citations omitted).

The *Negron* court pointed out that in *Pate v. Robinson*, n37 the Supreme Court of the United States held that "where the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing" pursuant to Illinois statutes. The Supreme Court also recognized in *Pate* that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." n38

n37 383 U.S. 375, 385, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966). [*28]

n38 *Id.* at 384.

In *Negron*, the court concluded that the same is true when it appears to the trial court that the defendant has a language disability. The court said that "the least we can require is that a court, put on notice of a defendant's severe language difficulty, make unmistakably clear to him that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial." n39 The First Circuit agrees, placing the burden squarely on the trial court's shoulders. In *Carrion*, the court stated that "[the trial court should] make unmistakably clear to a defendant who may have a language difficulty that he has a right to a court-appointed interpreter if the court determines that one is needed, and, whenever put on notice that there may be some significant language difficulty, the court should make such a determination of need." n40

n39 *Negron*, 434 F.2d at 390-91.

n40 *Carrion*, 488 F.2d at 15.

[*29]

We conclude that, when a trial judge is aware that the defendant has a problem understanding the English language, the defendant's right to have an interpreter translate the trial proceedings into a language which the defendant understands is a category-two *Marin* right. In these circumstances, the judge has an independent duty to implement this right in the absence of a knowing and voluntary waiver by the defendant. The judge may become aware of the defendant's language problem either by being informed of it by one or both parties or by noticing the problem *sua sponte*.

In this case, the record reflects that at trial the judge was aware that Garcia needed a translator. The pretrial proceedings were translated for Garcia. Defense counsel discussed Garcia's language difficulty during voir dire. Garcia himself testified that he had been unable to understand the complainant's testimony. And the judge admitted on the record that at "some point" during the trial he had become aware that the proceedings were not being translated for Garcia. Since the judge was aware that Garcia had difficulty understanding English, the judge was required to ensure that the trial proceedings were [*30] translated into a language which Garcia could understand, absent an effective waiver by Garcia. And Garcia did not knowingly or voluntarily waive his right to an interpreter. Garcia's Sixth Amendment right to confront the witnesses against him was violated.

Conclusion

"They deafened my ears with their gabble." n41 So said Kafka's Josef K. of his trial. Garcia might well make the same assertion. Like Negron, Garcia "deserved more than to sit in total incomprehension as the trial proceeded." n42 We sustain Garcia's first ground for review and dismiss the remaining grounds. We reverse the Court of Appeals' judgment and remand the case to that court for an assessment of harm. n43

n41 KAFKA, *supra* note 12, at 51.

n42 *See Negron*, 434 F.2d at 390.

n43 *See* Rule 44.2(a); *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986).

CONCURBY: KELLER

CONCUR:

Keller, P.J. *filed a concurring opinion in which WOMACK, J., joined.*

CONCURRING OPINION

The right [*31] to have proceedings interpreted n1 finds a ready analogy in the right to be competent at one's own trial. Whether a defendant's failure to understand the proceedings or assist in his defense n2 is caused by a mental defect or a language barrier, the outcome is largely the same: a trial in which the defendant lacks the ability to participate in a meaningful way. The two situations are also alike in that they are not the norm. Just as defendants are presumed to be competent, n3 they should be presumed to understand the English language. Our past cases on language barriers have treated the issue in such a manner, requiring it to be raised in some fashion before a duty devolves upon the trial court to conduct an inquiry. n4 This treatment distinguishes the right to have proceedings interpreted from other waivable-only rights, such as the right to counsel and the right to a jury trial. These latter are implemented as a matter of course, unless the defendant takes affirmative action to prevent such implementation.

n1 While this right flows from several provisions in United States and Texas Constitutions, it is also protected by statute. *See* TEX. CODE CRIM. PROC., Art. 38.30(a). [*32]

n2 *See* TEX. CODE CRIM. PROC., Art. 46B.003(a).

n3 *See* Art. 46B.003(b).

n4 *See Baltierra v. State*, 586 S.W.2d 553, 559 (Tex. Crim. App. 1979).

While competency and language proficiency are similar in several respects, there are also differences. An incompetent person cannot be tried, n5 but the trial court can compensate for a language barrier by appointing an interpreter. Also, incompetency to stand trial cannot be waived because an incompetent person cannot, by definition, intelligently waive his rights, but the right to have proceedings interpreted can be relinquished through a knowing and intelligent waiver. n6

n5 Article 46B.071.

n6 *Baltierra, supra.*

Accordingly, the right to have proceedings interpreted should be treated like competency to stand trial in some respects and like waivable-only rights in other respects. I would hold as [*33] follows: (1) The trial court has no duty to inquire about the defendant's ability to understand English until the issue is raised in some fashion. The issue is raised if one of the parties raises it or if any source of information indicates that the defendant's grasp of the English language is inadequate. n7 The trial court should address the issue even if it is raised late, such as during trial or in a motion for new trial, provided that, in the latter situation, the defendant has properly raised the issue by affidavit as required by caselaw. n8 (2) Once the issue is raised, the defendant must prove by a preponderance of the evidence his need for the proceedings to be interpreted. Unless the defendant wishes to waive his right to an interpreter, the trial court should permit the State to question the defendant's attorney concerning the defendant's ability to understand the English language. The lawyer-client privilege would be waived under those circumstances for the limited purpose of resolving the language proficiency question. n9 In reviewing whether the defendant has met his burden of proof, an appellate court should give due deference to the trial court's resolution of fact questions, [*34] especially those that turn upon credibility and demeanor. n10 (3) If it is shown that an interpreter is needed, one should be provided unless the defendant knowingly and intelligently waives such.

n7 This requirement parallels Art. 46B.004.

n8 *Wallace v. State*, 106 S.W.3d 103, 108 (Tex. Crim. App. 2003).

n9 *See* TEX. R. EVID. 503(d)(1)(crime-fraud exception).

n10 *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

Here, appellant's language barrier became manifest at trial and was specifically raised by appellant in a motion for new trial. The parties agree that appellant proved he needed an interpreter to understand the proceedings. And he did not waive his right to one. Under these circumstances, I agree with the Court that appellant was deprived of his right to have the proceedings interpreted.

KELLER, Presiding Judge

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Federal and State Case Law Update

OBJECTIVES

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

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

Federal and State Case Law Update

FY 2005

The U.S. Supreme Court

A. **4th Amendment**

1. **Stop and Identify** – Hibel v. 6th Jud. Dist.
2. **Roadblocks** – Illinois v. Lidster
3. **P.O. Probable Cause** – Maryland v. Pringle

B. **6th Amendment**

Confrontation Clause – Crawford v. Washington: "You just thought you understood the Rules of Evidence and exceptions to the hearsay rule."

The U.S. Supreme Court

C. **14th Amendment**

Tennessee v. Lane - ADA and Access to the Courts

The Texas Court of Criminal Appeals

A. **Jury Disqualification** – Nelson v. State: Who raised the d.q. before the verdict?
B. **Disqualification of Counsel** – Gonzalez v. State: No Absolute 6th Amendment Rights
C. **Translators** – Garcia v. State: Dehrecho constitucional bajo la Sexta Emienda. Me entiende?

The Texas Court of Criminal Appeals

D. **Indigency** – Whitehead v. State: So what does this mean to us?
E. **Community Care-taking** – Laney v. State: Emergency-Aid Version

Municipal Courts and Related Law

A. **Motion to Suppress** – Sanchez v. State (CCA): When does a trial on the merits commence?
B. **Judgments and Capias Pro Fines** – Jones v. State (CCA): What constitutes probable cause from a capias pro fine?

Municipal Courts and Related Law

C. Appeals

1. **Preston v. State** (Corpus Christi) – From record courts, appeals must conform to TRAP and CCP
2. **Alley v. State** (Houston) – Pre-trial appeals by the State in non-record courts do not go to the Court of Appeals
3. **Crawford v. Campbell** (Houston)– Appeals are barred by satisfaction of the judgment.

Municipal Courts and Related Law

D. Double Jeopardy – Ex parte King (Austin): Consequence of motion to quash in municipal court on other courts

E. Municipal Judges

1. **Reappointment** – Willmann v. City of San Antonio (S.A): Open Meeting Act applies to appointment process
2. **Whistle Blower Law** – Stockman v. City of Roman Forrest (Beaumont): The Texas Whistle Blower Act does not protect municipal judges

Municipal Courts and Related Law

F. City Attorneys & Municipal Prosecution

1. **Prosecuting Appeal from Municipal Court** – State v. Blankenship (CCA): Can the City Attorney have standing before the Court of Appeals with the consent of the County Attorney?
2. **Malicious Prosecution** – Gunnels v. City of Brownwood (Amarillo): The City won, yet still a tale of caution for city officials.
3. **Attorney/Client Privilege** – State v. Martinez (El Paso): Embattled police officers talks with City Attorney were protected.

Municipal Courts and Related Law

G. Ordinances

1. **Void for Vagueness** – State v. Guevera (CCA): Should ordinance tell defendant how not to stand in line?
2. **SOB** - Taylor v. State (CCA): "Employee" v. "On-Site Manager"
3. **Commerce Clause** – Shannon v. State (Houston): "On second thought..."
4. **Bike Path Ordinance** – Toma v. State (Houston) "The Path not Chosen"
5. **ETJ** – Hartsell v. Town of Talty (Dallas): No retroactive application to ETJ
6. **Mistaken Variance** – City of Dallas v. Vanesko

Municipal Courts and Related Law

H. Substantive Law

1. **Financial Responsibility** – Sanchez v. State (Houston): No such thing as "no proof of insurance"
2. **Littering** – Romero v. State (El Paso): Prior ordinance prosecution does not bar subsequent dumping prosecution
3. **Disorderly Conduct** – Coggins v. State (Austin): "The One Finger Salute"

Procedural Law

A. Disqualification and Recusal of Judges

1. **Anti-Bribery Oath** – Espinosa v. State (San Antonio): "Taken but not Filed"
2. **Strategic Suits** – In re Lincoln (Austin): "Have you sued a judge today?"

B. Evidentiary Issues

1. **Scientific Evidence**: "Life after Hernandez" - Holmes v. State (Waco) "Anyone up for reinventing the wheel?"

(Review B2, C, and D are on your own)

Procedural Law

E. Expunction

State v. Bhat (Dallas): "Premature Expunction"

F. Bond Forfeiture

1. Uncontrollable Circumstances? Casteneda v. State (CCA) Deportation of illegal aliens.

(See also Casper, Maya, and Williams)

Magistrate Issues (Highlights)

A. Warrants

1. **Swearingen v. State (CCA):** Two standards for review of searches
2. **Bitner v. State (Ft. Worth):** "All that you can't leave behind"
3. **Cardona v. State (Amarillo)** – Reviewing affidavits is not a trivia contest
4. **De La O v. State (San Antonio)** – "It's a clerical error!"
5. **Cates v. State (CCA)** –Affidavit review: "If you take out the lies, what do you have left?"

Magistrate Issues (Highlights)

B. Bail

1. **Ex part Durst** (Houston) and
2. **Ex parte Scott** (Ft. Worth) – Indicative of a trend?
3. **In re Henson** (Texarakana) – What documents must a magistrate review in setting bail?

Notable Search and Seizure Cases

A. **Traffic Arrests** – Berrett v. State (Houston): Citations: CCP v. Transportation Code

C. **Reasonable Suspicion?** LeBlanc v. State (Houston)

Removal of Judges

Please review:

1. In re Bartie, and
2. In re Chacon

Both are in the appendix materials

THE END...

Is just the beginning of something else.

Federal and State Case Law Update
Academic Year 2004–2005

Ryan Kellus Turner
General Counsel
TMCEC

Except where otherwise noted, the following case law and opinions were handed down October 1, 2003 through October 6, 2004.

I. United States Supreme Court

A. 4th Amendment: Search and Seizure

1. Stop and Identify

Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) – Defendant was convicted, before a justice of the peace for violating Nevada's "stop and identify" statute. The Sixth Judicial District Court, Humboldt County, upheld the conviction, and the Nevada Supreme Court affirmed. Certiorari was granted. The U.S. Supreme Court, Justice Kennedy writing for the majority, held that: (1) arrest of *Terry* stop suspect for refusal to identify himself, in violation of Nevada law, did not violate Fourth Amendment prohibition against unreasonable searches and seizures, and (2) defendant's conviction for refusal to identify himself did not violate his Fifth Amendment right against self-incrimination. Affirmed. (Justice Stevens dissented and filed opinion. Justice Breyer dissented and filed opinion in which Justices Souter and Ginsburg joined.)

2. Roadblocks

Illinois v. Lidster, 540 U.S. 419 (2004) – Defendant was convicted in the Circuit Court, Du Page County of driving under the influence of alcohol (DUI). Defendant appealed. The Appellate Court reversed. State appealed. The Supreme Court of Illinois, affirmed. Certiorari was granted. Before the U.S. Supreme Court, Justice Breyer writing for the majority held that: (1) brief stops of motorists at highway checkpoint at which police sought information about recent fatal hit-and-run accident on that highway were not presumptively invalid under the Fourth Amendment (special law enforcement concerns sometimes justify highway stops without individualized suspicion), and (2) stop of motorist who was arrested for driving under the influence of alcohol (DUI) after he arrived at the stop did not violate his Fourth Amendment rights.

3. Probable Cause

Maryland v. Pringle, 540 U.S. 366 (2003) – Defendant was convicted of drug possession offenses but asserted that a police officer had no probable cause to arrest defendant based on drugs found in a vehicle in which defendant was a passenger. Upon the grant of a writ of certiorari, the State of Maryland appealed the judgment of the Court of Appeals of

Maryland, which held that defendant's arrest lacked probable cause. The United States Supreme Court held that the officer had probable cause to believe that defendant was in possession of the drugs. It was an entirely reasonable inference that any or all three of the occupants had knowledge of, and exercised dominion and control over, the drugs, and thus a reasonable officer could conclude that there was probable cause to believe defendant committed the crime of possession of drugs, either solely or jointly. It was also reasonable for the officer to infer a common enterprise among the three occupants, in view of the likelihood of drug dealing in which an innocent party was unlikely to be involved. The judgment holding that defendant's arrest lacked probable cause was reversed, and the case was remanded for further proceedings.

B. 6th Amendment: Confrontation Clause

Crawford v. Washington, 124 S. Ct. 1354 (2004) – Defendant was convicted, after a jury trial in the Washington Superior Court of first-degree assault while armed with deadly weapon. Defendant appealed. The Washington Court of Appeals reversed. On review, the Washington Supreme Court reversed and reinstated defendant's conviction. Certiorari was granted. The Supreme Court, Justice Scalia writing for the majority held that: (1) out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court, abrogating *Ohio v. Roberts*, and (2) admission of wife's out-of-court statements to police officers, regarding incident in which defendant, her husband, allegedly stabbed victim violated the Confrontation Clause. Reversed, and remanded. (Chief Judge Rehnquist filed opinion concurring in judgment, in which Justice O'Connor joined.)

C. 14th Amendment: Americans with Disability Act and Access to Courts

Tennessee v. Lane, 124 S. Ct. 1978 (2004) – Disabled citizens brought action against state under Title II of the Americans with Disabilities Act (ADA), seeking to vindicate their right of access to the courts. The United States District Court for the Middle District of Tennessee denied the State's motion to dismiss. State appealed. On petition for rehearing, the Court of Appeals affirmed and remanded. Certiorari was granted. The United States Supreme Court, Justice Stevens writing for the majority, held that Title II of the ADA, as applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment. Affirmed. (Justice Souter filed a concurring opinion in which Justice Ginsburg joined. Justice Ginsburg filed a concurring opinion in which Justices Souter and Breyer joined. Chief Justice Rehnquist filed a dissenting opinion in which Justices Kennedy and Thomas joined. Justices Scalia and Thomas filed dissenting opinions.)

II. Texas Court of Criminal Appeals

A. Jury Disqualification

Nelson v. State, 129 S.W.3d 108, 113 (Tex. Crim. App. 2004) – Empaneling juror despite absolute disqualification for theft (Class C misdemeanor) did not entitle defendant to reversal. "This appellant could have raised, but did not raise, the disqualification before the verdict was entered. He actually did the opposite of raising the issue by telling the court that he had no objection to the disqualified juror. We cannot hold, as the court of appeals did, that the defendant's failure to raise the issue was of no consequence so long as someone raised it. His failure to raise the issue means this judgment of conviction may not be reversed under Article 44.46 [Code of Criminal Procedure]. For these reasons there is no occasion for us to address the court of appeals' holdings on the issue of harm. The judgment of the court of appeals is reversed, and the appeal is remanded to that court so that it may consider the appellant's other points of error."

B Disqualification of Counsel

Gonzalez v. State, 117 S.W.3d 831, 836 (Tex. Crim. App. 2003) – "The Federal and Texas Constitutions, as well as Texas statute, guarantee a defendant in a criminal proceeding the right to have assistance of counsel. The right to assistance of counsel contemplates the defendant's right to obtain assistance from counsel of the defendant's choosing. However, the defendant's right to counsel of choice is not absolute. A defendant has no right to an advocate who is not a member of the bar, an attorney he cannot afford or who declines to represent him, or an attorney who has a previous or ongoing relationship with an opposing party. Additionally, while there is a strong presumption in favor of a defendant's right to retain counsel of choice, this presumption may be overridden by other important considerations relating to the integrity of the judicial process and the fair and orderly administration of justice. However, when a trial court unreasonably or arbitrarily interferes with the defendant's right to choose counsel, its actions rise to the level of a constitutional violation. Therefore, courts must exercise caution in disqualifying defense attorneys, especially if less serious means would adequately protect the government's interests." (See also, Texas Disciplinary Rule of Professional Conduct 3.08)

C. Translators

Garcia v. State, 2004 Tex. Crim. App. LEXIS 519 (3/24/04) – In reversing and remanding, the Texas Court of Criminal Appeals held: (1) the presence of a bilingual individual beside the Spanish-speaking defendant did not satisfy defendant's Sixth Amendment right to an interpreter; (2) the defendant was not required to object at trial to lack of interpreter in order to preserve error for appeal; and (3) the trial court's failure to appoint interpreter for defendant violated defendant's Sixth Amendment right to confront witnesses.

D. Indigency

Whitehead v. State, 130 S.W.3d 866 (Tex. Crim. App. 2004) – By requiring the courts to formulate procedures and financial standards for determining whether a defendant is indigent, the Legislature has indicated a desire for the appointment of counsel to be more strictly regulated than other matters. Accordingly, a court's power to disbelieve allegations of indigency is limited.

E. Emergency Aid/Community Caretaking

Laney v. State, 117 S.W.3d 854 (Tex. Crim. App. 2003) – Sheriff's deputies responded to a disturbance between neighbors in defendant's mobile home park. Defendant approached the officers, explaining that he had turned off the electricity to a neighbor's trailer in retaliation for the neighbor turning off his. He was placed in the back of the patrol car pending possible charges. Two boys come out of defendant's trailer. Upon being asked if he had ever been arrested, defendant said he had been arrested for indecency with a child. One boy said his brother was in the back bedroom. The deputy entered the trailer and found photographic reproductions of boys engaging in deviant sexual contact. The defendant was convicted of possessing child pornography. The Texas Court of Criminal Appeals held: (1) officer's warrantless entry into defendant's mobile home was objectively reasonable, as required under the emergency-aid version of the community caretaking doctrine, and (2) the warrantless entry and search were strictly circumscribed by the exigencies which justified their initiation.

III. Municipal Courts and Related Law (Kind of)

A. Motions to Suppress

Sanchez v. State, 138 S.W.3d 324 (Tex. Crim. App. 2004). – Defendant was charged in the Dallas Municipal Court with a consumer affairs violation. On the day the case was set for trial, defendant made an oral motion to quash the complaint, which was granted. The judgment was affirmed on appeal, and the State again appealed. The Dallas Court of Appeals affirmed and overruled the State's motion for rehearing. The State filed a petition for discretionary review. On review, the State contended that the phrase "before the date on which the trial on the merits commences" under Article 45.019(f), Texas Code of Criminal Procedure should have been construed to mean that defendant had to make a motion to quash before the date on which the case was set or scheduled for trial.

The Texas Court of Criminal Appeals disagreed, holding that article 45.019(f) meant what it said, that a party could move to quash a charging instrument at any time prior to the day on which the trial on the merits commenced. Thus, defendant's motion to quash, filed on the day the case was set for trial, was timely.

B. Judgments and Capias Pro Fines

Jones v. State, 119 S.W.3d 766, 786 (Tex. Crim. App. 2003) – "While a *capias[pro fine]* is issued after a judgment has been rendered against the defendant, it must still be supported by probable cause. But because a judgment against a defendant signifies a finding beyond a reasonable doubt that he has committed the charged offense, we have held in the context of a parole violation that a judgment coupled with a finding by the court that there is a "reason to believe" that the defendant has violated the conditions of his parole will constitute sufficient probable cause to support the issuance of a parole violation warrant. While a traffic violator, unlike a parolee, is not subject to a judgment imposing a term of imprisonment, the judgment establishing the traffic violation nonetheless carries considerable weight and validity because it is based upon a finding beyond a reasonable doubt. Thus, a judgment for a traffic violation, together with a finding by the court that the defendant has failed to satisfy its terms, will comprise sufficient probable cause to support issuance of the *capias pro fine."*

C. Appeals

1. From Record Courts

Preston v. State, 2004 Tex. App. 7217 (Corpus Christi 8/12/04) – The record on appeal from a municipal court of record must substantially conform to rules governing appellate records under the Texas Rules of Appellate Procedure and the Texas Code of Criminal Procedure, and Government Code § 30.00016.

2. From Non-Record Courts

Alley v. State, 137 S.W.3d 866 (Tex. App.–Houston [4th] 2004) – Pretrial appeals by the State in non-record courts governed by Chapter 45 of the Code of Criminal Procedure must be heard by the county court or designated court, not a Court of Appeals.

3. Barred by Satisfaction of Judgment

Crawford v. Campbell, 124 S.W.3d 778 (Tex. App.–Houston [1st] Dist 2004) – In a public intoxication case, the fact that defendant complied with the statutory requirements for filing an appeal from the municipal court judgment did not entitle him to an appeal. Voluntary payment of $15 beyond bond (used to secure appearance and payment in the event of non-appearance) satisfied the judgment by paying his fine and rendered the appeal of judgment moot. (Conviction did not constitute a collateral consequence.)

D. Double Jeopardy

Ex parte King, 134 S.W.3d 500 (Tex. App. Austin 2004) – Granting motion to suppress in municipal court does not entitle petitioner to habeas corpus relief in county court after county court refused to suppress evidence stemming from the same event considered by the municipal court. The denial of the individual's petition for habeas corpus relief was proper, where her claim

for habeas corpus relief did not implicate the constitutional protections afforded under the Double Jeopardy Clause.

E. Municipal Judges

1. Reappointment

Willmann v. City of San Antonio, 123 S.W.3d 469 (Tex. App.–San Antonio 2003) – Appellants, municipal judges, sued the City of San Antonio, alleging that the ordinance which included recommendations for the appointment of new judges was void, as meetings held by the city council committee violated the city charter and the Texas Open Meetings Act (TOMA). The City prevailed in the trial court. On review, the judges contended that the trial court erred in granting the city's motion for partial summary judgment and challenged the trial court's judgment that the ordinance in question did not violate Texas Constitution Article XVI, § 17. The appellate court found that the ordinance effectively removed the judges from office and that there were the same number of judges after the plaintiff judges' terms had expired as there were when they were in office. Thus, no vacancy occurred in the office of municipal judge resulting in public inconvenience to warrant the application of § 17. The appellate court, however, also found that the judges raised a genuine issue of material fact with regard to whether the city council violated the TOMA (as letters informing the judges they would not be reappointed suggested an assumption by the committee that its decision was final and, therefore, not advisory). Further, there was no substantive discussion regarding the various applicants at the open meeting. As such, the trial court erred in granting the city's no-evidence motion for partial summary judgment. Accordingly, the part of the judgment granting the city's partial motion for summary judgment on the judges open meetings violation claim was reversed and remanded to the trial court for further proceedings. The remaining portions of the judgment were affirmed.

2. Whistle Blower Lawsuits

Stockman v. City of Roman Forrest, 141 S.W. 805 (Tex. App. –Beaumont 2004) – Municipal judges are political appointees, not city employees. As they are not "employees." They are not able to sue under the Texas Whistle Blowers Act.

F. City Attorneys and Municipal Prosecution

1. Prosecuting Appeals: Who is the State?

State v. Blankenship, 2004 Tex. Crim. App. LEXIS 1651(10/6/04) – Defendant was convicted in the Austin Municipal Court of two city ordinances. A county court reversed that decision, and the State appealed. The notices of appeal were signed by an assistant city attorney and not by the county attorney. The Austin Court of Appeals dismissed the appeal, holding that "the County Attorney was required to actually 'make' the appeal himself." The Texas Court of Criminal Appeals reversed, holding that the timely made assertion in the city's amended notice of appeal that the county attorney had consented to

the city attorney prosecuting the appeal was in some fashion a written express personal authorization by the county attorney of the specific notice of appeal in the particular case. It was not a general delegation of authority to an assistant, and it was more than a signature stamp. The Texas Court of Criminal Appeals, thus rejected the argument of the Court of Appeals that such a notice of appeal could not simultaneously comply with Code of Criminal Procedure articles 45.201 and 44.01(d).

2. Malicious Prosecution

Gunnels v. City of Brownwood, 2003 Tex. App. LEXIS 9981 (11/24/03) –Affirming summary judgment, the Amarillo Court of Appeals held that the plaintiff did not establish as an element of malicious prosecution that it was city custom, practice, or policy to prosecute municipal court cases without probable cause and that the evidence did not establish differential treatment that was invidious, an element of selective prosecution in violation of equal protection. On motion for rehearing the Court further held that the plaintiff failed to preserve appellate review of argument that there was no evidence that cars on which handbills were placed were on city streets and that city therefore lacked probable cause for prosecuting her.

3. Attorney/Client Privilege

State v. Martinez, 116 S.W.3d 385 (Tex. App. El Paso 2003) – Defendant, who was a deputy police chief was charged with aggravated perjury based on inconsistencies between his statements to detectives and his recorded conversations with an assistant city attorney. The defendant moved to suppress all evidence obtained from the city attorney. The district court entered an order excluding defendant's written, sworn, statement to grand jury, based upon attorney-client privilege. The State appealed. The El Paso Court of Appeal affirmed. The State appealed. The Texas Court of Criminal Appeals, affirmed in part and reversed in part. On remand, the El Paso Court of Appeals, held that: (1) the defendant's conversations with the assistant city attorney and any fruits stemming from the conversation were protected by attorney-client privilege, and (2) the crime-fraud exception did not apply to pierce attorney-client privilege to require disclosure of protected statements. Affirmed.

G. Ordinances

1. Void for Vagueness

State v. Guevera, 137 S.W.3d 55 (Tex. Crim. App. 2004) – Defendant was found guilty by the San Antonio Municipal Court of allowing patrons to queue in front of her restaurant on public right of way along the Riverwalk. The Fourth Court of Appeals found that defendant was not guilty of violating the ordinance, that the ordinance was unconstitutional and unenforceable, and that the map referred to in the ordinance was vague. The State appealed. In reversing the Court of Appeals, the Texas Court of Criminal Appeals found that the ordinance did not affirmatively impose on those subject to it the duty to adopt a particular system to prevent the queuing of patrons waiting for

tables. Further the Court found that the fact that the ordinance did not suggest a method of preventing queuing was of no significance. There were common sense methods for preventing queuing and it was not necessary or desirable to require the city to codify those methods. The judgment was reversed, and the case was remanded for further proceedings.

2. Sexually Oriented Business

Taylor v. State, 117 S.W.3d 848 (Tex. Crim. App. 2003) – Defendant was convicted of acting as a manager of a sexually oriented enterprise without a permit. Defendant appealed. The Houston Court of Appeals affirmed. Defendant petitioned for discretionary review. The Texas Court of Criminal Appeals held that: (1) evidence reasonably supported inference that defendant was onsite manager of sexually oriented enterprise, and (2) construing defendant to be onsite manager did not render definition of employee in city ordinance meaningless.

3. Commerce Clause

Shannon v. State, 129 S.W.3d 670 (Tex. App.–Houston [1st] 2004) – The City of Houston, Texas, passed a series of ordinances to regulate the transportation and treatment of certain non-hazardous wastes. The issue presented was whether the dormant Commerce Clause prohibited the City from passing an ordinance requiring transporters of non-hazardous waste to pay a flat fee to obtain the necessary licenses and permits required to pick up waste originating within the city limits. Defendant argued that the City's permit and registration fees were unconstitutional under the Commerce Clause of the United States Constitution. Upon reconsideration of its initial opinion, the appellate court ruled that the $50 permit fee and the $400 registration decal fee were unconstitutional because the out-of-state transporter who made just one entry a year into the City to load waste had to pay the same fee as a local hauler who loaded waste in the City on a daily basis. Also, transporters would be encouraged to conduct only local transport of waste, rather than attempt to pay the multiple registration fees necessary to conduct their business on an interstate basis.

4. Constitutionality of Bicycle Path Ordinance

Toma v. State, 126 S.W.3d 528 (Tex. App.–Houston [1st] 2003) – Municipal ordinance ordinance prohibiting persons from riding a bicycle on the street when a bicycle path is available is neither vague nor unconstitutional.

5. Application in Extraterritorial Jurisdiction

Hartsell v. Town of Talty, 130 S.W.3d 325 (Tex. App.–Dallas 2004)
Chapter 245 of the Texas Local Government Code prohibits application of the Town's Ordinance extending it building code to its extraterritorial jurisdiction to appellants' projects that were approved before the ordinance was enacted.

6. Mistaken Variance

City of Dallas v. Vanesko, 127 S.W.3d 220 (Tex. App.–Dallas 2003) – Homeowner whose plans were mistakenly approved by building inspector was entitled to roof variance.

H. Substantive Law

1. Proof of Financial Responsibility

Sanchez v. State, 137 S.W.3d 860 (Tex. App.–Houston [1st] 2004) – Evidence was insufficient to support conviction where defendant was asked to provide "insurance" rather than proof of financial responsibility under Chapter 601 of the Transportation Code.

2. Littering

Romero v. State, 129 S.W.3d 263 (Tex. App.–El Paso 2004) – Municipal court defendant's convicted for public nuisance did not bar subsequent prosecution for state offense of illegal dumping. The defendant's behavior in allowing waste to remain on the property and allow further dumping constituted admissible proof of required reckless mental state. (dumping a strict liability offense as of 9/1/01)

3. Authority to Establish Speed Limits

Brazoria County v. Tex. Commission on Environmental Quality, 128 S.W.3d 728 (Tex. App.–Austin 2004) – TCEQ has authority to issue environmental speed limits to protect air quality and the authority to revise procedures for setting such speed limits.

4. Disorderly Conduct

Coggins v. State, 123 S.W.3d 82 (Tex. App.–Austin 2003) – Appellant claimed that the Texas disorderly conduct statute (Section 42.10, Penal Code) was facially unconstitutional by impermissibly restricting protected free speech, void for vagueness and over breadth, and unconstitutional as applied by punishing protected free speech (specifically, "shooting the bird") .The appellate court held that the conduct proscribed under § 42.01(a)(2) fell within the "fighting words" exception and did not violate rights of free speech and expression. Nor was the statute too vague for a criminal law; given the common, plain definitions of the words in the statute, it did not fail to give a person of ordinary intelligence a reasonable opportunity to know what was prohibited. However, the court also found that, although the gesture may have been provocative, there was no evidence that the complainant was moved to violence or restrained himself from retaliating. Given the brief exposure to the gesture as one car passed the other, made stranger to stranger, causing momentary hostility on the complainant's part, the appellate

court held that defendant's conduct did not tend to incite an immediate breach of the peace. The conviction was reversed, and a judgment of acquittal was rendered.

IV. Procedural Law

A. Disqualification and Recusal of Judges

1. Anti-Bribery Oath

Espinosa v. State, 115 S.W.3d 64 (Tex. App.–San Antonio 2003) – Defendant argued that the present proceeding, as well as prior proceedings being used to enhance the present offense, were null and void, as persons involved in the cases had not taken the anti-bribery oath required by the Texas Constitution and the judge and others had not filed the oaths with the Secretary of State. The Court of Appeals rejected defendant's argument. Defendant's claim that the trial judge was not qualified to act could be raised only in a quo warranto proceeding, not a collateral attack. Further, the judge had taken the oath, and the fact that it had not been filed did not affect the judge's ability to act.

2. Strategic Suits

In re Lincoln, 114 S.W.3d 724 (Tex. App.–Austin 2003) – The mere filing of a lawsuit against a judge does not encumber that judge with the type of certain and immediate, personal or pecuniary stake in the underlying litigation that prevents the judge from deciding the case. Suing a judge by itself is an insufficient basis for disqualification or recusal of that judge.

B. Evidentiary Issues

1. Life After *Hernandez*

Holmes v. State, 135 S.W.3d 178, 185-186 (Tex. App.–Waco 2004) – "But a party seeking to introduce evidence of a scientific principle need not always present expert testimony, treatises, or other scientific material to satisfy the first two criteria of the *Kelly* test. *Hernandez v. State* 116 S.W.3d 26, 28-29 (Tex. Crim. App. 2003). It is only at the dawn of judicial consideration of a particular type of forensic scientific evidence that trial courts must conduct full-blown "gatekeeping" hearings under *Kelly*. Trial courts are not required to reinvent the scientific wheel in every trial. Some court, somewhere, has to conduct an adversarial gatekeeping hearing to determine the reliability of the given scientific theory and its methodology. There is no "bright line" judicial rule for when a scientific theory or technique becomes so widely accepted or persuasively proven that future courts may take judicial notice of its reliability. However, if the Court of Criminal Appeals, this Court, or another Texas appellate court has already determined the validity of a particular scientific theory or technique, then the party offering the expert testimony need not satisfy *Kelly's* first two criteria. The trial court and a reviewing court can rely upon prior opinions and take judicial notice of those findings." (Citations omitted).

2. Heresay/Admission of Videotape

Cheek v. State, 119 S.W.3d 475 (Tex. App.–El Paso 2003) – Defendant was convicted of intentionally causing bodily injury to her fourteen-month-old daughter. Defendant appealed. The Court of Appeals held that the videotaped interview of child witness, which contained statement from witness that defendant's boyfriend injured victim, was not admissible under business records exception to hearsay rule. Under the business records exception to the hearsay rule, a record kept in the course of a regularly conducted business activity is admissible if it was made at or near the time of the event recorded, by a person who had both personal knowledge of the event and a business duty to report the event. Affirmed.

C. Defendant's Rights at Trial

Romero v. State, 136 S.W.3d 680 (Tex. App.–Texarkana 2004) – Defendant's right to confrontation was violated when adverse witness testified in "disguise." (The Texas Court of Criminal Appeals granted review of this case on September 22, 2004. TMCEC will keep you updated).

D. Waiver of Appeals

Hargesheimer v. State, 126 S.W.3d 658 (Tex. App.–Amarillo 2004) – Pre-sentence waiver of right to appeal from proceedings to revoke community supervision when there was no bargain or recommendation as to punishment was invalid as matter of law.

E. Expunction

State v. Bhat, 127 S.W.3d 435 (Tex. App.–Dallas 2004) – Arrestee sought expungement of all records relating to his arrest for assault. The district court issued an order of expunction. The State appealed. The Court of Appeals held that the arrestee was not entitled to expunction, because the limitations period for prosecuting him for assault had not expired. Reversed and rendered.

F. Bond Forfeiture

1. "Uncontrollable Circumstances"

Castaneda v. State, 138 S.W.3d 304 (Tex. Crim. App. 2004) – State filed motion to impose forfeiture liability against bail bonding company after principals were deported. The "Jail Court" granted the motion and the surety appealed. The Corpus Christi Court of Appeals affirmed. The surety filed petition for discretionary review. On review, the surety argued that he was entitled to exoneration from liability pursuant to Article 22.13(3), Code of Criminal Procedure, because the principals' failure to appear for their court settings was a result of an uncontrollable circumstance that arose through no fault of either the principals or the surety. The Texas Court of Criminal Appeals held: (1)

bonding company was released from liability for bond posted for one principal; (2) bonding company was not released from liability for bond posted for second principal; (3) uncontrollable circumstances could not be deemed sufficient to exonerate principal and his sureties from liability for bail bond forfeiture. On rehearing, the Court also held: (4) that the bail bonding company failed to deliver adequate notice to sheriff that three principals were incarcerated in federal custody; and (5) evidence supported finding that uncontrollable circumstances did not prevent appearance of those three principals. Affirmed in part and reversed in part.

2. Appealing Bond Forfeiture

Casper v. State, 127 S.W.3d 370 (Tex. App. –Beaumont 2004) – Appellate jurisdiction in bail bond forfeiture cases is described by Article 44.12, Code of Criminal Procedure. "An appeal may be taken by the defendant from every final judgment rendered upon a personal bond, bail bond or bond taken for the prevention or suppression of offenses, where such judgment is for twenty dollars or more, exclusive of costs, but not otherwise." Here, the judgment exclusive of costs was for less than twenty dollars. Therefore, the Court of Appeals held that it lacked jurisdiction to consider the merits of the judgment forfeiting a bond that was less than $20. The appeal was dismissed.

3. Going "Off Bond"

Maya v. State, 126 S.W.3d 581 (Tex. App.–Texarkana 2004) – The accused hired the bond company to post bond on his behalf, and the accused failed to appear for a hearing. A warrant was issued for the accused's arrest, and the bond posted by the bond company was ordered forfeited to the State. A judgment nisi was signed the same day, and service was executed October 18, 2003. At trial on the judgment nisi, the bond company asserted it should not be held liable for the bond. Before the issuance of the forfeiture, the bond company stated it filed an affidavit to "go off bond" and the trial court failed to act upon the affidavit before the accused's failure to appear. The bond company requested that the Court of Appeals reverse the trial court's judgment of forfeiture and hold that the mere filing of an affidavit to go off bond presented an affirmative defense to the forfeiture suit in the present case. The appellate court ruled that there was no evidence in the record to show that the trial court denied or otherwise refused to grant the affidavit to go off bond. There was no evidence in the record to show the affidavit to go off bond was presented for the trial court's approval or refusal, pursuant to Article 17.19, Code of Criminal Procedure.

4. Judgment *Nisi*

Williams v. State, 114 S.W.3d 703 (Tex. App.–Corpus Christi 2003) – Genuine issue of material fact, whether the State mailed judgment nisi to principal and precluded summary judgment. The Court of Appeals reversed the summary judgment and remanded the case for further proceedings.

V. Magistrate Issues

A. Warrants

1. ***Swearingen v. State***, 2004 Tex. Crim. App. LEXIS 1017 (6/23/04) – The Texas Court of Criminal Appeals acknowledges different standards of review of searches: warrantless searches and magistrate issued search warrants.

2. ***Bitner v. State***, 135 S.W.3d 906 (Tex. App.–Fort Worth 2004) Affirming the judgment of the trial court, the Fort Worth Court of Appeals held that a justice of the peace, in her capacity as a magistrate, was authorized to a sign search warrant for property located within the magistrate's county even though the magistrate was outside of that geographical jurisdiction when she signed the search warrant.

3. ***Cardona v. State***, 134 S.W.3d 854 (Tex. App.–Amarillo 2004) – The specialized knowledge of a particular magistrate or affiant may not be imputed into the affidavit. Again, the rule of law prohibits us from perusing beyond the four corners of the document.

4. ***De La O v. State***, 127 S.W.3d 799, 801 (Tex. App.–San Antonio 2003) – Absence of a copy of search warrant from clerk's file did not establish that blood sample was taken without valid warrant. "If the State intends to justify a search or arrest on the basis of a warrant, it is incumbent on the State to produce the warrant and its supporting affidavit for inspection by the trial court. This procedure allows the trial court to review the documents and determine whether probable cause exists and whether the accused's rights have been protected. Courts have excused the State from compliance with this production requirement if the State introduces testimony from the magistrate who issued the warrant, the officer who presented the probable cause affidavit for the warrant, or another witness familiar with the factual basis for the warrant. Presentation of such other evidence suffices if the accused has the opportunity to cross-examine the witness concerning the validity of the warrant and the trial court has adequate opportunity to determine whether probable cause existed" (citations omitted).

5. ***Cates v. State***, 120 S.W.3d 352, 355 (Tex. Crim. App. 2003) – Defendant proved that if the false portions of a search warrant affidavit were excised, the remainder of the affidavit lacked probable cause.

B. Bail

1. ***Ex parte Durst***, 2004 Tex. App. LEXIS 7560 (Tex. App.–Houston 14th 2004) – Defendant was charged with two counts of felony bail jumping and failure to appear, and one count of tampering with evidence. After bond was set in each case at one billion dollars, defendant filed applications for writs of habeas corpus, challenging the bond amounts. The District Court denied the applications, and defendant appealed. The Court of Appeals reversed, holding the bail amount to be unconstitutionally excessive, and remanded the case to the trial court to reset bail in the amount of $150,000 for each

offense, resulting in a total of $450,000.

2. ***Ex parte Scott***, 122 S.W.3d 866, 871 (Tex. App.–Fort Worth 2003) – Magistrate set bond on defendant accused of aggravated kidnapping at $500,000. Defendant sought habeas relief from trial court which was denied. On appeal the Court of Appeals stated: "[a]ffording due deference to the trial court's ruling, we cannot say that the trial court acted arbitrarily or unreasonably by denying a reduction in the amount of Scott's bond. Although the bond is high, Scott has failed to demonstrate that the bond set is excessive. ... Based on the nature and circumstances of the offense, concerns regarding the safety of the victim, the absence of evidence regarding Scott's community ties, and his ability to make bond, the trial court could have properly concluded that Scott's bond of $100,000 was reasonable. Because we hold that the trial court did not abuse its discretion in denying Scott's request for bond reduction, we overrule Scott's three points. We therefore affirm the order denying habeas corpus relief" (citations omitted).

3. ***In re Henson***, 120 S.W.3d 926 (Tex. App.–Texarkana 2003) – Article 17.33, Code of Criminal Procedure does not mandate that a magistrates review statements and evidence in setting bail.

VI. Search and Seizure

A. Traffic Arrests

Berrett v. State, 2004 Tex. App. LEXIS 4393 (Tex. App. Houston [14th] 2004) – Under both the Code of Criminal Procedure and the Transportation Code, a peace officer, in lieu of a custodial arrest (which requires promptly taking the arrestee before a magistrate), may issue a citation or notice to appear before a magistrate to a defendant who commits a Class C misdemeanor. The Code of Criminal Procedure is silent as to whether a citation requires an alleged offender's promise to appear. However, before officer may issue a citation and release defendant charged with violating Transportation Code, the defendant must sign a promise to appear before a magistrate. If defendant does not promise to appear, the officer is under no duty to release him, but could choose to take defendant immediately before a magistrate.

B. School Searches by Non-Peace Officer

In re KCB, 141 S.W.3d 303 (Tex. App. Austin 2004) – A high school hall monitor received an anonymous tip from a student that the juvenile had a plastic bag containing marihuana in his underwear. The juvenile was escorted to the assistant principal's office where the monitor told the juvenile about the tip. The monitor asked the juvenile to lift up his shirt, at which time the assistant principal approached the juvenile and extended the elastic on the juvenile's shorts. Observing a plastic bag in the juvenile's waistline, the assistant principal removed it, and the juvenile was later arrested for possession of marihuana. In reversing the adjudication of the juvenile as a delinquent, the court held that the assistant principal lacked reasonable suspicion to search student's person.

C. Reasonable Suspicion (one wrapper at a time)

LeBlanc v. State, 138 S.W.3d 603 (Tex. App.–Houston [14th] 2004) – After the defendant's truck was stopped by police, he initially consented to a partial search of the truck, but later withdrew his consent. In the bed of the truck, police found three round balls (which tested positive for methamphetamine) and hypodermic needles. On appeal, defendant challenged whether the deputies had probable cause or reasonable suspicion to continue to detain him after the original purpose of the traffic stop had expired. He claimed the trial court erred in denying his motion to suppress because the State failed to show the deputies had probable cause to detain him after the conclusion of the initial traffic stop. The Court of Appeals held that the State only needed to show reasonable suspicion to support a detention. (Part of the reasonable suspicion included fast food wrappers on the floorboard of the automobile). Based on the review of the totality of the circumstances and in light of the officers' experience and knowledge, the Court found that the deputies had sufficient reasonable suspicion to justify the short detention of defendant from the time the citation was issued until the deputy retrieved his canine from the patrol car at the scene.

D. "Plain Feel" of Crack Pipe

Sturchio v. State, 136 S.W.3d 21 (Tex. App.–San Antonio 2002) – A police officer observed defendant walking up and down a street carrying a gasoline can. Defendant would approach cars occupied by men and hold brief conversations with the occupants of the vehicle. The officer, who had 15 years experience and who was assigned to a task force targeting prostitution, detained defendant on suspicion of prostitution. The officer found a crack pipe in the zipper of defendant's pants while searching defendant for weapons. The officer found crack cocaine hidden in defendant's bra while searching defendant incident to arrest for possession of the pipe. The appellate court held that both the initial detention and the pat-down search were valid. The officer had, however, exceeded the permissible scope of a Terry search because the incriminating nature of the crack pipe could not reasonably have been apparent to the officer based on the "plain feel" of the pipe, and the officer was not justified in reaching into defendant's pants to retrieve the pipe. Defendant's arrest was, therefore, unlawful and the cocaine found in defendant's bra was not discovered pursuant to a lawful search incident to arrest.

E. Fruit of Poisonous Tree

State v. Bagby, 119 S.W.3d 446 (Tex. App.–Tyler 2003) – Taint of illegal search of shed not sufficiently attenuated by subsequent execution of written consent.

F. Community Care Taking/Failure to Maintain Lane

Eichler v. State, 117 S.W.3d 897 (Tex. App.–Houston 14th 2003) – The State did not carry its burden of demonstrating the reasonableness of the stop on the basis of a suspicion that defendant failed to drive within a single lane, nor did the State show that the stop was justified as part of the police officer's community caretaking function.

G. Cell Phone Tip/Investigatory Stop

Pipkin v. State, 114 S.W.3d 649 (Tex. App.–Fort Worth 2003) – An informant called the police on his cell phone and told them that defendant was driving extremely slow on the freeway and was smoking crack cocaine while driving. A police officer did not recall seeing any traffic violations, but stated that he pulled defendant over based on the informant's observations of defendant. During a search of the vehicle after another officer saw defendant throw a rock of cocaine to the ground, the police found another rock of cocaine, rolling papers, a glass tube, and a lighter in the center console of the vehicle. The information that the informant gave the dispatcher not only allowed the officer to confirm that he was approaching the correct vehicle, but also ensured that the informant's identity could be verified. Accordingly, the investigatory stop based on cell phone tip was justified.

H. Peace Officer Immunity

Cherqui v. Westheimer St. Festival Corp., 116 S.W.3d 337 (Tex. App.–Houston 14th 2003) – Homeowner who was injured while being ticketed for violating temporary no-parking zone sued the City of Houston, Westheimer Street Festival Corporation, and police officer for negligence. The 215th District Court granted defendants a directed verdict, and the homeowner appealed. The Houston 14th Court of Appeals, held that: (1) the street festival corporation was not vicariously liable for officer's alleged negligence; (2) the homeowner's injuries were not a foreseeable result of alleged negligent placement of temporary no-parking signs, for purposes of determining whether city was liable under the Tort Claims Act; and (3) the police officer acted in good faith, for purposes of determining whether officer was entitled to official immunity. Affirmed.

VII. Removal of Judges

A. ***In re Bartie***, 138 S.W.3d 81 (Tex. Rev. Trib 2004) – Texas State Commission on Judicial Conduct recommended that judge be removed as Justice of Peace, and that judge be forever barred from holding judicial office. Judge appealed. The Review Tribunal, Catherine Stone, J., held that: (1) evidence was sufficient to support recommendation, and (2) Commission did not exceed its authority in investigating allegations of judicial misconduct by impermissibly providing legal assistance to various complainants. Affirmed.

B. ***In re Chacon***, 138 S.W.3d 86 (Tex. Rev. Trib 2004) – Texas State Commission on Judicial Conduct recommended that judge be removed as justice of peace, and that judge be prohibited from holding state judicial office in future. Judge appealed. The Review Tribunal held that: (1) sufficient evidence supported Commission's conclusions that judge's conduct constituted incompetence in performance of her official duties and willfully or persistently allowed her improper relationships to influence her judgment in performance of her duties, and (2) judge's conduct warranted that she be removed as justice of peace, and be prohibited from holding state judicial office in future. Affirmed.

Table of Cases

LARRY D. HIIBEL, Petitioner v. SIXTH JUDICIAL DISTRICT COURT OF NEVADA, HUMBOLDT COUNTY, et al.

No. 03-5554

SUPREME COURT OF THE UNITED STATES

124 S. Ct. 2451; 159 L. Ed. 2d 292; 2004 U.S. LEXIS 4385; 72 U.S.L.W. 4509; 17 Fla. L. Weekly Fed. S 406

March 22, 2004, Argued
June 21, 2004, Decided

SUBSEQUENT HISTORY: US Supreme Court rehearing denied by Hiibel v. Sixth Judicial Dist. Court, 2004 U.S. LEXIS 4868 (U.S., Aug. 23, 2004)

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA. Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 2002 Nev. LEXIS 102 (2002)

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

SYLLABUS:

Petitioner Hiibel was arrested and convicted in a Nevada court for refusing to identify himself to a police officer during an investigative stop involving a reported assault. Nevada's "stop and identify" statute requires a person detained by an officer under suspicious circumstances to identify himself. The state intermediate appellate court affirmed, rejecting Hiibel's argument that the state law's application to his case violated the Fourth and Fifth Amendments. The Nevada Supreme Court affirmed.

Held:

Petitioner's conviction does not violate his Fourth Amendment rights or the Fifth Amendment's [***2] prohibition on self-incrimination.

(a) State stop and identify statutes often combine elements of traditional vagrancy laws with provisions intended to regulate police behavior in the course of investigatory stops. They vary from State to State, but all permit an officer to ask or require a suspect to disclose his identity. In *Papachristou* v. *Jacksonville,* 405 U.S. 156, 167-171, 31 L. Ed. 2d 110, 92 S. Ct. 839, this Court invalidated a traditional vagrancy law for vagueness because of its broad scope and imprecise terms. The Court recognized similar constitutional limitations in *Brown* v. *Texas,* 443 U.S. 47, 52, 61 L. Ed. 2d 357, 99 S. Ct. 2637, where it invalidated a conviction for violating a Texas stop and identify statute on Fourth Amendment grounds, and in *Kolender* v. *Lawson,* 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855, where it invalidated on vagueness grounds California's modified stop and identify statute that required a suspect to give an officer "credible and reliable" identification when asked to identify himself, *id.,* at 360, 75 L. Ed. 2d 903, 103 S. Ct. 1855. This case begins where those cases left off. Here, the initial stop was based on reasonable suspicion, satisfying the Fourth Amendment requirements noted [***3] in *Brown.* Further, Hiibel has not alleged that the Nevada statute is unconstitutionally vague, as in *Kolender.* This statute is narrower and more precise. In contrast to the "credible and reliable" identification requirement in *Kolender,* the Nevada Supreme Court has interpreted the instant statute to require only that a suspect disclose his name. It apparently does not require him to produce a driver's license or any other document.

If he chooses either to state his name or communicate it to the officer by other means, the statute is satisfied and no violation occurs.

(b) The officer's conduct did not violate Hiibel's Fourth Amendment rights. Ordinarily, an investigating officer is free to ask a person for identification without implicating the Amendment. *INS* v. *Delgado,* 466 U.S. 210, 216, 80 L. Ed. 2d 247, 104 S. Ct. 1758. Beginning with *Terry* v. *Ohio,* 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868, the Court has recognized that an officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further. Although it is well established that an officer may ask a suspect [***4] to [**298] identify himself during a *Terry* stop, see, *e.g., United States* v. *Hensley,* 469 U.S. 221, 229, 83 L. Ed. 2d 604, 105 S. Ct. 675, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer, see *Brown, supra*, at 53, n. 3, 61 L. Ed. 2d 357, 99 S. Ct. 2637. The Court is now of the view that *Terry* principles permit a State to require a suspect to disclose his name in the course of a *Terry* stop. *Terry, supra,* at 34, 20 L. Ed. 2d 889, 88 S. Ct. 1868. The Nevada statute is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures because it properly balances the intrusion on the individual's interests against the promotion of legitimate government interests. See *Delaware* v. *Prouse,* 440 U.S. 648, 654, 59 L. Ed. 2d 660, 99 S. Ct. 1391. An identity request has an immediate relation to the *Terry* stop's purpose, rationale, and practical demands, and the threat of criminal sanction helps ensure that the request does not become a legal nullity. On the other hand, the statute does not alter the nature of the stop itself, changing neither its duration nor its location. Hiibel argues unpersuasively that the statute circumvents the probable-cause requirement by allowing [***5] an officer to arrest a person for being suspicious, thereby creating an impermissible risk of arbitrary police conduct. These familiar concerns underlay *Kolender, Brown*, and *Papachristou.* They are met by the requirement that a *Terry* stop be justified at its inception and be "reasonably related in scope to the circumstances which justified" the initial stop. *Terry*, 392 U.S., at 20, 20 L. Ed. 2d 889, 88 S. Ct. 1868. Under those principles, an officer may not arrest a suspect for failure to identify himself if the identification request is not reasonably related to the circumstances justifying the stop. Cf. *Hayes* v. *Florida,* 470 U.S. 811, 817, 84 L. Ed. 2d 705, 105 S. Ct. 1643. The request in this case was a commonsense inquiry, not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence. The stop, the request, and the State's requirement of a response did not contravene the Fourth Amendment.

(c) Hiibel's contention that his conviction violates the Fifth Amendment's prohibition on self-incrimination fails because disclosure of his name and identity presented no reasonable danger of incrimination. The Fifth Amendment prohibits only compelled [***6] testimony that is incriminating, see *Brown* v. *Walker,* 161 U.S. 591, 598, 40 L. Ed. 819, 16 S. Ct. 644, and protects only against disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used, *Kastigar* v. *United States,* 406 U.S. 441, 445, 32 L. Ed. 2d 212, 92 S. Ct. 1653. Hiibel's refusal to disclose was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it would furnish evidence needed to prosecute him. *Hoffman* v. *United States,* 341 U.S. 479, 486, 95 L. Ed. 1118, 71 S. Ct. 814. It appears he refused to identify himself only because he thought his name was none of the officer's business. While the Court recognizes his strong belief that he should not have to disclose his identity, the Fifth Amendment does not override the Nevada Legislature's judgment to the contrary absent a reasonable belief that the disclosure would tend [**299] to incriminate him. Answering a request to disclose a name is likely to be so insignificant as to be incriminating only in unusual circumstances. See, *e.g., Baltimore City Dep't of Social Servs.* v. *Bouknight,* 493 U.S. 549, 555, 107 L. Ed. 2d 992, 110 S. Ct. 900. If a case [***7] arises where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense, the court can then consider whether the Fifth Amendment privilege applies, whether it has been violated, and what remedy must follow. Those questions need not be resolved here.

118 Nev. 868, 59 P. 3d 1201, affirmed.

COUNSEL:

Robert E. Dolan argued the cause for petitioner.

Conrad Hafen argued the cause for respondents.

Sri Srinivasan argued the cause for the United States, as amicus curiae, by special leave of court.

JUDGES: Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C. J., and O'Connor, Scalia, and Thomas, JJ., joined. Stevens, J., filed a dissenting opinion. Breyer, J., filed a dissenting opinion, in which Souter and Ginsburg JJ., joined.

OPINIONBY: KENNEDY

OPINION: [*2455] Justice **Kennedy** delivered the opinion of the Court.

[**LEdHR1A] [1A] [**LEdHR2A] [2A] [**LEdHR3A] [3A] [**LEdHR4] [4] The petitioner was arrested and convicted for refusing to identify himself during a stop allowed by *Terry* v. *Ohio,* 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). He challenges his conviction under the Fourth and Fifth Amendments to the United States Constitution, applicable to the States through the Fourteenth Amendment.

I

The sheriff's department in Humboldt County, Nevada, received an afternoon telephone call reporting an assault. [***8] The caller reported seeing a man assault a woman in a red and silver GMC truck on Grass Valley Road. Deputy Sheriff Lee Dove was dispatched to investigate. When the officer arrived at the scene, he found the truck parked on the side of the road. A man was standing by the truck, and a young woman was sitting inside it. The officer observed skid marks in the gravel behind the vehicle, leading him to believe it had come to a sudden stop.

The officer approached the man and explained that he was investigating a report of a fight. The man appeared to be intoxicated. The officer asked him if he had "any identification on [him]," which we understand as a request to produce a driver's license or some other form of written identification. The man refused and asked why the officer wanted to see identification. The officer responded that he was conducting an investigation and needed to see some identification. The unidentified man became agitated and insisted he had done nothing wrong. The officer explained that he wanted to find out who the man was and what he was doing there. After continued refusals to comply with the officer's request for identification, the man began to taunt the officer [***9] by placing his hands behind his back and telling the officer to arrest him and take him to jail. This routine kept up for several minutes: the officer asked for identification 11 times and was refused each time. After warning the man that he would be arrested if he continued to refuse to comply, the officer placed him under arrest.

We now know that the man arrested [**300] on Grass Valley Road is Larry Dudley Hiibel. Hiibel was charged with "willfully resist[ing], delay[ing], or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office" in violation of Nev. Rev. Stat. (NRS) § 199.280 (2003). The government reasoned that Hiibel had obstructed the officer in carrying out his duties under § 171.123, a Nevada statute that defines the legal rights and duties of a police officer in the context of an investigative stop. Section 171.123 provides in relevant part:

> "1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
>
> . . . . .
>
> "3. The officer may detain the person pursuant to this section only to ascertain his identity [***10] and the suspicious circumstances surrounding his presence [*2456] abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer."

Hiibel was tried in the Justice Court of Union Township. The court agreed that Hiibel's refusal to identify himself as required by § 171.123 "obstructed and delayed Dove as a public officer in attempting to discharge his duty" in violation of § 199.280. App. 5. Hiibel was convicted and fined $250. The Sixth Judicial District Court affirmed, rejecting Hiibel's argument that the application of § 171.123 to his case violated the Fourth and Fifth Amendments. On review the Supreme Court of Nevada rejected the Fourth Amendment challenge in a divided opinion. 118 Nev. 868, 59 P. 3d 1201 (2002). Hiibel petitioned for rehearing, seeking explicit resolution of his Fifth Amendment challenge. The petition was denied without opinion. We granted certiorari. 540 U.S. 965, 157 L. Ed. 2d 309, 124 S. Ct. 430 (2003).

II

NRS § 171.123(3) is an enactment sometimes referred to as a "stop and identify" statute. See Ala. Code § 15-5-30 (West 2003); Ark. Code Ann. § 5-71-213(a)(1) (2004); Colo. Rev. Stat. § 16-3-103(1) [***11] (2003); Del. Code Ann., Tit. 11, § § 1902(a), 1321(6) (2003); Fla. Stat. § 856.021(2) (2003); Ga. Code Ann. § 16-11-36(b) (2003); Ill. Comp. Stat., ch. 725, § 5/107-14 (2004); Kan. Stat. Ann. § 22-2402(1) (2003); La. Code Crim. Proc. Ann., Art. 215.1(A) (West 2004); Mo. Rev. Stat. § 84.710(2) (2003); Mont. Code Ann. § 46-5-401(2)(a) (2003); Neb. Rev. Stat. § 29-829 (2003); N. H. Rev. Stat. Ann. § § 594:2 and 644:6 (Lexis 2003); N. M. Stat. Ann. § 30-22-3 (2004); N. Y. Crim. Proc. Law § 140.50(1) (West 2004); N. D. Cent. Code § 29-29-21 (2003); R. I. Gen. Laws § 12-7-1 (2003); Utah Code Ann. § 77-7-15 (2003); Vt. Stat. Ann., Tit. 24, § 1983 (Supp. 2003); Wis. Stat. § 968.24 (2003). See also Note, Stop and Identify Statutes: A New Form of an Inadequate Solution to an Old Problem,

12 Rutgers L. J. 585 (1981); Note, Stop-and-Identify Statutes After *Kolender v. Lawson:* Exploring the Fourth and Fifth Amendment Issues, 69 Iowa L. Rev. 1057 (1984).

Stop and identify statutes often combine elements of traditional vagrancy laws with provisions intended to regulate police behavior in the course of investigatory stops. The [**301] statutes vary from State to [***12] State, but all permit an officer to ask or require a suspect to disclose his identity. A few States model their statutes on the Uniform Arrest Act, a model code that permits an officer to stop a person reasonably suspected of committing a crime and "demand of him his name, address, business abroad and whither he is going." Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 344 (1942). Other statutes are based on the text proposed by the American Law Institute as part of the Institute's Model Penal Code. See ALI, Model Penal Code, § 250.6, Comment 4, pp 392-393 (1980). The provision, originally designated § 250.12, provides that a person who is loitering "under circumstances which justify suspicion that he may be engaged or about to engage in crime commits a violation if he refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfulness of his conduct and purposes." § 250.12 (Tentative Draft No. 13) (1961). In some States, a suspect's refusal to identify himself is a misdemeanor offense or civil violation; in others, it is a factor to be considered in whether the suspect has violated loitering laws. In other [***13] States, a suspect may decline to identify himself without penalty.

[*2457] Stop and identify statutes have their roots in early English vagrancy laws that required suspected vagrants to face arrest unless they gave "a good Account of themselves," 15 Geo. 2, ch. 5, § 2 (1744), a power that itself reflected common-law rights of private persons to "arrest any suspicious night-walker, and detain him till he give a good account of himself . . . ." 2 W. Hawkins, Pleas of the Crown, ch 13, § 6, p 130. (6th ed. 1787). In recent decades, the Court has found constitutional infirmity in traditional vagrancy laws. In *Papachristou* v. *Jacksonville,* 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972), the Court held that a traditional vagrancy law was void for vagueness. Its broad scope and imprecise terms denied proper notice to potential offenders and permitted police officers to exercise unfettered discretion in the enforcement of the law. See *id.*, at 167-171, 31 L. Ed. 2d 110, 92 S. Ct. 839.

The Court has recognized similar constitutional limitations on the scope and operation of stop and identify statutes. In *Brown* v. *Texas,* 443 U.S. 47, 52, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979), the Court invalidated a conviction for [***14] violating a Texas stop and identify statute on Fourth Amendment grounds. The Court ruled that the initial stop was not based on specific, objective facts establishing reasonable suspicion to believe the suspect was involved in criminal activity. See *id.*, at 51-52, 61 L. Ed. 2d 357, 99 S. Ct. 2637. Absent that factual basis for detaining the defendant, the Court held, the risk of "arbitrary and abusive police practices" was too great and the stop was impermissible. *Id.*, at 52, 61 L. Ed.2d 357, 99 S. Ct. 2637. Four Terms later, the Court invalidated a modified stop and identify statute on vagueness grounds. See *Kolender* v. *Lawson,* 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983). The California law in *Kolender* required a suspect to give an officer "'credible and reliable'" identification when asked to identify himself. *Id.,* at 360, 75 L. Ed. 2d 903, 103 S. Ct. 1855. The Court held that the statute was void because it provided no standard for determining what a suspect must do to comply [**302] with it, resulting in "'virtually unrestrained power to arrest and charge persons with a violation.'" *Id.,* at 360, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (quoting *Lewis* v. *New Orleans,* 415 U.S. 130, 135, 39 L. Ed. 2d 214, 94 S. Ct. 970 (1974) (Powell, J., concurring in result)).

[**LEdHR1B] [1B] [**LEdHR2B] [2B] The present [***15] case begins where our prior cases left off. Here there is no question that the initial stop was based on reasonable suspicion, satisfying the Fourth Amendment requirements noted in *Brown* Further, the petitioner has not alleged that the statute is unconstitutionally vague, as in *Kolender.* Here the Nevada statute is narrower and more precise. The statute in *Kolender* had been interpreted to require a suspect to give the officer "credible and reliable" identification. In contrast, the Nevada Supreme Court has interpreted NRS § 171.123(3) to require only that a suspect disclose his name. See 118 Nev., at ____, 59 P. 3d, at 1206 (opinion of Young, C. J.) ("The suspect is not required to provide private details about his background, but merely to state his name to an officer when reasonable suspicion exists"). As we understand it, the statute does not require a suspect to give the officer a driver's license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means--a choice, we assume, that the suspect may make--the statute is satisfied and no violation occurs. See *id.,* at ____, 59 P. 3d, at 1206-1207. [***16]

III

[**LEdHR2C] [2C] Hiibel argues that his conviction cannot stand because the officer's conduct violated his Fourth Amendment rights. We disagree.

[**LEdHR5] [*2458] [5] [**LEdHR6] [6] Asking questions is an essential part of police investigations. In the ordinary course a police officer is

free to ask a person for identification without implicating the Fourth Amendment. "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *INS* v. *Delgado,* 466 U.S. 210, 216, 80 L. Ed. 2d 247, 104 S. Ct. 1758 (1984). Beginning with *Terry* v. *Ohio,* 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), the Court has recognized that a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further. *Delgado, supra,* at 216, 80 L. Ed. 2d 247, 104 S. Ct. 1758; *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 881, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975). To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited. The officer's action must be "'justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference [***17] in the first place.'" *United States* v. *Sharpe,* 470 U.S. 675, 682, 84 L. Ed. 2d 605, 105 S. Ct. 1568 (1985) (quoting *Terry, supra,* at 20, 20 L. Ed. 2d 889, 88 S. Ct. 1868). For example, the seizure cannot continue for an excessive period of time, see *United States* v. *Place,* 462 U.S. 696, 709, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983), or resemble a traditional arrest, see *Dunaway* v. *New York,* 442 U.S. 200, 212, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979).

Our decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops. See *United States* v. *Hensley,* 469 U.S. 221, 229, [**303] 83 L. Ed. 2d 604, 105 S. Ct. 675 (1985) ("[T]he ability to briefly stop [a suspect], ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice"); *Hayes* v. *Florida,* 470 U.S. 811, 816, 84 L. Ed. 2d 705, 105 S. Ct. 1643 (1985) ("[I]f there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information"); *Adams* v. *Williams,* 407 U.S. 143, 146, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972) [***18] ("A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time").

[**LEdHR1C] [1C] Obtaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in cases such as this, where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.

[**LEdHR7A] [7A] Although it is well established that an officer may ask a suspect to identify himself in the course of a *Terry* stop, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer. See *Brown,* 443 U.S., at 53, n. 3, 61 L. Ed. 2d 357, 99 S. Ct. 2637. [***19] Petitioner draws our attention to statements in prior opinions that, according to him, answer the question in his favor. In *Terry,* Justice White stated in a concurring opinion that a person detained in an investigative stop can [*2459] be questioned but is "not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest." 392 U.S., at 34, 20 L. Ed. 2d 889, 88 S. Ct. 1868. The Court cited this opinion in dicta in *Berkemer* v. *McCarty,* 468 U.S. 420, 439, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984), a decision holding that a routine traffic stop is not a custodial stop requiring the protections of *Miranda* v. *Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). In the course of explaining why *Terry* stops have not been subject to *Miranda,* the Court suggested reasons why *Terry* stops have a "nonthreatening character," among them the fact that a suspect detained during a *Terry* stop "is not obliged to respond" to questions. See *Berkemer, supra,* at 439, 440, 82 L. Ed. 2d 317, 104 S. Ct. 3138. According to petitioner, these statements establish a right to refuse to answer questions during a *Terry* stop.

We do not read these statements as controlling. The passages recognize that the [***20] Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government. As a result, the Fourth Amendment itself cannot require a suspect to answer questions. This case concerns a different issue, however. Here, the source of the legal obligation arises from Nevada [**304] state law, not the Fourth Amendment. Further, the statutory obligation does not go beyond answering an officer's request to disclose a name. See NRS § 171.123(3) ("Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer"). As a result, we cannot view the dicta in *Berkemer* or Justice White's concurrence in *Terry* as answering the question whether a State can compel a suspect to disclose his name during a *Terry* stop.

[**LEdHR1D] [1D] [**LEdHR8] [8] The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop. The

reasonableness of a seizure under the Fourth Amendment is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Delaware* v. *Prouse,* 440 U.S. 648, 654, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979). The Nevada [***21] statute satisfies that standard. The request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop. The threat of criminal sanction helps ensure that the request for identity does not become a legal nullity. On the other hand, the Nevada statute does not alter the nature of the stop itself: it does not change its duration, *Place*, *supra*, at 709, 77 L. Ed. 2d 110, 103 S. Ct. 2637, or its location, *Dunaway*, *supra*, at 212, 60 L. Ed. 824, 99 S. Ct. 2248. A state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures.

[**LEdHR1E] [1E] [**LEdHR2D] [2D] [**LEdHR7B] [7B] Petitioner argues that the Nevada statute circumvents the probable cause requirement, in effect allowing an officer to arrest a person for being suspicious. According to petitioner, this creates a risk of arbitrary police conduct that the Fourth Amendment does not permit. Brief for Petitioner 28-33. These are familiar concerns; they were central to the opinion in *Papachristou,* and also to the decisions limiting the operation of stop and identify statutes in *Kolender* and *Brown.* Petitioner's concerns are met by the requirement that a *Terry* [***22] stop must be justified at its inception and "reasonably related in scope to the circumstances which justified" the initial stop. 392 U.S., at 20, 20 L. Ed. 2d 889, 88 S. Ct. 1868. Under these principles, an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop. The Court noted a [*2460] similar limitation in *Hayes*, where it suggested that *Terry* may permit an officer to determine a suspect's identity by compelling the suspect to submit to fingerprinting only if there is "a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime." 470 U.S., at 817, 84 L. Ed. 2d 705, 105 S. Ct. 1643. It is clear in this case that the request for identification was "reasonably related in scope to the circumstances which justified" the stop. *Terry*, *supra,* at 20, 20 L. Ed. 2d 889, 88 S. Ct. 1868. The officer's request was a commonsense inquiry, not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence. The stop, the request, and the State's requirement of a response did not contravene the guarantees of the Fourth Amendment.

IV

[**LEdHR9A] [9A] Petitioner further contends [***23] [**305] that his conviction violates the Fifth Amendment's prohibition on compelled self-incrimination. The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled. See *United States* v. *Hubbell,* 530 U.S. 27, 34-38, 147 L. Ed. 2d 24, 120 S. Ct. 2037 (2000).

[**LEdHR3B] [3B] [**LEdHR9B] [9B] Respondents urge us to hold that the statements NRS § 171.123(3) requires are nontestimonial, and so outside the Clause's scope. We decline to resolve the case on that basis. "[T]o be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe* v. *United States,* 487 U.S. 201, 210, 101 L. Ed. 2d 184, 108 S. Ct. 2341 (1988). See also *Hubbell,* 530 U.S., at 35, 147 L. Ed. 2d 24, 120 S. Ct. 2037. Stating one's name may qualify as an assertion of fact relating to identity. Production of identity documents might meet the definition as well. As we noted in *Hubbell*, acts of production may yield testimony establishing "the existence, authenticity, and custody of items [the police seek]." *Id.,* at 41, 147 L. Ed. 24, 120 S. Ct. 2037. Even if these required actions [***24] are testimonial, however, petitioner's challenge must fail because in this case disclosure of his name presented no reasonable danger of incrimination.

[**LEdHR10] [10] The Fifth Amendment prohibits only compelled testimony that is incriminating. See *Brown* v. *Walker,* 161 U.S. 591, 598, 40 L. Ed. 819, 16 S. Ct. 644 (1896) (noting that where "the answer of the witness will not directly show his infamy, but only *tend* to disgrace him, he is bound to answer"). A claim of Fifth Amendment privilege must establish

> "'reasonable ground to apprehend danger to the witness from his being compelled to answer. . . . [T]he danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things,--not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.'" *Id.,* at 599-600, 40 L. Ed. 819, 16 S. Ct. 644 (quoting *Queen* v *Boyes*, 1 Best & S. 311, 321 (1861) (Cockburn, C. J.)).

As we stated in *Kastigar* v. *United States,* 406 U.S. 441, 445, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972), the Fifth Amendment privilege against [***25] compulsory self-incrimination "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Suspects who have been granted immunity from prosecution may, therefore, be compelled to answer; with the threat of [*2461] prosecution removed, there can be no reasonable belief that the evidence will be used against them. See *id.,* at 453, 32 L. Ed. 2d 212, 92 S. Ct. 1653.

[**LEdHR3C] [3C] In this case petitioner's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it "would furnish a link in the chain of evidence needed to prosecute" him. [**306] *Hoffman* v. *United States,* 341 U.S. 479, 486, 95 L. Ed. 1118, 71 S. Ct. 814 (1951). As best we can tell, petitioner refused to identify himself only because he thought his name was none of the officer's business. Even today, petitioner does not explain how the disclosure of his name could have been used against him in a criminal case. While we recognize petitioner's strong belief that he should not have to disclose his identity, the Fifth Amendment does not override the Nevada Legislature's judgment to the contrary [***26] absent a reasonable belief that the disclosure would tend to incriminate him.

The narrow scope of the disclosure requirement is also important. One's identity is, by definition, unique; yet it is, in another sense, a universal characteristic. Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances. See *Baltimore City Dep't of Social Servs.* v. *Bouknight,* 493 U.S. 549, 555, 107 L. Ed. 2d 992, 110 S. Ct. 900 (1990) (suggesting that "fact[s] the State could readily establish" may render "any testimony regarding existence or authenticity [of them] insufficiently incriminating"); Cf. *California* v. *Byers,* 402 U.S. 424, 432, 29 L. Ed. 2d 9, 91 S. Ct. 1535 (1971) (opinion of Burger, C. J.). In every criminal case, it is known and must be known who has been arrested and who is being tried. Cf. *Pennsylvania* v. *Muniz,* 496 U.S. 582, 601-602, 110 L. Ed. 2d 528, 110 S. Ct. 2638 (1990) (opinion of Brennan, J.). Even witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand. Still, a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have [***27] given the police a link in the chain of evidence needed to convict the individual of a separate offense. In that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow. We need not resolve those questions here.

The judgment of the Nevada Supreme Court is affirmed.

DISSENTBY: STEVENS; BREYER SOUTERGINSBURG

DISSENT: Justice **Stevens,** dissenting.

The Nevada law at issue in this case imposes a narrow duty to speak upon a specific class of individuals. The class includes only those persons detained by a police officer "under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime" n1--persons who are, in other words, targets of a criminal investigation. The statute therefore is directed not "at the public at large," but rather "at a highly selective group inherently suspect of criminal activities." *Albertson* v. *Subversive Activities Control Bd.,* 382 U.S. 70, 79, 15 L. Ed. 2d 165, 86 S. Ct. 194 (1965).

n1 Nev. Rev. Stat. § 171.123(1) (2003).

[***28]

Under the Nevada law, a member of the targeted class "may not be compelled to answer" any inquiry except a command that he "identify himself." n2 Refusal to identify oneself upon request is punishable [*2462] as a [**307] crime. n3 Presumably the statute does not require the detainee to answer any other question because the Nevada Legislature realized that the Fifth Amendment prohibits compelling the target of a criminal investigation to make any other statement. In my judgment, the broad constitutional right to remain silent, which derives from the Fifth Amendment's guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," U.S. Const., Amdt. 5, n4 is not as circumscribed as the Court suggests, and does not admit even of the narrow exception defined by the Nevada statute.

n2 § 171.123(3).

n3 In this case, petitioner was charged with violating § 199.280, which makes it a crime to "willfully resis[t], dela[y] or obstruc[t] a public officer in discharging or attempting to discharge any legal duty of his office." A violation of that provision is a misdemeanor unless a dangerous weapon is involved. [***29]

n4 The Fifth Amendment's protection against compelled self-incrimination applies to the States through the Fourteenth Amendment's Due Process Clause. See *Malloy* v. *Hogan,* 378 U.S. 1, 6, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964).

"[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda* v. *Arizona,* 384 U.S. 436, 467, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). It is a "settled principle" that "the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes," but "they have no right to compel them to answer." *Davis* v. *Mississippi,* 394 U.S. 721, 727, n. 6, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969). The protections of the Fifth Amendment are directed squarely toward those who are the focus of the government's investigative and prosecutorial powers. In a criminal trial, the indicted defendant has an unqualified right to refuse to testify and may not be punished for invoking that right. [***30] See *Carter* v. *Kentucky,* 450 U.S. 288, 299-300, 67 L. Ed. 2d 241, 101 S. Ct. 1112 (1981). The unindicted target of a grand jury investigation enjoys the same constitutional protection even if he has been served with a subpoena. See *Chavez* v. *Martinez,* 538 U.S. 760, 767-768, 155 L. Ed. 2d 984, 123 S. Ct. 1994 (2003). So does an arrested suspect during custodial interrogation in a police station. *Miranda,* 384 U.S., at 467, 16 L. Ed. 2d 694, 86 S. Ct. 1602.

There is no reason why the subject of police interrogation based on mere suspicion, rather than probable cause, should have any lesser protection. Indeed, we have said that the Fifth Amendment's protections apply with equal force in the context of *Terry* stops, see *Terry* v. *Ohio,* 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), where an officer's inquiry "must be 'reasonably related in scope to the justification for [the stop's] initiation.'" *Berkemer* v. *McCarty,* 468 U.S. 420, 439, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984) (some internal quotation marks omitted). "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to [***31] respond." *Ibid.* See also *Terry,* 392 U.S.1, at 34, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (White, J., concurring) ("Of course, the person stopped is not [**308] obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest, although it may alert the officer to the need for continued observation"). Given our statements to the effect that citizens are not required to respond to police officers' questions during a *Terry* stop, it [*2463] is no surprise that petitioner assumed, as have we, that he had a right not to disclose his identity.

The Court correctly observes that a communication does not enjoy the Fifth Amendment privilege unless it is testimonial. Although the Court declines to resolve this question, *ante,* at ____ - ____, 159 L. Ed. 2d, at 305, I think it clear that this case concerns a testimonial communication. Recognizing that whether a communication is testimonial is sometimes a "difficult question," *Doe* v. *United States,* 487 U.S. 201, 214-215, 101 L. Ed. 2d 184, 108 S. Ct. 2341 (1988), we have stated generally that "[i]t is the 'extortion of information from the accused,' the attempt to force him 'to disclose the contents of his own mind,' that implicates the Self-Incrimination Clause," *id.,* at 211, 101 L. Ed. 2d 184, 108 S. Ct. 2341 [***32] (citations omitted). While "[t]he vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within the privilege," *id.,* at 213-214, 101 L. Ed. 2d 184, 108 S. Ct. 2341, certain acts and physical evidence fall outside the privilege. n5 In all instances, we have afforded Fifth Amendment protection if the disclosure in question was being admitted because of its content rather than some other aspect of the communication. n6

n5 A suspect may be made, for example, to provide a blood sample, *Schmerber* v. *California,* 384 U.S. 757, 765, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966), a voice exemplar, *United States* v. *Dionisio,* 410 U.S. 1, 7, 35 L. Ed. 2d 67, 93 S. Ct. 764 (1973), or a handwriting sample, *Gilbert* v. *California,* 388 U.S. 263, 266-267, 18 L. Ed. 2d 1178, 87 S. Ct. 1951 (1967).

n6 See *Pennsylvania* v. *Muniz,* 496 U.S. 582, 598-599, 110 L. Ed. 2d 528, 110 S. Ct. 2638 (1990) (respondent's answer to the "birthday question" was protected because the "content of his truthful answer supported an inference that his mental faculties were impaired"); *Doe* v. *United States,* 487 U.S. 201, 211, n. 10, 101 L. Ed. 2d 184, 108 S. Ct. 2341 (1988) ("The content itself must have testimonial significance"); *Fisher* v. *United States,* 425 U.S. 391, 410-411, 48 L. Ed. 2d 39, 96 S. Ct. 1569 (1976) ("[H]owever incriminating the contents of the accountant's workpapers might be, the act of producing them--the only thing which the taxpayer is compelled to do--would not itself involve testimonial self-incrimination"); *Gilbert,* 388 U.S., at 266-267, 18

L. Ed. 2d 1178, 87 S. Ct. 1951 ("A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying characteristic outside its protection"); *United States* v. *Wade,* 388 U.S. 218, 223, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967) ("[I]t deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicates his privilege").

[***33]

Considered in light of these precedents, the compelled statement at issue in this case is clearly testimonial. It is significant that the communication must be made in response to a question posed by a police officer. As we recently explained, albeit in the different context of the Sixth Amendment's Confrontation Clause, "[w]hatever else the term ['testimonial'] covers, it applies at a minimum . . . to police interrogations." *Crawford* v. *Washington,* 541 U.S. ___, ___, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004)). Surely police questioning during a *Terry* stop qualifies as an interrogation, and it follows that responses to such questions are testimonial in nature.

Rather than determining whether [**309] the communication at issue is testimonial, the Court instead concludes that the State can compel the disclosure of one's identity because it is not "incriminating." *Ante*, at ____, 159 L Ed 2d, at 305. But our cases have afforded Fifth Amendment protection to statements that are "incriminating" in a much broader sense than the Court suggests. It has "long been settled that [the Fifth Amendment's] protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements [***34] themselves are not incriminating and are not introduced into evidence." [*2464] *United States* v. *Hubbell,* 530 U.S. 27, 37, 147 L. Ed. 2d 24, 120 S. Ct. 2037 (2000). By "incriminating" we have meant disclosures that "could be used in a criminal prosecution or could lead to other evidence that might be so used," *Kastigar* v. *United States,* 406 U.S. 441, 445, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972) --communications, in other words, that "would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime," *Hoffman* v. *United States,* 341 U.S. 479, 486, 95 L. Ed. 1118, 71 S. Ct. 814 (1951). Thus, "[c]ompelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." *Hubbell,* 530 U.S., at 38, 147 L. Ed. 2d 24, 120 S. Ct. 2037 (citing *Doe,* 487 U.S., at 208, n. 6, 101 L. Ed. 2d 184, 108 S. Ct. 2341).

Given a proper understanding of the category of "incriminating" communications that fall within the Fifth Amendment privilege, it is clear that the disclosure of petitioner's identity is protected. The Court reasons that we should not assume that the disclosure of petitioner's name would be used to incriminate him or that it would furnish a link in a chain [***35] of evidence needed to prosecute him. *Ante,* at ____ - ____, 159 L Ed 2d, at 305-306. But why else would an officer ask for it? And why else would the Nevada Legislature require its disclosure only when circumstances "reasonably indicate that the person has committed, is committing or is about to commit a crime"? n7 If the Court is correct, then petitioner's refusal to cooperate did not impede the police investigation. Indeed, if we accept the predicate for the Court's holding, the statute requires nothing more than a useless invasion of privacy. I think that, on the contrary, the Nevada Legislature intended to provide its police officers with a useful law enforcement tool, and that the very existence of the statute demonstrates the value of the information it demands.

n7 Nev. Rev. Stat. § 171.123(1) (2003). The Court suggests that furnishing identification also allows the investigating officer to assess the threat to himself and others. See *ante*, at ____, 159 L. Ed. 2d, at 303. But to the extent that officer or public safety is immediately at issue, that concern is sufficiently alleviated by the officer's ability to perform a limited patdown search for weapons. See *Terry* v. *Ohio,* 392 U.S. 1, 25-26, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

[***36]

A person's identity obviously bears informational and incriminating worth, "even if the [name] itself is not inculpatory." *Hubbell,* 530 U.S., at 38, 147 L .Ed. 2d 24, 120 S. Ct. 2037. A name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases. And that information, in turn, can be tremendously useful in a criminal prosecution. It is therefore quite wrong to suggest that a person's [**310] identity provides a link in the chain to incriminating evidence "only in unusual circumstances." *Ante*, at ____, 159 L. Ed. 2d, at 306.

The officer in this case told petitioner, in the Court's words, that "he was conducting an investigation and needed to see some identification." *Ante*, at ____, 159 L. Ed. 2d, at 299. As the target of that investigation, petitioner, in my view, acted well within his rights when he opted to stand mute. Accordingly, I respectfully dissent.

Justice **Breyer,** with whom Justice **Souter** and Justice **Ginsburg** join, dissenting.

Notwithstanding the vagrancy statutes to which the majority refers, see *ante,* at ____ - ____, 159 L. Ed. 2d, at 300-301, this Court's Fourth Amendment precedents make clear that police may conduct a *Terry* stop only within circumscribed [***37] limits. And one of those limits invalidates laws that compel responses to police questioning.

[*2465] In *Terry* v. *Ohio,* 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), the Court considered whether police, in the absence of probable cause, can stop, question, or frisk an individual at all. The Court recognized that the Fourth Amendment protects the "'right of every individual to the possession and control of his own person.'" *Id.,* at 9, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (quoting *Union Pacific R. Co.* v. *Botsford,* 141 U.S. 250, 251, 35 L. Ed. 734, 11 S. Ct. 1000 (1891)). At the same time, it recognized that in certain circumstances, public safety might require a limited "seizure," or stop, of an individual against his will. The Court consequently set forth conditions circumscribing when and how the police might conduct a *Terry* stop. They include what has become known as the "reasonable suspicion" standard. 392 U.S., at 20-22, 20 L. Ed. 2d 889, 88 S. Ct. 1868. Justice White, in a separate concurring opinion, set forth further conditions. Justice White wrote: "Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need [***38] for continued observation." *Id.,* at 34, 20 L. Ed. 2d 889, 88 S. Ct. 1868.

About 10 years later, the Court, in *Brown* v. *Texas,* 443 U.S. 47, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979), held that police lacked "any reasonable suspicion" to detain the particular petitioner and require him to identify himself. *Id.,* at 53, 61 L. Ed. 2d 357, 99 S. Ct. 2637. The Court noted that the trial judge had asked the following: "I'm sure [officers conducting a *Terry* stop] should ask everything they possibly could find out. *What I'm asking is what's the State's interest in putting a man in jail because he doesn't want to answer . . . .*" *Id.,* at 54, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (Appendix to opinion of the Court) (emphasis in original). The Court referred to Justice White's *Terry* concurrence. 443 U.S., at 53, n. 3, 61 L. Ed. 2d 357, 99 S. Ct. 2637. And it said that it "need not decide" the matter. *Ibid.*

Then, five years later, the Court wrote that an "officer may ask the *[Terry]* detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond.*" *Berkemer* v. *McCarty,* 468 U.S. 420, 439, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984) (emphasis [**311] added). [***39] See also *Kolender* v. *Lawson,* 461 U.S. 352, 365, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983) (Brennan, J., concurring) (*Terry* suspect "must be free to . . . decline to answer the questions put to him"); *Illinois* v. *Wardlow,* 528 U.S. 119, 125, 145 L. Ed. 2d 570, 120 S. Ct. 673 (2000) (stating that allowing officers to stop and question a fleeing person "is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning").

This lengthy history--of concurring opinions, of references, and of clear explicit statements--means that the Court's statement in *Berkemer*, while technically dicta, is the kind of strong dicta that the legal community typically takes as a statement of the law. And that law has remained undisturbed for more than 20 years.

There is no good reason now to reject this generation-old statement of the law. There are sound reasons rooted in Fifth Amendment considerations for adhering to this Fourth Amendment legal condition circumscribing police authority to stop an individual against his will. See *ante,* at ____ - ____, 159 L. Ed. 2d, at 306-310 (Stevens, J., dissenting). Administrative considerations also militate against change. Can a State, in addition [***40] to requiring a stopped individual to answer "What's your name?" also require an answer to "What's your license number?" or "Where do you live?" Can a police officer, [*2466] who must know how to make a *Terry* stop, keep track of the constitutional answers? After all, answers to any of these questions may, or may not, incriminate, depending upon the circumstances.

Indeed, as the majority points out, a name itself--even if it is not "Killer Bill" or "Rough 'em up Harry"--will sometimes provide the police with "a link in the chain of evidence needed to convict the individual of a separate offense." *Ante,* at ____ - ____, 159 L. Ed. 2d, at 305-306. The majority reserves judgment about whether compulsion is permissible in such instances. *Ante,* at ____, 159 L. Ed. 2d, at 306. How then is a police officer in the midst of a *Terry* stop to distinguish between the majority's ordinary case and this special case where the majority reserves judgment?

The majority presents no evidence that the rule enunciated by Justice White and then by the *Berkemer* Court, which for nearly a generation has set forth a settled *Terry*-stop condition, has significantly interfered with law enforcement. Nor has the majority presented any other convincing justification [***41] for change. I would not begin to erode a clear rule with special exceptions.

I consequently dissent.

REFERENCES: Go To Full Text Opinion

Go to Supreme Court Brief(s)

Go to Supreme Court Transcripts

21A Am Jur 2d, Criminal Law § 1138; 68 Am Jur 2d, Searches and Seizures § 88; 81 Am Jur 2d, Witnesses § 91

USCS, Constitution, Amendments 4, 5

L Ed Digest, Search and Seizure § 11.5; Witnesses § 88

L Ed Index, Search and Seizure; Self-Incrimination; Stop and Identify

Annotation References

Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity--Supreme Court cases. 104 L Ed 2d 1046.

What constitutes "seizure" within meaning of Federal Constitution's Fourth Amendment [***42] -- Supreme Court cases. 100 L Ed 2d 981.

Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination--Supreme Court cases. 32 L Ed 2d 869.

Comment note.--What provisions of the Federal Constitution's Bill of Rights are applicable to the states. 18 L Ed 2d 1388, 23 L Ed 2d 985.

Necessity and manner of establishing incriminating nature of answer, where witness invokes privilege against self-incrimination. 95 L Ed 1126.

124 S. Ct. 1354, *; 158 L. Ed. 2d 177, **;
2004 U.S. LEXIS 1838, ***; 72 U.S.L.W. 4229

MICHAEL D. CRAWFORD, Petitioner v. WASHINGTON

No. 02-9410

SUPREME COURT OF THE UNITED STATES

124 S. Ct. 1354; 158 L. Ed. 2d 177; 2004 U.S. LEXIS 1838; 72 U.S.L.W. 4229; 63 Fed. R. Evid. Serv. (Callaghan) 1077; 17 Fla. L. Weekly Fed. S 181

November 10, 2003, Argued
March 8, 2004, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON. State v. Crawford, 147 Wn.2d 424, 54 P.3d 656, 2002 Wash. LEXIS 598 (2002)

DISPOSITION: Reversed and remanded.

LexisNexis(R) Headnotes

SYLLABUS:

[**183] Petitioner was tried for assault and attempted murder. The State sought to introduce a recorded statement that petitioner's wife Sylvia had made during police interrogation, as evidence that the stabbing was not in self-defense. Sylvia did not testify at trial because of Washington's marital privilege. Petitioner argued that admitting the evidence would violate his Sixth Amendment right to be "confronted with the witnesses against him." Under *Ohio* v. *Roberts,* 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531, that right does not bar admission of an unavailable witness's statement against a criminal defendant if the statement [***2] bears "adequate 'indicia of reliability,'" a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Id.*, at 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531. The trial court admitted the statement on the latter ground. The State Supreme Court upheld the conviction, deeming the statement reliable because it was nearly identical to, *i.e.,* interlocked with, petitioner's own statement to the police, in that both were ambiguous as to whether the victim had drawn a weapon before petitioner assaulted him.

Held:

The State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.

(a) The Confrontation Clause's text does not alone resolve this case, so this Court turns to the Clause's historical background. That history supports two principles. First, the principal evil at which the Clause was directed was the civil-law mode of criminal procedure, particularly the use of *ex parte* examinations as evidence against the accused. The Clause's primary object is [***3] testimonial hearsay, and interrogations by law enforcement officers fall squarely within that class. Second, the Framers 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 had a prior opportunity for cross-examination. English authorities and early state cases indicate that this was the common law at the time of the founding. And the "right . . . to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the common-law right of [**184] confrontation, admitting only those exceptions established at the time of the founding. See *Mattox* v. *United States,* 156 U.S. 237, 243, 39 L. Ed. 409, 15 S. Ct. 337.

(b) This Court's decisions have generally remained faithful to the Confrontation Clause's original meaning. See, *e.g., Mattox, supra.* .

(c) However, the same cannot be said of the rationales of this Court's more recent decisions. See *Roberts, supra,* at 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531. The *Roberts* test departs from historical principles because it admits statements consisting of *ex parte* testimony upon a mere reliability [***4] finding.

(d) The Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Roberts* allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability, thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one.

(e) *Roberts'* framework is unpredictable. Whether a statement is deemed reliable depends on which factors a judge considers and how much weight he accords each of them. However, the unpardonable vice of the *Roberts* test is its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.

(f) The instant case is a self-contained demonstration of *Roberts'* unpredictable and inconsistent application. It also reveals *Roberts'* failure to interpret the Constitution in a way that secures its intended constraint on judicial discretion. The Constitution prescribes the procedure for determining the reliability of testimony in criminal trials, and this Court, no less than the state courts, lacks authority [***5] to replace it with one of its own devising.

147 Wash. 2d 424, 54 P. 3d 656, reversed and remanded.

COUNSEL:

Jeffrey L. Fisher argued the cause for petitioner.

Michael R. Dreeben argued the cause for the United States, as amicus curiae, by special leave of court.

Steven C. Sherman argued the cause for respondent.

JUDGES: Scalia, J., delivered the opinion of the Court, in which Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ., joined. Rehnquist, C. J., filed an opinion concurring in the judgment, in which O'Connor, J., joined.

OPINIONBY: SCALIA

OPINION: [*1356] Justice **Scalia** delivered the opinion of the Court.

[**LEdHR1A] [1A] Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for [*1357] the jury Sylvia's tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination. The Washington Supreme Court upheld petitioner's conviction after determining that Sylvia's statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

I

On August 5, 1999, Kenneth Lee was stabbed at his apartment. Police arrested petitioner later that night. After giving petitioner and his wife *Miranda* warnings, detectives [***6] interrogated each of them twice. Petitioner eventually confessed that he and Sylvia had gone in search of Lee [**185] because he was upset over an earlier incident in which Lee had tried to rape her. The two had found Lee at his apartment, and a fight ensued in which Lee was stabbed in the torso and petitioner's hand was cut.

Petitioner gave the following account of the fight:

> "Q. Okay. Did you ever see anything in [Lee's] hands?
>
> "A. I think so, but I'm not positive.
>
> "Q. Okay, when you think so, what do you mean by that?
>
> "A. I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I, my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later." App. 155 (punctuation added).

Sylvia generally corroborated petitioner's story about the events leading up to the fight, but her account of the fight itself was [***7] arguably different--particularly with respect to whether Lee had drawn a weapon before petitioner assaulted him:

> "Q. Did Kenny do anything to fight back from this assault?

"A. (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what.

"Q. After he was stabbed?

"A. He saw Michael coming up. He lifted his hand . . . his chest open, he might [have] went to go strike his hand out or something and then (inaudible).

"Q. Okay, you, you gotta speak up.

"A. Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant).

"Q. Okay, when he's standing there with his open hands, you're talking about Kenny, correct?

"A. Yeah, after, after the fact, yes.

"Q. Did you see anything in his hands at that point?

"A. (pausing) um um (no)." *Id.*, at 137 (punctuation added).

[**LEdHR2] [2] The State charged petitioner [***8] with assault and attempted murder. At trial, he claimed self-defense. Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent. See Wash. Rev. Code § 5.60.060(1) (1994). [*1358] In Washington, this privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, see *State* v. *Burden*, 120 Wn. 2d 371, 377, 841 P.2d 758, 761 (1992), so the State sought to introduce Sylvia's tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to Lee's apartment and thus had facilitated [**186] the assault, the State invoked the hearsay exception for statements against penal interest, Wash. Rule Evid. 804(b)(3) (2003).

Petitioner countered that, state law notwithstanding, admitting the evidence would violate his federal constitutional right to be "confronted with the witnesses against him." Amdt. 6. According to our description of that right in *Ohio* v. *Roberts,* 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), it does not bar admission of an unavailable witness's statement against a criminal defendant [***9] if the statement bears "adequate 'indicia of reliability.'" *Id.*, at 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531. To meet that test, evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Ibid.* The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or "justified reprisal"; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a "neutral" law enforcement officer. App. 76-77. The prosecution played the tape for the jury and relied on it in closing, arguing that it was "damning evidence" that "completely refutes [petitioner's] claim of self-defense." Tr. 468 (Oct. 21, 1999). The jury convicted petitioner of assault.

The Washington Court of Appeals reversed. It applied a nine-factor test to determine whether Sylvia's statement bore particularized guarantees of trustworthiness, and noted several reasons why it did not: The statement contradicted one she had previously given; it was made in response to specific questions; [***10] and at one point she admitted she had shut her eyes during the stabbing. The court considered and rejected the State's argument that Sylvia's statement was reliable because it coincided with petitioner's to such a degree that the two "interlocked." The court determined that, although the two statements agreed about the events leading up to the stabbing, they differed on the issue crucial to petitioner's self-defense claim: "[Petitioner's] version asserts that Lee may have had something in his hand when he stabbed him; but Sylvia's version has Lee grabbing for something only after he has been stabbed." App. 32.

The Washington Supreme Court reinstated the conviction, unanimously concluding that, although Sylvia's statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness: "'[W]hen a codefendant's confession is virtually identical [to, *i.e.*, interlocks with,] that of a defendant, it may be deemed reliable.'" 147 Wash. 2d 424, 437, 54 P. 3d 656, 663 (2002) (quoting *State* v. *Rice*, 120 Wn. 2d 549, 570, 844 P.2d 416, 427 (1993)). The court explained:

"Although the Court of Appeals concluded that the statements [***11] were contradictory, upon closer inspection they appear to overlap. . . .

"[B]oth of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure

when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, [**187] if ever, Lee possessed a weapon. In this respect they overlap.

[*1359] "[N]either Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." 147 Wash. 2d, at 438-439, 54 P. 3d, at 664 (internal quotation marks omitted). n1

n1 The court rejected the State's argument that guarantees of trustworthiness were unnecessary since petitioner waived his confrontation rights by invoking the marital privilege. It reasoned that "forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice." 147 Wash. 2d, at 432, 54 P. 3d, at 660. The State has not challenged this holding here. The State also has not challenged the Court of Appeals' conclusion (not reached by the State Supreme Court) that the confrontation violation, if it occurred, was not harmless. We express no opinion on these matters.

[***12]

We granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause. 539 U.S. 914, 157 L. Ed. 2d 309, 124 S. Ct. 460 (2003).

II

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer* v. *Texas,* 380 U.S. 400, 406, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965). As noted above, *Roberts* says that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability--*i.e.*, falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U.S., at 66, 13 L. Ed. 2d 923, 85 S. Ct. 1065. Petitioner argues that this test strays from the original meaning of the Confrontation Clause and urges us to reconsider it.

A

The Constitution's text does not alone resolve this case. One could plausibly read "witnesses against" a defendant to mean those who actually testify at trial, cf. *Woodsides* v. *State*, 3 Miss. 655, 664-665, 1 Morr. St. Cas. 95 (1837), those whose statements are offered at [***13] trial, see 3 J. Wigmore, Evidence § 1397, p 104 (2d ed. 1923) (hereinafter Wigmore), or something in-between, see *infra*, at ____ - ____, 158 L. Ed. 2d, at 192-193. We must therefore turn to the historical background of the Clause to understand its meaning.

The right to confront one's accusers is a concept that dates back to Roman times. See *Coy* v. *Iowa,* 487 U.S. 1012, 1015, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988); Herrmann & Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l L. 481 (1994). The founding generation's immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers. See 3 W. Blackstone, Commentaries on the Laws of England 373-374 (1768).

[**188] Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court [***14] in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.* the witnesses against him, brought before him face to face." 1 J. Stephen, History of the [*1360] Criminal Law of England 326 (1883). In some cases, these demands were refused. See 9 W. Holdsworth, History of English Law 216-217, 228 (3d ed. 1944); *e.g., Raleigh's Case*, 2 How. St. Tr. 1, 15-16, 24 (1603); *Throckmorton's Case*, 1 How. St. Tr. 869, 875-876 (1554); cf. *Lilburn's Case*, 3 How. St. Tr. 1315, 1318-1322, 1329 (Star Chamber 1637).

Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 *id.*, c. 10 (1555). These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial. See J. Langbein, Prosecuting Crime in the Renaissance 21-34 (1974). Whatever the original

purpose, however, they came to be used as evidence [***15] in some cases, see 2 M. Hale, Pleas of the Crown 284 (1736), resulting in an adoption of continental procedure. See 4 Holdsworth, *supra*, at 528-530.

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." 1 D. Jardine, Criminal Trials 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ." 2 How. St. Tr., at 15-16. The judges refused, *id.*, at 24, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," *id.*, at 15, the jury convicted, and Raleigh was [***16] sentenced to death.

One of Raleigh's trial judges later lamented that "'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'" 1 Jardine, *supra*, at 520. Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused "face to face" at his arraignment. *E.g.*, 13 Car. 2, c. 1, § 5 (1661); see 1 Hale, *supra*, at 306. Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. See *Lord Morley's Case*, 6 How. St. Tr. 769, 770-771 (H. L. 1666); 2 Hale, *supra*, at 284; 1 Stephen, *supra*, at 358. Several authorities also stated that a suspect's confession [**189] could be admitted only against himself, and not against others he implicated. See 2 W. Hawkins, Pleas of the Crown c. 46, § 3, pp 603-604 (T. Leach 6th ed. 1787); 1 Hale, *supra*, at 585, n *(k)*; 1 G. Gilbert, Evidence 216 (C. Lofft ed. 1791); cf. *Tong's Case*, Kel. J. 17, 18, 84 Eng. Rep. 1061, 1062 (1662) [***17] (treason). But see *King* v *Westbeer*, 1 Leach 12, 168 Eng. Rep. 108, 109 (1739).

One recurring question was whether the admissibility of an unavailable witness's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him. In 1696, the Court of King's Bench answered this question in the affirmative, in the widely reported misdemeanor libel case of *King* v *Paine*, 5 Mod. 163, 87 Eng. Rep. 584. The court ruled that, even though a witness was dead, his examination was not admissible [*1361] where "the defendant not being present when [it was] taken before the mayor . . . had lost the benefit of a cross-examination." *Id.*, at 165, 87 Eng. Rep., at 585. The question was also debated at length during the infamous proceedings against Sir John Fenwick on a bill of attainder. Fenwick's counsel objected to admitting the examination of a witness who had been spirited away, on the ground that Fenwick had had no opportunity to cross-examine. See *Fenwick's Case*, 13 How. St. Tr. 537, 591-592 (H. C. 1696) (Powys) ("[T]hat which they would offer is something that Mr. Goodman hath sworn when he was [***18] examined . . .; sir J. F. not being present or privy, and no opportunity given to cross-examine the person; and I conceive that cannot be offered as evidence . . ."); *id.*, at 592 (Shower) ("[N]o deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him . . . . [O]ur constitution is, that the person shall see his accuser"). The examination was nonetheless admitted on a closely divided vote after several of those present opined that the common-law rules of procedure did not apply to parliamentary attainder proceedings--one speaker even admitting that the evidence would normally be inadmissible. See *id.*, at 603-604 (Williamson); *id.*, at 604-605 (Chancellor of the Exchequer); *id.*, at 607; 3 Wigmore § 1364, at 22-23, n 54. Fenwick was condemned, but the proceedings "must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination." *Id.*, § 1364, at 22; cf. *Carmell* v. *Texas,* 529 U.S. 513, 526-530, 146 L. Ed. 2d 577, 120 S. Ct. 1620 (2000).

Paine had settled [***19] the rule requiring a prior opportunity for cross-examination as a matter of common law, but some doubts remained over whether the Marian statutes prescribed an exception to it in felony cases. The statutes did not identify the circumstances under which examinations were admissible, see 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 *id.*, c. 10 (1555), and some inferred that no prior opportunity for cross-examination was required. See *Westbeer, supra*, at 12, 168 Eng. Rep., at 109; compare *Fenwick's Case*, 13 How St. Tr., at 596 (Sloane), with *id.*, at 602 (Musgrave). Many who expressed this view acknowledged that it meant the statutes were in derogation of the common law. See *King* v *Eriswell*, 3 T. R. 707, 710, 100 Eng. Rep. 815, 817 (K. B. 1790) (Grose, J.) (dicta); *id.*, at 722-723, 100 Eng. [**190] Rep., at 823-824 (Kenyon, C. J.) (same); compare 1 Gilbert, Evidence, at 215 (admissible only "by Force 'of the Statute'"), with *id.*, at 65. Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices

of the peace in felony cases. See *King* v [***20] *Dingler*, 2 Leach 561, 562-563, 168 Eng. Rep. 383, 383-384 (1791); *King* v *Woodcock*, 1 Leach 500, 502-504, 168 Eng. Rep. 352, 353 (1789); cf. *King* v *Radbourne*, 1 Leach 457, 459-461, 168 Eng. Rep. 330, 331-332 (1787); 3 Wigmore § 1364, at 23. Early 19th-century treatises confirm that requirement. See 1 T. Starkie, Evidence 95 (1826); 2 *id.*, at 484-492; T. Peake, Evidence 63-64 (3d ed. 1808). When Parliament amended the statutes in 1848 to make the requirement explicit, see 11 & 12 Vict., c. 42, § 17, the change merely "introduced in terms" what was already afforded the defendant "by the equitable construction of the law." *Queen* v *Beeston*, 29 Eng. L. & Eq. R. 527, 529 (Ct. Crim. App. 1854) (Jervis, C. J.). n2

> n2 There is some question whether the requirement of a prior opportunity for cross-examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes. See 3 Wigmore § 1364, at 23 (requirement "never came to be conceded at all in England"); T. Peake, Evidence 64, n *(m)* (3d ed. 1808) (not finding the point "expressly decided in any reported case"); *State* v. *Houser*, 26 Mo. 431, 436 (1858) ("there may be a few cases . . . but the authority of such cases is questioned, even in [England], by their ablest writers on common law"); *State* v. *Campbell*, 30 S.C.L. 124 (1844) (point "has not . . . been plainly adjudged, even in the English cases"). Whatever the English rule, several early American authorities flatly rejected any special status for coroner statements. See *Houser*, *supra*, at 436; *Campbell*, *supra*, at 130; T. Cooley, Constitutional Limitations *318.

[***21]

[*1362] B

Controversial examination practices were also used in the Colonies. Early in the 18th century, for example, the Virginia Council protested against the Governor for having "privately issued several commissions to examine witnesses against particular men *ex parte*," complaining that "the person accused is not admitted to be confronted with, or defend himself against his defamers." A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, reprinted in 9 English Historical Documents 253, 257 (D. Douglas ed. 1955). A decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-law procedures and thus routinely took testimony by deposition or private judicial examination. See 5 Geo. 3, c. 12, § 57 (1765); Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub. L. 381, 396-397 (1959). Colonial representatives protested that the Act subverted their rights "by extending the jurisdiction of the courts of admiralty beyond its ancient limits." Resolutions of the Stamp Act Congress § 8th (Oct. 19, 1765), reprinted in Sources of Our [***22] Liberties 270, 271 (R. Perry & J. Cooper eds. 1959). John Adams, defending a merchant in a high-profile admiralty case, argued: "Examinations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them." Draft of Argument in *Sewall* v *Hancock* (1768-1769), in 2 Legal Papers of John Adams 194, 207 (K. Wroth & H. Zobel eds. 1965).

[**191] Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation. See Virginia Declaration of Rights § 8 (1776); Pennsylvania Declaration of Rights § IX (1776); Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch. I, § X (1777); Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783), all reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 235, 265, 278, 282, 287, 323, 342, 377 (1971). The proposed Federal Constitution, however, did not. At the Massachusetts ratifying convention, Abraham Holmes objected [***23] to this omission precisely on the ground that it would lead to civil-law practices: "The mode of trial is altogether indetermined; . . . whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told. . . . [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the *Inquisition.*" 2 Debates on the Federal Constitution 110-111 (J. Elliot 2d ed. 1863). Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized the [*1363] use of "written evidence" while objecting to the omission of a vicinage right: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Schwartz, *supra*, at 469, 473. The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment. [***24]

Early state decisions shed light upon the original understanding of the common-law right. *State* v. *Webb*, 2 N. C. 103 (1794) *(per curiam),* decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.,* at 104.

Similarly, in *State* v. *Campbell*, 30 S.C.L. 124 (1844), South Carolina's highest law court excluded a deposition taken by a coroner in the absence of the accused. It held: "[I]f we are to decide the question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are *ex parte*, and, therefore, utterly incompetent." *Id.*, at 125. The court said that one of [***25] the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." *Ibid.*

Many other decisions are to the [**192] same effect. Some early cases went so far as to hold that prior testimony was inadmissible in criminal cases *even if* the accused had a previous opportunity to cross-examine. See *Finn* v. *Commonwealth*, 26 Va. 701, 708 (1827); *State* v. *Atkins*, 1 Tenn. 229 (1807) *(per curiam).* Most courts rejected that view, but only after reaffirming that admissibility depended on a prior opportunity for cross-examination. See *United States* v. *Macomb*, 26 F. Cas. 1132, 1133 (No. 15,702) (CC Ill 1851); *State* v. *Houser*, 26 Mo. 431, 435-436 (1858); *Kendrick* v. *State*, 29 Tenn. 479, 485-488 (1850); *Bostick* v. *State*, 22 Tenn. 344, 345-346 (1842); *Commonwealth* v. *Richards*, 35 Mass. 434, 437, 18 Pick. 434 (1837); *State* v. *Hill*, 20 S.C.L. 607, 608-610 (S. C. 1835); *Johnston* v. *State*, 10 Tenn. 58, 59 (1821). [***26] Nineteenth-century treatises confirm the rule. See 1 J. Bishop, Criminal Procedure § 1093, p 689 (2d ed. 1872); T. Cooley, Constitutional Limitations *318.

III

[**LEdHR3A] [3A] [**LEdHR4A] [4A] This history supports two inferences about the meaning of the Sixth Amendment.

A

[**LEdHR3B] [3B] [**LEdHR5A] [5A] First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

[*1364] Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore § 1397, at 101; accord, *Dutton* v. *Evans,* 400 U.S. 74, 94, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970) (Harlan, J., concurring in result). Leaving the regulation of out-of-court statements [***27] to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

[**LEdHR5B] [5B] This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

[**LEdHR3C] [3C] The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused--in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance [***28] does not. The [**193] constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . .

contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White* v. *Illinois,* 502 U.S. 346, 365, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define [***29] the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition--for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, *e.g., Campbell,* 30 S.C.L., at 130. Under the Marian statutes, witnesses were typically put on oath, but suspects [*1365] were not. See 2 Hale, Pleas of the Crown, at 52. Yet Hawkins and others went out of their way to caution that such unsworn confessions were not admissible against anyone but the confessor. See *supra,* at ____, 158 L.Ed. 2d, at 189. n3

n3 These sources--especially Raleigh's trial--refute the Chief Justice's assertion, *post,* at ____, 158 L. Ed. 2d, at 204-205 (opinion concurring in judgment), that the right of confrontation was not particularly concerned with unsworn testimonial statements. But even if, as he claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference. We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK. (The claim that unsworn testimony was self-regulating because jurors would disbelieve it, cf. *post,* at ____, n 1, 158 L. Ed. 2d, at 204, is belied by the very existence of a general bar on unsworn testimony.) Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation--what the Chief Justice calls use of a "proxy," *post,* at ____, 158 L. Ed. 2d, at 204-205 but that is hardly a reason not to make the estimation as accurate as possible. Even if, as the Chief Justice mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.

[***30]

That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not [**194] magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. See 1 Stephen, Criminal Law of England, at 221; Langbein, Prosecuting Crime in the Renaissance, at 34-45. England did not have a professional police force until the 19th century, see 1 Stephen, *supra,* at 194-200, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.

[**LEdHR3D] [3D] [**LEdHR6A] [6A] In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class. n4

n

[**LEdHR6B] [6B] We use the term "interrogation" in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island* v. *Innis,* 446 U.S. 291, 300-301, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980). Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.

[***31]

B

[**LEdHR4B] [4B] The historical record also supports a second proposition: that the Framers 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 had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right . . . to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox* v. *United States,* 156 U.S. 237, 243, 39 L. Ed. 409, 15 S. Ct. 337 (1895); cf. *Houser*, 26 Mo., at 433-435. As the English authorities above reveal, [*1366] the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country. n5

n5 The Chief Justice claims that English law's treatment of testimonial statements was inconsistent at the time of the framing, *post*, at ____ - ____, 158 L. Ed. 2d, at 205-206, but the examples he cites relate to examinations under the Marian statutes. As we have explained, to the extent Marian examinations were admissible, it was only because the statutes *derogated* from the common law. See *supra*, at ____, 158 L. Ed. 2d, at 189-190. Moreover, by 1791 even the statutory-derogation view had been rejected with respect to justice-of-the-peace examinations--explicitly in *King* v *Woodcock*, 1 Leach 500, 502-504, 168 Eng. Rep. 352, 353 (1789), and *King* v *Dingler*, 2 Leach 561, 562-563, 168 Eng. Rep. 383, 383-384 (1791), and by implication in *King* v *Radbourne*, 1 Leach 457, 459-461, 168 Eng. Rep. 330, 331-332 (1787).

None of the Chief Justice's citations proves otherwise. *King* v *Westbeer*, 1 Leach 12, 168 Eng. Rep. 108 (1739), was decided a half-century earlier and cannot be taken as an accurate statement of the law in 1791 given the directly contrary holdings of *Woodcock* and *Dingler*. Hale's treatise is older still, and far more ambiguous on this point, see 1 M. Hale, Pleas of the Crown 585-586 (1736); some who espoused the requirement of a prior opportunity for cross-examination thought it entirely consistent with Hale's views. See *Fenwick's Case*, 13 How. St. Tr. 537, 602 (H. C. 1696) (Musgrave). The only timely authority the Chief Justice cites is *King* v *Eriswell*, 3 T. R. 707, 100 Eng. Rep. 815 (K. B. 1790), but even that decision provides no substantial support. *Eriswell* was not a criminal case at all, but a Crown suit against the inhabitants of a town to charge them with care of an insane pauper. *Id.*, at 707-708, 100 Eng. Rep., at 815-816. It is relevant only because the judges discuss the Marian statutes in dicta. One of them, Buller, J., defended admission of the pauper's statement of residence on the basis of authorities that purportedly held *ex parte* Marian examinations admissible. *Id.*, at 713-714, 100 Eng. Rep., at 819. As evidence writers were quick to point out, however, his authorities said no such thing. See Peake, Evidence, at 64, n *(m)* ("Mr. J. Buller is reported to have said that it was so settled in 1 Lev. 180, and Kel. 55; certainly nothing of the kind appears in those books"); 2 T. Starkie, Evidence 487-488, n *(c)* (1826) ("Buller, J. . . . refers to *Radbourne*'s case . . .; but in that case the deposition was taken in the hearing of the prisoner, and of course the question did not arise" (citation omitted)). Two other judges, Grose, J., and Kenyon, C. J., responded to Buller's argument by distinguishing Marian examinations as a statutory exception to the common-law rule, but the context and tenor of their remarks suggest they merely *assumed* the accuracy of Buller's premise without independent consideration, at least with respect to examinations by justices of the peace. See 3 T. R., at 710, 100 Eng. Rep., at 817 (Grose, J.); *id.*, at 722-723, 100 Eng. Rep., at 823-824 (Kenyon, C. J.). In fact, the case reporter specifically notes in a footnote that their assumption was erroneous. See *id.*, at 710, n *(c),* 100 Eng. Rep., at 817, n *(c)*. Notably, Buller's position on pauper examinations was resoundingly rejected only a decade later in *King* v *Ferry Frystone*, 2 East 54, 55, 102 Eng. Rep. 289 (K. B. 1801) ("The point . . . has been since considered to be so clear against the admissibility of the evidence . . . that it was abandoned by the counsel . . . without argument"), further suggesting that his views on evidence were not mainstream at the time of the framing.

In short, none of the Chief Justice's sources shows that the law in 1791 was unsettled *even as to examinations by justices of the peace under the Marian statutes.* More importantly, however, even if the statutory rule in 1791 were in doubt, the numerous early state-court decisions make abundantly clear that the Sixth Amendment incorporated the *common-law* right of confrontation and not any exceptions the Marian statutes supposedly carved out from it. See *supra*, at ____ - ____, 158 L. Ed. 2d, at 191-192;

see also *supra*, at ____, n 2, 158 L. Ed. 2d, at 190 (coroner statements). The common-law rule had been settled since *Paine* in 1696. See *King* v *Paine*, 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (K. B.).

[***32]

[**LEdHR4C] [4C] We do not read the historical sources to say that a prior opportunity [**195] to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of [*1367] testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. This is not to deny, as the Chief Justice notes, that "[t]here were always exceptions to the general rule of exclusion" of hearsay evidence. *Post*, at ____, 158 L. Ed. 2d, at 206. Several had become well established by 1791. See 3 Wigmore § 1397, at 101; Brief for United States as *Amicus Curiae* 13, n 5. But there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case. n6 Most of the hearsay exceptions covered statements that by their nature were not testimonial--for example, business records [**196] or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony. Cf. *Lilly* v. *Virginia*, 527 U.S. 116, 134, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999) (plurality opinion) ("[A]ccomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to [***33] the hearsay rule"). n7

n6 The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, *e.g.*, *Mattox* v. *United States*, 156 U.S. 237, 243-244, 39 L. Ed. 409, 15 S. Ct. 337 (1895); *King* v *Reason*, 16 How. St. Tr. 1, 24-38 (K. B. 1722); 1 D. Jardine, Criminal Trials 435 (1832); Cooley, Constitutional Limitations, at *318; 1 G. Gilbert, Evidence 211 (C. Lofft ed. 1791); see also F. Heller, The Sixth Amendment 105 (1951) (asserting that this was the *only* recognized criminal hearsay exception at common law). Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. See *Woodcock*, *supra*, at 501-504, 168 Eng. Rep., at 353-354; *Reason*, *supra*, at 24-38; Peake, Evidence, at 64; cf. *Radbourne*, *supra*, at 460-462, 168 Eng. Rep., at 332-333. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*. [***34]

n7

[**LEdHR4D] [4D] We cannot agree with the Chief Justice that the fact "[t]hat a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions." *Post*, at ____, 158 L. Ed. 2d, at 206-207. Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse--a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

IV

[**LEdHR4E] [4E] Our case law has been largely consistent with these two principles. Our leading early decision, for example, involved a deceased witness's prior trial testimony. *Mattox* v. *United States*, 156 U.S. 237, 39 L. Ed. 409, 15 S. Ct. 337 (1895). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness: "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once [***35] had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . ." *Id.*, at 244, 39 L. Ed. 409, 15 S. Ct. 337.

Our later cases conform to *Mattox*'s holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi* v. *Stubbs*, 408 U.S. 204, 213-216, 33 L. Ed. 2d 293, 92 S. Ct. 2308 (1972); *California* v. *Green*, 399 U.S. 149, 165-168, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970); *Pointer* v. *Texas*, 380 U.S., at 406-408, 13 L. Ed. 2d 923, 85 S. Ct. 1065; cf. *Kirby* v. *United States*, 174 U.S. 47, 55-61, 43 L. Ed. 890, 19 S. Ct. 574 (1899). Even where the defendant had such an opportunity, [*1368] we excluded the testimony where the government had not established unavailability of the witness. See *Barber* v. *Page*, 390 U.S. 719, 722-725, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968); cf. *Motes* v. *United States*, 178 U.S. 458, 470-471, 44 L. Ed. 1150, 20 S. Ct. 993 (1900). We similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine. See *Roberts* v. *Russell*, 392 U.S. 293,

294-295, 20 L. Ed. 2d 1100, 88 S. Ct. 1921 (1968) *(per curiam); Bruton* v. *United States,* 391 U.S. 123, 126-128, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968); [***36] *Douglas* v. *Alabama,* 380 U.S. 415, 418-420, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965). In contrast, we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. See *Dutton* v. *Evans,* 400 U.S., at 87-89, 27 L. Ed. 2d213, 91 S. Ct. 210 (plurality opinion).

Even our recent cases, in their outcomes, hew closely to the traditional line. *Ohio* v. *Roberts,* 448 U.S., at 67-70, 65 L. Ed. 2d 597, 100 S. Ct. 2531, admitted testimony from a preliminary hearing at which the defendant had examined the witness. *Lilly* v *Virginia, supra,* excluded testimonial statements that the defendant had had no opportunity to test by cross-examination. And *Bourjaily* v. [**197] *United States,* 483 U.S. 171, 181-184, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987), admitted statements made unwittingly to an FBI informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement. n8

n8 One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White* v. *Illinois,* 502 U.S. 346, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992), which involved, *inter alia,* statements of a child victim to an investigating police officer admitted as spontaneous declarations. *Id.*, at 349-35, 1116 L. Ed. 2d 848, 112 S. Ct. 736. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Thompson* v *Trevanion,* Skin. 402, 90 Eng. Rep. 179 (K. B. 1694). In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. See 502 U.S., at 348-349, 116 L. Ed. 2d 848, 112 S. Ct. 736. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable. We "[took] as a given . . . that the testimony properly falls within the relevant hearsay exceptions." *Id.*, at 351, n. 4, 116 L. Ed. 2d 848, 112 S. Ct. 736.

[***37]

Lee v. *Illinois,* 476 U.S. 530, 90 L. Ed. 2d 514, 106 S. Ct. 2056 (1986), on which the State relies, is not to the contrary. There, we *rejected* the State's attempt to admit an accomplice confession. The State had argued that the confession was admissible because it "interlocked" with the defendant's. We dealt with the argument by rejecting its premise, holding that "when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." *Id.*, at 545, 90 L. Ed. 2d 514, 106 S. Ct. 2056. Respondent argues that "[t]he logical inference of this statement is that when the discrepancies between the statements *are* insignificant, then the codefendant's statement *may* be admitted." Brief for Respondent 6. But this is merely a possible inference, not an inevitable one, and we do not draw it here. If *Lee* had meant authoritatively to announce an exception--previously unknown to this Court's jurisprudence--for interlocking confessions, it would not have done so in such an oblique manner. Our only precedent on interlocking confessions had addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant's [***38] [*1369] *own* confession against him in a joint trial. See *Parker* v. *Randolph,* 442 U.S. 62, 69-76, 60 L. Ed. 2d 713, 99 S. Ct. 2132 (1979) (plurality opinion), abrogated by *Cruz* v. *New York,* 481 U.S. 186, 95 L. Ed. 2d 162, 107 S. Ct. 1714 (1987).

[**LEdHR4F] [4F] [**LEdHR7A] [7A] Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. n9

n9 The Chief Justice complains that our prior decisions have "never drawn a distinction" like the one we now draw, citing in particular *Mattox* v. *United States,* 156 U.S. 237, 39 L. Ed. 409, 15 S. Ct. 337 (1895), *Kirby* v. *United States,* 174 U.S. 47, 43 L. Ed. 890, 19 S. Ct. 574 (1899), and *United States* v. *Burr,* 25 F. Cas. 187, F. Cas. No. 14694 (No. 14,694) (CC Va 1807) (Marshall, C. J.). *Post,* at ____ - ____, 158 L. Ed. 2d, at 205-207. But nothing in these cases contradicts our holding in any way. *Mattox* and *Kirby* allowed or excluded evidence depending on whether the defendant had had an opportunity for cross-examination. *Mattox, supra,* at 242-244, 39 L. Ed. 409, 15 S. Ct. 337; *Kirby, supra,* at 55-61, 43 L. Ed. 890, 19 S. Ct. 574. That the two cases did not extrapolate a more general class of evidence to which that criterion applied does not prevent us from doing so now. As to *Burr,* we disagree

with the Chief Justice's reading of the case. Although Chief Justice Marshall made one passing reference to the Confrontation Clause, the case was fundamentally about the hearsay rules governing statements in furtherance of a conspiracy. The "principle so truly important" on which "inroad[s]" had been introduced was the "rule of evidence which rejects mere hearsay testimony." See 25 F. Cas., at 193. Nothing in the opinion concedes exceptions to the Confrontation Clause's exclusion of testimonial statements as we use the term. The Chief Justice fails to identify a single case (aside from one minor, arguable exception, see *supra*, at ____, n 8, 158 L. Ed. 2d, at 197), where we have admitted testimonial statements based on indicia of reliability other than a prior opportunity for cross-examination. If nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached.

[**LEdHR7B] [7B] Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California* v. *Green*, 399 U.S. 149, 162, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970). It is therefore irrelevant that the reliability of some out-of-court statements "'cannot be replicated, even if the declarant testifies to the same matters in court.'" *Post*, at ____, 158 L. Ed. 2d, at 206-207 (quoting *United States* v. *Inadi*, 475 U.S. 387, 395, 89 L. Ed. 2d 390, 106 S. Ct. 1121 (1986)). The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee* v. *Street*, 471 U.S. 409, 414, 85 L. Ed. 2d 425, 105 S. Ct. 2078 (1985).)

[***39]

[**198] V

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U.S., at 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531. This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause. See, *e.g.*, *Lilly*, [*1370] 527 U.S., at 140-143, 144 L. Ed. 2d 117, 119 S. Ct 1887 (Breyer, J., concurring); *White*, 502 U.S., at 366, 116 L. Ed. 2d 848, 112 S. Ct. 736 [***40] (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); A. Amar, The Constitution and Criminal Procedure 125-131 (1997); Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L. J. 1011 (1998). They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law--thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine--thus eliminating the excessive narrowness referred to above.

In *White*, we considered the first proposal and rejected it. 502 U.S., at 352-353, 116 L. Ed. 2d 848, 112 S. Ct. 736. Although our analysis in this [**199] case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition. This case does, however, squarely implicate the second proposal.

A

[**LEdHR8A] [8A] Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous [***41] notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more

conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

[**LEdHR9] [9] The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method [***42] of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See *Reynolds* v. *United States,* 98 U.S. 145, 158-159, 25 L. Ed. 244 (1879).

The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham's statements were self-inculpatory, 2 How. St. Tr., at 19, that they were not made in the heat of passion, *id.*, at 14, and that they were not "extracted from [him] upon any hopes or promise of Pardon," *id.*, at 29. It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these factors [*1371] before sentencing him to death. [***43] Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.

[**LEdHR8B] [8B] Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

[**200] B

The legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. See, *e.g., People* v. *Farrell*, 34 P. 3d 401, 406-407 (Colo. 2001) (eight-factor test). Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court [***44] held a statement more reliable because its inculpation of the defendant was "detailed," *id.*, at 407, while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting," *United States* v. *Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245 (2001). The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), see *Nowlin* v. *Commonwealth*, 40 Va. App. 327, 335-338, 579 S. E. 2d 367, 371-372 (2003), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect, see *State* v. *Bintz*, 2002 WI App. 204, P13, 257 Wis. 2d 177, 187, 650 N.W.2d 913, 918. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, *Farrell*, *supra*, at 407, while that same court, in another case, found a statement more reliable because two years had elapsed, *Stevens* v. *People*, 29 P. 3d 305, 316 (2001). [***45]

The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Despite the plurality's speculation in *Lilly*, 527 U.S., at 137, 144 L. Ed. 2d 117, 119 S. Ct. 1887, that it was "highly unlikely" that accomplice confessions implicating the accused could survive *Roberts*, courts continue routinely to admit them. See *Photogrammetric Data Servs., supra*, at 245-246; *Farrell*, *supra*, at 406-408; *Stevens*, *supra*, at 314-318; *Taylor* v. *Commonwealth*, 63 S. W. 3d 151, 166-168 (Ky. 2001); *State* v. *Hawkins*, 2002 Ohio 7347, No. 2001-P-0060, 2002 WL 31895118, PP34-37, *6 (Ohio App., Dec. 31, 2002); *Bintz*, *supra*, PP7-14, 257 Wis. 2d, at 183-188, 650 N. W. 2d, at 916-918; *People* v. *Lawrence*, 55 P. 3d 155, 160-161 (Colo. App. 2001); *State* v. *Jones*, 171 Ore. App. 375, 387-391, 15 P. 3d 616, 623-625 (2000); *State* v. *Marshall*, 136 Ohio App. 3d 742, 747-748, 737 N.E.2d 1005, 1009 (2000); *People* v. *Schutte*, 240 Mich. App. 713, 718-721, 613 N.W.2d 370, 376-377 (2000); [***46] *People* v. *Thomas*, 313 Ill. App. 3d 998, 1005-1007, 730 N.E.2d 618, 625-626, 246 Ill. Dec. 593 (2000); cf. *Nowlin*, *supra*, at 335-338, 579 S. E. 2d, at 371-372 (witness confessed to a related crime); [*1372] *People* v. *Campbell*, 309 Ill. App. 3d 423, 431-432, 721 N.E.2d 1225, 1230, 242 Ill. Dec. 694 (1999) (same). One recent study found that, after *Lilly*, appellate courts admitted accomplice statements to the authorities in 25 out of [**201] 70 cases--more than one-third of the time. Kirst, Appellate Court Answers to the Confrontation Questions in *Lilly v. Virginia*, 53

Syracuse L. Rev. 87, 105 (2003). Courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. See *United States* v. *Aguilar*, 295 F.3d 1018, 1021-1023 (CA9 2002) (plea allocution showing existence of a conspiracy); *United States* v. *Centracchio*, 265 F.3d 518, 527-530 (CA7 2001) (same); *United States* v. *Dolah*, 245 F.3d 98, 104-105 (CA2 2001) (same); *United States* v. *Petrillo*, 237 F.3d 119, 122-123 (CA2 2000) (same); *United States* v. *Moskowitz*, 215 F.3d 265, 268-269 (CA2 2000) [***47] (same); *United States* v. *Gallego*, 191 F.3d 156, 166-168 (CA2 1999) (same); *United States* v. *Papajohn*, 212 F.3d 1112, 1118-1120 (CA8 2000) (grand jury testimony); *United States* v. *Thomas*, 30 Fed. Appx. 277, 279 (CA4 2002) (same); *Bintz*, *supra*, PP15-22, 257 Wis. 2d, at 188-191, 650 N. W. 2d, at 918-920 (prior trial testimony); *State* v. *McNeill*, 140 N. C. App. 450, 457-460, 537 S. E. 2d 518, 523-524 (2000) (same).

To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial. As noted earlier, one court relied on the fact that the witness's statement was made to police while in custody on pending charges--the theory being that this made the statement more clearly against penal interest and thus more reliable. *Nowlin*, *supra*, at 335-338, 579 S. E. 2d, at 371-372. Other courts routinely rely on the fact that a prior statement is given under oath in judicial proceedings. *E.g.*, *Gallego*, *supra*, at 168 (plea allocution); [***48] *Papajohn*, *supra* , at 1120 (grand jury testimony). That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.

C

Roberts' failings were on full display in the proceedings below. Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case. Indeed, she had been told that whether she would be released "depend[ed] on how the investigation continues." App. 81. In response to often leading questions from police detectives, she implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim. Despite all this, the trial court admitted her statement, listing several reasons why it was reliable. In its opinion reversing, the Court of Appeals listed several *other* reasons why the statement was *not* reliable. Finally, the State Supreme Court relied exclusively on the interlocking character of the statement and disregarded every [***49] other factor the lower courts had considered. The case is thus a self-contained demonstration of *Roberts'* unpredictable and inconsistent application.

Each of the courts also made assumptions that cross-examination might well have undermined. The trial court, for example, stated that Sylvia Crawford's statement was reliable because she was an eyewitness with direct knowledge of the [**202] events. But Sylvia at one point told the police that she had "shut [her] eyes and . . . didn't really watch" part of the fight, and that she was "in shock." App. 134. [*1373] The trial court also buttressed its reliability finding by claiming that Sylvia was "being questioned by law enforcement, and, thus, the [questioner] is . . . neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant." *Id.*, at 77. The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by "neutral" government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her situation. Only cross-examination [***50] could reveal that.

[**LEdHR1B] [1B] The State Supreme Court gave dispositive weight to the interlocking nature of the two statements--that they were both ambiguous as to when and whether Lee had a weapon. The court's claim that the two statements were *equally* ambiguous is hard to accept. Petitioner's statement is ambiguous only in the sense that he had lingering doubts about his recollection: "A. I coulda swore I seen him goin' for somethin' before, right before everything happened. . . . [B]ut I'm not positive." *Id.*, at 155. Sylvia's statement, on the other hand, is truly inscrutable, since the key timing detail was simply assumed in the leading question she was asked: "Q. Did Kenny do anything to fight back from this assault?" *Id.*, at 137. Moreover, Sylvia specifically said Lee had nothing in his hands after he was stabbed, while petitioner was not asked about that.

The prosecutor obviously did not share the court's view that Sylvia's statement was ambiguous--he called it "damning evidence" that "completely refutes [petitioner's] claim of self-defense." Tr. 468 (Oct. 21, 1999). We have no way of knowing whether the jury agreed with the prosecutor or the court. Far from obviating [***51] the need for cross-examination, the "interlocking" ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth.

We readily concede that we could resolve this case by simply reweighing the "reliability factors" under

Roberts and finding that Sylvia Crawford's statement falls short. But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. Moreover, to reverse the Washington Supreme Court's decision after conducting our own reliability analysis would perpetuate, not avoid, what the Sixth Amendment condemns. The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be [***52] trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were [**203] loath to leave too much discretion in judicial hands. Cf. U.S. Const., Amdt. 6 (criminal jury trial); Amdt. 7 (civil jury trial); *Ring* v. *Arizona,* 536 U.S. 584, 611-612, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002) (Scalia, J., concurring). By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's--great state trials where the impartiality of even [*1374] those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts'* providing any meaningful protection in those circumstances.

* * *

[**LEdHR1C] [1C] [**LEdHR10] [10] Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial [***53] evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." n10 Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

n10 We acknowledge the Chief Justice's objection, *post,* at ____ - ____, 158 L. Ed. 2d, at 207-208, that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo. See *supra,* at ____ - ____, 158 L. Ed. 2d, at 200-201, and cases cited. The difference is that the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable.

[**LEdHR1D] [1D] In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no [***54] opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CONCURBY: REHNQUIST

CONCUR: Chief Justice **Rehnquist,** with whom Justice **O'Connor** joins, concurring in the judgment.

I dissent from the Court's decision to overrule *Ohio* v. *Roberts,* 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980). I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over [**204] future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.

The Court's distinction between testimonial and nontestimonial statements, contrary to its claim, [***55] is no better rooted in history than our current doctrine. Under the common law, although the courts were far from consistent, out-of-court statements made by someone other than the accused and not taken under oath, unlike *ex parte* depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based. n1 See, *e.g., King* v *Brasier*, 1 Leach 199, 200, [*1375] 168 Eng. Rep. 202 (K. B. 1779); see also J. Langbein, Origins of Adversary Criminal Trial 235-242 (2003); G. Gilbert, Evidence 152 (3d ed 1769). n2 Testimonial statements such as

accusatory statements to police officers likely would have been disapproved of in the 18th century, not necessarily because they resembled *ex parte* affidavits or depositions as the Court reasons, but more likely than not because they were not made under oath. n3 See *King* v *Woodcock*, 1 Leach 500, 503, 168 Eng. Rep. 352, 353 (1789) (noting that a statement taken by a justice of the peace may not be admitted into evidence unless taken under oath). Without an oath, one usually did not get to the second step of whether confrontation was required.

n1 Modern scholars have concluded that at the time of the founding the law had yet to fully develop the exclusionary component of the hearsay rule and its attendant exceptions, and thus hearsay was still often heard by the jury. See Gallanis, The Rise of Modern Evidence Law, 84 Iowa L. Rev. 499, 534-535 (1999); Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 738-746. In many cases, hearsay alone was generally not considered sufficient to support a conviction; rather, it was used to corroborate sworn witness testimony. See 5 J. Wigmore, Evidence, § 1364, pp 17, 19-20, 19, n 33 (J. Chadbourn rev. 1974) (hereinafter Wigmore) (noting in the 1600's and early 1700's testimonial and nontestimonial hearsay was permissible to corroborate direct testimony); see also J. Langbein, Origins of Adversary Criminal Trial 238-239 (2003). Even when unsworn hearsay was proffered as substantive evidence, however, because of the predominance of the oath in society, juries were largely skeptical of it. See Landsman, Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England, 75 Cornell L. Rev. 497, 506 (1990) (describing late 17th-century sentiments); Langbein, Criminal Trial before the Lawyers, 45 U. Chi. L. Rev. 263, 291-293 (1978). In the 18th century, unsworn hearsay was simply held to be of much lesser value than were sworn affidavits or depositions. [***56]

n2 Gilbert's noted in 1769:

"Hearsay is no Evidence . . . though a Person Testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath; and if a Man had been in Court and said the same Thing and had not sworn it, he had not been believed in a Court of Justice; for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without Oath, an Oath that there was such a Speech makes it no more than a bare speaking, and so of no Value in a Court of Justice, where all Things were determined under the Solemnities of an Oath . . . ."

n3 Confessions not taken under oath were admissible against a confessor because "'the most obvious Principles of Justice, Policy, and Humanity'" prohibited an accused from attesting to his statements. 1 G. Gilbert, Evidence 216 (C. Lofft ed. 1791). Still, these unsworn confessions were considered evidence only against the confessor as the Court points out, see *ante*, at ____, 158 L .Ed. 2d, at 193, and in cases of treason, were insufficient to support even the conviction of the confessor, 2 W. Hawkins, Pleas of the Crown, C. 46, § 4, p 604, n 3 (T. Leach 6th ed. 1787).

[***57]

Thus, while I agree that the Framers were mainly concerned about sworn affidavits and depositions, it does not follow that they were similarly concerned about the Court's broader category of testimonial statements. [**205] See 1 N. Webster, An American Dictionary of the English Language (1828) (defining "Testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. *Such affirmation in judicial proceedings, may be verbal or written, but must be under oath*" (emphasis added)). As far as I can tell, unsworn testimonial statements were treated no differently at common law than were nontestimonial statements, and it seems to me any classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today. n4

n4 The fact that the prosecution introduced an unsworn examination in 1603 at Sir Walter Raleigh's trial, as the Court notes, see *ante*, at ____, 158 L. Ed. 2d, at 193, says little about the Court's distinction between testimonial and nontestimonial statements. Our precedent indicates that unsworn testimonial statements, as do some nontestimonial statements, raise confrontation concerns once admitted into evidence, see, *e.g.*, *Lilly* v. *Virginia*, 527 U.S. 116, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999);

> *Lee* v. *Illinois,* 476 U.S. 530, 90 L. Ed. 2d 514, 106 S. Ct. 2056 (1986), and I do not contend otherwise. My point is not that the Confrontation Clause does not reach these statements, but rather that it is far from clear that courts in the late 18th century would have treated unsworn statements, even testimonial ones, the same as sworn statements.

[***58]

[*1376] I therefore see no reason why the distinction the Court draws is preferable to our precedent. Starting with Chief Justice Marshall's interpretation as a Circuit Justice in 1807, 16 years after the ratification of the Sixth Amendment, *United States* v. *Burr*, 25 F. Cas. 187, 193 (No. 14,694) (CC Va 1807), continuing with our cases in the late 19th century, *Mattox* v. *United States,* 156 U.S. 237, 243-244, 39 L. Ed. 409, 15 S. Ct. 337 (1895); *Kirby* v. *United States,* 174 U.S. 47, 54-57, 43 L. Ed. 890, 19 S. Ct. 574 (1899), and through today, *e.g., White* v. *Illinois,* 502 U.S. 346, 352-353, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992), we have never drawn a distinction between testimonial and nontestimonial statements. And for that matter, neither has any other court of which I am aware. I see little value in trading our precedent for an imprecise approximation at this late date.

I am also not convinced that the Confrontation Clause categorically requires the exclusion of testimonial statements. Although many States had their own Confrontation Clauses, they were of recent vintage and were not interpreted with any regularity before 1791. State cases that recently followed the ratification of the [***59] Sixth Amendment were not uniform; the Court itself cites state cases from the early 19th century that took a more stringent view of the right to confrontation than does the Court, prohibiting former testimony even if the witness was subjected to cross-examination. See *ante*, at ____, 158 L. Ed. 2d, at 191-192 (citing *Finn* v. *Commonwealth*, 26 Va. 701, 708 (1827); *State* v. *Atkins*, 1 Tenn. 229 (1807) *(per curiam)*).

Nor was the English law at the time of the framing entirely consistent in its treatment of testimonial evidence. Generally *ex parte* affidavits and depositions were excluded as the Court notes, but even that proposition was not universal. See *King* v *Eriswell*, 3 T. R. 707, 100 Eng. Rep. 815 (K. B. 1790) (affirming by an equally divided court the admission of an *ex parte* examination because the declarant was unavailable to testify); *King* v *Westbeer*, 1 [**206] Leach 12, 13, 168 Eng. Rep. 108, 109 (1739) (noting the admission of an *ex parte* affidavit); see also 1 M. Hale, Pleas of the Crown 585-586 (1736) (noting that statements of "accusers and witnesses" which were taken under oath could be admitted into evidence if [***60] the declarant was "dead or not able to travel"). Wigmore notes that sworn examinations of witnesses before justices of the peace in certain cases would not have been excluded until the end of the 1700's, 5 Wigmore § 1364, at 26-27, and sworn statements of witnesses before coroners became excluded only by statute in the 1800's, see *ibid.; id.,* § 1374, at 59. With respect to unsworn testimonial statements, there is no indication that once the hearsay rule was developed courts ever excluded these statements if they otherwise fell within a firmly rooted exception. See, *e.g., Eriswell, supra*, at 715-719 (Buller, J.), 720 (Ashhurst, J.), 100 Eng. Rep., at 819-822 (concluding that an *ex parte* examination was admissible as an exception to the hearsay rule because it was a declaration by a party of his state and condition). Dying declarations are one example. See, *e.g., Woodcock, supra*, at 502-504, 168 Eng. Rep., at 353-354; *King* v *Reason*, 16 How. St. Tr. 1, 22-23 (K. B. 1722).

[*1377] Between 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed. See n 1, *supra.* There were always [***61] exceptions to the general rule of exclusion, and it is not clear to me that the Framers categorically wanted to eliminate further ones. It is one thing to trace the right of confrontation back to the Roman Empire; it is quite another to conclude that such a right absolutely excludes a large category of evidence. It is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled.

To find exceptions to exclusion under the Clause is not to denigrate it as the Court suggests. Chief Justice Marshall stated of the Confrontation Clause: "I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important." *Burr*, 25 F. Cas., at 193. Yet, he recognized that such a right was not absolute, acknowledging that exceptions to the exclusionary component of the hearsay rule, which he considered as an "inroad" on the right to confrontation, had been introduced. [***62] See *ibid.*

Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made. We have recognized, for example, that co-conspirator statements simply "cannot be replicated, even if the declarant testifies to the same matters in court." *United States* v. *Inadi,* 475 U.S. 387, 395, 89 L. Ed. 2d 390, 106 S. Ct. 1121 (1986). Because the statements are

made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission "actually furthers the 'Confrontation Clause's very mission' which is to 'advance the accuracy of the truth-determining process in criminal [**207] trials.'" [**207] *Id.*, at 396, 89 L. Ed. 2d 390, 106 S. Ct. 1121 (quoting *Tennessee* v. *Street,* 471 U.S. 409, 415, 85 L. Ed. 2d 425, 105 S. Ct. 2078 (1985) (some internal quotation marks omitted)). Similar reasons justify the introduction of spontaneous declarations, see *White*, 502 U.S., at 356, 116 L. Ed. 2d 848, 112 S. Ct. 736, statements made in the course of procuring medical services, see *ibid.*, dying declarations, see *Kirby, supra*, at 61, 43 L. Ed. 2d 890, 19 S. Ct. 574, and countless other hearsay [***63] exceptions. That a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure. See *Kentucky* v. *Stincer,* 482 U.S. 730, 737, 96 L. Ed. 2d 631, 107 S. Ct. 2658 (1987) ("The right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial"); see also *Maryland* v. *Craig,* 497 U.S. 836, 845, 111 L. Ed. 2d 666, 110 S. Ct. 3157 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact"). "[I]n a given instance [cross-examination may] be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." 5 Wigmore § 1420, at 251. In such a case, as we noted over 100 years ago, "The law in its wisdom declares that the rights of [*1378] the public shall [***64] not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Mattox,* 156 U.S., at 243, 39 L. Ed. 2d 409, 15 S. Ct. 337; see also *Salinger* v. *United States,* 272 U.S. 542, 548, 71 L. Ed. 398, 47 S. Ct. 173 (1926). By creating an immutable category of excluded evidence, the Court adds little to a trial's truth-finding function and ignores this longstanding guidance.

In choosing the path it does, the Court of course overrules *Ohio* v. *Roberts,* 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), a case decided nearly a quarter of a century ago. *Stare decisis* is not an inexorable command in the area of constitutional law, see *Payne* v. *Tennessee,* 501 U.S. 808, 828, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991), but by and large, it "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," *id.*, at 827, 115 L. Ed. 2d 720, 111 S. Ct. 2597. And in making this appraisal, doubt that the new rule is indeed the "right" one should surely be weighed in the balance. Though there are no vested interests involved, unresolved questions for the future of everyday [***65] criminal trials throughout the country surely counsel the same sort of caution. The Court grandly declares that "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" *ante*, at ____, 158 L. Ed. 2d, at 203. But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists, see *ibid.*, is covered by the new rule. They need them now, not months or years from now. [**208] Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

To its credit, the Court's analysis of "testimony" excludes at least some hearsay exceptions, such as business records and official records. See *ante*, at ____, 158 L. Ed. 2d, at 195. To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process. Likewise to the Court's credit is its implicit recognition that the mistaken application of its new rule by courts which guess wrong as to the scope of the rule is subject to harmless-error analysis. See *ante,* at ____, n 1, 158 L. Ed. 2d, at 187.

But these are palliatives to what I believe is a mistaken change [***66] of course. It is a change of course not in the least necessary to reverse the judgment of the Supreme Court of Washington in this case. The result the Court reaches follows inexorably from *Roberts* and its progeny without any need for overruling that line of cases. In *Idaho* v. *Wright,* 497 U.S. 805, 820-824, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990), we held that an out-of-court statement was not admissible simply because the truthfulness of that statement was corroborated by other evidence at trial. As the Court notes, *ante*, at ____, 158 L. Ed. 2d, at 202, the Supreme Court of Washington gave decisive weight to the "interlocking nature of the two statements." No re-weighing of the "reliability factors," which is hypothesized by the Court, *ante*, at ____, 158 L. Ed. 2d, at 202, is required to reverse the judgment here. A citation to *Idaho* v *Wright, supra*, would suffice. For the reasons stated, I believe that this would be a far preferable course for the Court to take here.

REFERENCES: Go To Full Text Opinion

Go to Supreme Court Brief(s)

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21A Am Jur 2d, Criminal Law § 1182

USCS, Constitution, Amendment 6

L Ed Digest, Criminal Law § 51

L Ed Index, Confrontation of Witnesses

Annotation References

Federal constitutional right to confront witnesses--Supreme Court cases. 98 L Ed 2d 1115.

Supreme Court cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial error or harmless error. 31 L Ed 2d 921.

Marital privilege under Rule 501 of Federal Rules of Evidence. 46 ALR Fed 735.

Rafael Sanchez, Appellant v. THE STATE OF TEXAS

NO. 1051-03

COURT OF CRIMINAL APPEALS OF TEXAS

138 S.W.3d 324; 2004 Tex. Crim. App. LEXIS 1119

June 30, 2004, Delivered
June 30, 2004, Filed

NOTICE: [**1]

PUBLISH.

SUBSEQUENT HISTORY: As Corrected September 10, 2004.

PRIOR HISTORY: ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE DALLAS COURT OF APPEALS. DALLAS COUNTY. State v. Sanchez, 135 S.W.3d 698, 2003 Tex. App. LEXIS 3130 (Tex. App. Dallas, Apr. 10, 2003)

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

COUNSEL: FOR APPELLANT: RANDALL SCOTT, Grand Prairie, TX.

FOR STATE: PATRICIA POPPOFF NOBLE, MATTHEW R. FILPI, ASST. DA's, Dallas, TX,

JUDGES: Meyers, J., delivered the opinion of the Court, in which Keller, P.J., and Johnson, Holcomb, and Cochran, JJ., joined. Womack, Keasler, and Hervey, JJ., concurred. Price, J., filed a dissenting opinion.

OPINIONBY: Meyers

OPINION:

[*325] Appellee was charged in a Dallas municipal court with a consumer affairs violation. On the day the case was set for trial, he made an oral motion to quash the complaint. The municipal court granted Appellee's motion to quash in an unrecorded hearing. Arguing that the motion was untimely according to Texas Code of Criminal Procedure article 45.019(f)

, the State appealed to the County Criminal Court of Appeals, which affirmed the judgment of the municipal court. The State then appealed to the Dallas Court of Appeals, which in an *en banc* published opinion affirmed the judgment of the County Court of Criminal Appeals. Four judges dissented to the majority's opinion. The Court of Appeals overruled the State's motion for rehearing, and the State subsequently filed this petition for discretionary review.

n1 Unless otherwise noted, all future references to Articles refer to the Texas Code of Criminal Procedure.

[**2]

The issue in this case is one that has not been examined directly by this Court. Under article 45.019(f) of the Texas Code of Criminal Procedure, what does the phrase "before the date on which the trial on the merits commences" mean? TEX. CODE CRIM. PROC. ANN. art. 45.019(f) (Vernon 2002). Is the phrase to be interpreted by its literal meaning, in which case a defendant must object before the date on which the trial *starts*, or should the phrase mean, rather, that the defendant must object before the date on which the case is *set* for trial?

The overall goal when interpreting a statute is to give effect to the collective intent or purpose of the Legislature that enacted the statute. *Boykin v. State*, 818 S.W.2d 782,785 (Tex. Crim. App. 1991). To do so, one must focus on the literal text of the statute and try to discern the fair, objective meaning of that text. *Id.* If the meaning of the text is clear and unambiguous, the court

should give effect to that meaning. *Id.* If however, the statute is ambiguous or the plain meaning of the statute would lead to absurd consequences that the Legislature [**3] could not possibly have intended, extratextual sources may "then and only then, out of absolute necessity," be consulted. *Id.*

The first step is therefore to discern the plain meaning of the statute according to the literal text. *Boykin*, 818 S.W.2d at 785. Chapter 45 of the Texas Code of Criminal Procedure, which governs criminal actions in municipal and justice courts, states (in relevant part):

> If the defendant does not object to a defect, error, or irregularity of form or substance in a charging instrument *before the date on which the trial on the merits commences*, the defendant waives and forfeits the right to object to the defect, error, or irregularity.

Tex. Code Crim. Proc. Ann. art. 45.019(f) (Vernon 2002) (emphasis added). The Court of Appeals used the dictionary to find that "commence" means "to begin, start" or "to initiate formally by performing [*326] the first act." *State v. Sanchez*, 135 S.W.3d 698, 2003 Tex. App. LEXIS 3130, No. 05-02-00727-CR, (Tex. App.-Dallas, Apr. 10, 2003) at *3, citing WEBSTER'S THIRD NEW INT'L DICTIONARY 456 (1981). The court thus determined that, under the plain meaning of the statute, the defendant must object before the [**4] date on which trial *begins* or *starts*. *Id.* The court did not discuss when "trial on the merits" commences, but held that because the municipal court granted Appellee's motion to quash, trial did not commence on that day, and Appellee's motion was therefore timely.

The State argues that the Court of Appeals: 1) failed to consider instructive authority and 2) interpreted article 45.019(f) in a manner that leads to absurd consequences. The State urges that although the literal text of the statute would mean what the court of appeals claims, the results are so absurd that such a meaning could not have been intended by the Legislature. Rather, the State insists that the phrase "before the date on which the trial on the merits commences" should be construed to mean that the defendant must make a motion to quash before the date on which the case is *set* or *scheduled* for trial. Under the State's interpretation, then, Appellee's motion to quash, on the date the case was *set* for trial, was untimely.

Case Law

The State concedes that this Court has never before determined the meaning of "before the date on which the trial on the merits commences" in article 45.019(f), [**5] but cites to cases which have analyzed identical language in other Texas statutes. Because the language is the same, the State uses the cases for instructive purposes. In one instance, this Court interpreted the exact same language contained in article 1.14(b) of the Texas Code of Criminal Procedure. n2 *See State v. Turner*, 898 S.W.2d 303 (Tex. Crim. App. 1995), *overruled on other grounds, Proctor v. State*, 967 S.W.2d 840 (Tex. Crim. App. 1998). In *Turner*, on "the day of trial," the defendant filed a motion to dismiss the indictment, claiming it was barred by the statute of limitations. *Id.* at 306. The trial court granted the defendant's motion and, as a result, the case did not go to trial that day. The court of appeals affirmed. This Court reversed, stating that "by waiting until *the day of trial*" to object to the indictment, the defendant had waived his right to complain and the motion to dismiss the indictment was untimely. *Id.* (emphasis added).

> n2 Article 1.14(b) states, in relevant part: "If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information *before the date on which the trial on the merits commences*, he waives and forfeits the right to object . . . ."
>
> TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 2003) (emphasis added). Although article 1.14(b) refers to an "indictment or information" (instead of a "charging instrument" in article 45.019(f)), the distinction is irrelevant. *See Sanchez*, 2003 Tex. App. LEXIS 3130 at *13, n.5 (James, J., dissenting).

[**6]

The State insists that since the Court in *Turner* declared the defendant's motion untimely because it was made on "*the day of trial*," and since the motion was made on the date the case was *set* for trial but before anything had occurred to "begin" the trial, the language in the statute must mean that the motion needs to be filed before the date on which the case is *set* for trial. We disagree with the State's interpretation of *Turner*. In an important footnote, the majority in *Turner* responded to Judge Baird's dissent which asked the majority to determine when "trial on the merits commences." 898 S.W.2d at 310 (Baird, J. dissenting) ("Because the Legislature did not define when 'trial on the merits commences,' it is incumbent upon us to determine what constitutes trial on [*327] the merits in determining whether appellee's motion was timely"). In that footnote, the majority pointed out that neither of the parties raised the issue of when "trial on the merits commences," and the Court explicitly stated that it "[does] not address issues that are not addressed by the Court of Appeals or raised by the parties." *Id.* at 306, n.4. Furthermore, [**7]

the majority stated that the "Court of Appeals *assumed* that the day of trial was the date on which appellee's motion to dismiss was filed [and that] *neither party disputed the Court of Appeal's assumption* as to the date of trial or contended that this was not 'the date on which the trial commenced' for purposes of article 1.14(b)." *Id.* (emphasis added) (citations omitted). Thus, we decline to say the Court was implying that a motion to quash must be made before the date the cause is *set* for trial. If the Court was indeed deciding when "trial on the merits" commences, why would the Court respond in such a way to a dissent that alleged it had not answered the important issue? If any type of conclusion can be drawn from the footnote, we are inclined to believe that the Court was specifically pointing out that it did not decide the issue of "when trial on the merits commences" because the issue was not contested or raised. Therefore, *Turner* is unhelpful in our decision today.

The Court of Appeals' dissent cites to another case which it deems instructive. *See Sanchez*, 2003 Tex. App. LEXIS 3130 at *23 (James, J., dissenting), citing *Sodipo v. State,* 815 S.W.2d 551, 552 (Tex. Crim. App. 1990), [**8] *opinion on rehearing* at 1991 Tex. Crim. App. LEXIS 126 (June 12, 1991). In *Sodipo*, on "the day of trial," but prior to jury selection, the State moved to amend the indictment under article 28.10(a) of the Texas Code of Criminal Procedure. n3 815 S.W.2d at 552. The trial court allowed the amendment and proceeded with trial that day. *Id.* at 553. On rehearing, this Court noted that "neither Section (a) or (b) [of article 28.10] addresses an indictment amendment on the date of trial prior to the commencement of trial on the merits" and concluded that "the State was not permitted to amend the . . . indictment on the date of trial prior to the trial on the merits commencing." *State v. Sodipo*, 1991 Tex. Crim. App. LEXIS 126 at *2,4 (Tex. Crim. App. 1991). Justice James, in his dissenting opinion in *Sanchez*, attempts to convince us that by holding that the trial court should have denied the motion *"when faced* with [it]," the *Sodipo* Court of Appeals was saying that the motion must have been filed *before* the date of trial, whether or not the trial actually commenced on that day. [**9] *Sanchez*, 2003 Tex. App. LEXIS 3130 at *23. In other words, Justice James insists that the Court considered the motion to be untimely even before the trial court had decided to commence the trial on that day. He further declares that impaneling the jury was not "core" to the Court's decision. *Id.* But the Court's entire discussion pertains to a motion being made "on the date of trial *prior to the commencement of trial on the merits*." *State v. Sodipo*, 1991 Tex. Crim. App. LEXIS 126 at *1 (emphasis added). That suggests two things: 1) the Court did not equate the date set for trial with commencement of trial, and 2) the Court did not interpret the phrase "before the date on which the trial on the merits commences" in article 28.10 to mean that the motion must be filed before the day on which the case was *set* for trial, as the State suggests. If the Court had construed the phrase in such a manner, then why would it articulate the issue as determining [*328] the timeliness of a motion "on the date of trial *prior to the commencement of trial on the merits*[?]" 1991 Tex. Crim. App. LEXIS at *3 (emphasis added). And, *Sodipo* is distinguishable in another way: There, after the motion was made, [**10] but on the same day, the jury was impaneled and the trial *actually commenced*, unlike in the case at hand. 815 S.W.2d at 553; *see Sanchez*, 2003 Tex. App. LEXIS 3130 at *7 (there is no indication, and the State did not argue, that any steps were taken to commence trial on the merits).

> n3 Article 28.10 states, in relevant part: ". . . a matter of form or substance may be amended at any time *before the date the trial on the merits commences*." TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 2002) (emphasis added).

Absurd Results

The State maintains that applying the statute's plain meaning will lead to absurd results the Legislature could not possibly have intended. First, the State comments that applying the statute's literal text causes the timeliness of a motion to quash to be determined by subsequent events: If the court grants the motion to quash, the motion is timely because the trial will start at a later date; but, if the court denies the motion to quash [**11] and trial commences on that day, then the defendant's motion is untimely (after the fact) because it will not have been made on the day before trial commenced. The State is correct. But, as Appellee notes, a case may be set for trial numerous times. As such, under the State's proposed interpretation, if the case is re-set, the defendant is likewise uncertain as to when will be the particular day before which he must object for the motion to be timely. Therefore, the defendant faces an amount of uncertainty in either situation. Using the plain meaning of the statute, the defendant would still be aware that if the case goes to trial on the set date, then a motion on that date would be too late. Hence, he is on notice that he is taking a risk by objecting on that day. We decline to say that the Legislature could not have intended such a meaning.

Second, the State argues that applying the plain meaning of the statute encourages sandbagging, giving the State no notice and no opportunity to correct the error before trial. The State cites *Van Dusen v. State*, 744 S.W.2d 279 (Tex. App.- Dallas 1987), in support of this

concern. In *Van Dusen*, the defendant complained of [**12] the information for the first time on the day of trial. n4 The court of appeals analyzed article 1.14(b) of the Texas Code of Criminal Procedure and determined that the purpose of the statute was to eliminate sandbagging and to allow the State to correct defective indictments before a cause commences in the trial court. *Id.* at 280. But as the Court of Appeals and Appellee both note here, the State is not ambushed if the defendant chooses to wait until the day the case is set for trial to make his motion to quash. *See Sanchez*, 2003 Tex. App. LEXIS 3130 at *9. Instead, the State has two options if the motion is heard and granted. It can: 1) appeal the ruling under article 44.01(a)(1) of the Texas Code of Criminal Procedure, or 2) refile the complaint. *Id.* In effect, the judge has the ability to "ensure the complaint is not defective prior to trial." *Id.* These two options protect against the defendant sandbagging the State.

> n4 It is worth noting that the State had announced "ready" on January 27, 1986, but the case "did not come to be heard" until February 13, 1987. *Van Dusen*, 744 S.W.2d 279. The court did not distinguish between the date *set* for trial and the date trial *commenced* when it said the motion was made on "the day of trial." But the court did cite to *Aylor v. State*, 727 S.W.2d 727 (Tex. App.- Austin 1987, no writ), saying that a defendant waives his right to object to a defective indictment if it is "not objected to before the date on which the trial on the merits commences." 744 S.W.2d at 280 (citing *Aylor*, 727 S.W.2d at 730). Clearly then, the court did not consider the announcement of "ready" on January 27, presumably the date the case was *set* for trial, as the *commencement* of the trial on the merits.

[**13]

[*329] The State would like us to hold that the Legislature could not have intended the phrase "trial on the merits" to be applied literally because such an interpretation would cause absurd results. Instead, the State wants us to conclude that even though the Legislature used the particular phrase "trial on the merits," the only reasonable interpretation of the statute would be to add the words *set* or *scheduled*, so that the statute would essentially read, " . . . on the day before the trial on the merits is *set* to commence." We cannot agree with the State. The phrase "trial on the merits" is a term of art that specifies a "distinct phase late in a criminal proceeding." *See Tigner v. State*, 928 S.W.2d 540, 544 (Tex. Crim. App. 1996); *see also Turner*, 898 S.W.2d at 310 (Baird, J., dissenting) ('The phrase 'trial on the merits' designates the stage of trial where the substantive facts of the case are presented to the factfinder"). We have found no persuasive precedent that equates the phrase "trial on the merits" with the date a case is set for trial in this context. But we have found many court of appeals cases standing for the proposition that [**14] "trial on the merits" begins when the jury is impaneled and sworn. *See Hinojosa v.* State, 875 S.W.2d 339, 342 (Tex. App.- Corpus Christi 1994, no pet.) ("We hold that [, for purposes of article 28.10,] trial on the merits commences at the time that the jury is impaneled and sworn, i.e., at the same time that jeopardy attaches"); *Westfall v. State*, 970 S.W.2d 590, 592 (Tex. App.- Waco 1998, pet. ref'd) (For purposes of article 28.10, trial on the merits commences at the same time jeopardy attaches - when the jury is impaneled and sworn); *Thornton v. State*, 957 S.W.2d 153, 156 (Tex. App.- Ft. Worth 1997, *aff'd*, 986 S.W.2d 615 (Tex. Crim. App. 1999)) (For purposes of Texas Penal Code article 3.02, trial begins when jeopardy attaches, in other words, when the jury is impaneled and sworn); *Carpenter v. State*, 952 S.W.2d 1, 6 (Tex. App.- San Antonio 1997) (For purposes of article 28.10, "trial 'commences' at the same point that double jeopardy attaches - that is, on the day the jury is sworn"); *Dixon v. State*, 932 S.W.2d 567, (Tex. App.- Tyler 1995, no pet.) (Regarding article 28.10, "trial [**15] on the merits commences" when the jury is impaneled and sworn); *Garcia v. State*, 928 S.W.2d 666 (Tex. App.- Corpus Christi 1996, no pet.) (Trial on the merits commences when the jury is selected and sworn).

In the case *Sanders v. State*, 978 S.W.2d 597 (Tex. App.- Tyler 1997, pet. ref'd), the State twice moved to amend the indictment on the date the case was set for trial pursuant to article 28.10. *Id.* at 598. The trial court granted both of the State's motions. Appellant requested and received a ten-day continuance, and a jury was not selected until after that ten-day period. The court held that trial on the merits therefore had not commenced on that date. *Id.* In *Carpenter*, another article 28.10 case, the State moved to amend the indictment on the day that trial was "scheduled to start," even though the case did not go to trial that day. The defendant wanted the court to construe "date" in article 28.10 to mean "the day the trial is scheduled to start," as the State asks us to do here. *Id.* at 6. The court in *Carpenter*, however, was "not persuaded," and we are similarly not persuaded today. *Id.* at 6.

In [**16] *Turner*, the Court stated that article 1.14(b) "means what it says." 898 S.W.2d at 306. We likewise agree that article 45.019(f) means what it says. If the Legislature wanted the statute to mean that a defendant must make a motion to quash before the date on which the cause was *set* for trial, it could simply have said so, as it did in articles 28.01 and 46.03 of the Texas Code of Criminal Procedure. n5 [*330] Instead, the

Legislature chose a term of art tied to a specific meaning. And although some negative implications may result from the application of the statute's plain text, we cannot say that the results are so absurd that the Legislature could not have intended it to be interpreted as such. Consequently, we disagree with the State's suggestion that "before the date on which *trial on the merits commences*" should mean, essentially, "before the date on which the case is *set* for trial." Article 45.019(f) means what it says, that a party can move to quash a charging instrument at any time prior to the day on which the trial on the merits commences. n6 We therefore affirm the Court of Appeals.

n5 Article 28.01 says that a court can set a criminal case for a pre-trial hearing "before it is *set for trial* upon its merits." TEX. CODE CRIM. PROC. ANN. art. 28.01(1) (Vernon 2002) (emphasis added). Article 46.03 states that a defendant must file a notice of intent to offer evidence of the insanity defense "at least 10 days prior to the date the case is *set for trial*." *Id.* at. art. 46.03(2)(a)(1) (emphasis added). [**17]

n6 This opinion is not intended to indicate at exactly which point trial on the merits commences for the purposes of this statute. Rather, the opinion merely expresses that trial on the merits, under Article 45.019(f), does not necessarily commence on the date the case is set for trial.

Meyers, J.

DISSENTBY: Price

DISSENT:

Price, J., *filed a dissenting opinion.*

Code of Criminal Procedure Article 45.019(f) says that a defendant must object to any defects in a charging instrument filed in a justice or municipal court "before the date on which the trial on the merits commences." I understand the majority to say that, when Article 45.019(f) is read according to its plain meaning, the language quoted above refers to the date on which the trial *actually* begins. I also understand the majority to conclude that this does not produce an absurd result.

I cannot agree with the majority's second conclusion. As a result, I respectfully dissent.

The majority's construction of Article 45.019(f) will render the subsection meaningless if a trial court sustains the objection and [**18] quashes the charging instrument. n1 If the objection is sustained and thus, the trial does not commence, then it will not matter on what date the objection was raised. Thus, the Article's time bar is meaningless in that situation. I can think of no other instance in criminal law where a ruling on the merits can render an objection timely or not.

n1 I assume it would be the same for Article 1.14, which deals with objections to charging instruments in district or county courts, because the language is identical.

It is odd to assume that a trial will not commence on the date it is set for trial. Although trials are often reset, parties generally show up on the date trial is set prepared to begin.

I want to add a word of caution to criminal defendants. If a defendant files an objection to the charging instrument on the date that the trial is set, he will be not be allowed to appeal a trial court's overruling of the objection if the trial actually begins on that date.

Because the majority's construction of Article [**19] 45.019 produces absurd results, I respectfully dissent.

THE STATE OF TEXAS v. ROBERT BLANKENSHIP, Appellee

NOS. 1998/99/00/01/02/03/04/05-03

COURT OF CRIMINAL APPEALS OF TEXAS

2004 Tex. Crim. App. LEXIS 1651

October 6, 2004, Delivered

NOTICE: [*1] PUBLISH

PRIOR HISTORY: ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS. TRAVIS COUNTY. State v. Blankenship, 123 S.W.3d 99, 2003 Tex. App. LEXIS 8818 (Tex. App. Austin, 2003)

DISPOSITION: Reversed and remanded.

LexisNexis(R) Headnotes

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

OPINIONBY: Hervey

OPINION:

The issue in this case is whether the County Attorney of Travis County "made" this particular appeal in the Court of Appeals. We hold that the County Attorney "made" this appeal.

A City of Austin municipal court convicted appellee of several violations of two city ordinances. *See State v. Blankenship*, 123 S.W.3d 99, 101 (Tex.App.-Austin 2003). A county court reversed that decision and the State appealed. *See id.* The City timely filed a notice of appeal and an amended notice of appeal with the latter stating that the "County Attorney has consented to the City Attorney prosecuting this appeal under Article 45.201 of the Code of Criminal Procedure." *See Blankenship*, 123 S.W. 3d at 104-05. These notices of appeal were signed by an assistant city attorney and not by the County Attorney. *See id.* n1

n1 Article 44.01(a) and (b), TEX. CODE CRIM. PROC., permits the "state" to appeal certain matters. *See, e.g.*, Article 44.01(a) (the "state" is entitled to appeal). Article 44.01(d), TEX. CODE CRIM. PROC., authorizes the "prosecuting attorney" to "make an appeal" within certain time limits after an appealable event occurs. *See* Article 44.01(d) (the "prosecuting attorney" may not "make an appeal"). And, Article 44.01(i), TEX. CODE CRIM. PROC., defines "prosecuting attorney" as the "county attorney, district attorney, or criminal district attorney who has the primary responsibility of prosecuting cases in the court hearing the case and does not include an assistant prosecuting attorney." Article 45.201 (c), TEX. CODE CRIM. PROC., provides that in municipal prosecutions a "city attorney or a deputy city attorney" may, with the consent of the county attorney, prosecute an appeal such as the one involved in this case.

[*2]

After the time for filing a timely notice of appeal expired, appellee claimed in a motion to dismiss the appeal that the Court of Appeals lacked jurisdiction over the appeal because neither the amended notice of appeal nor anything else in the record reflected that the County Attorney "personally" made the appeal. *See Blankenship*, 123 S.W.3d at 102-05. n2 In response, the City filed several documents including an affidavit signed by the County Attorney all indicating that the County Attorney consented to and authorized the City's appeal within the time for timely filing a notice of appeal. *See Blankenship*, 123 S.W.3d at 106.

n2 Appellee's motion to dismiss in the Court of Appeals stated, among other things:

> Article 44.01 is not simply duplicative of Article 45.201. While the Assistant City Attorney's personal allegation that the County Attorney "consented to" the City Attorney's prosecution of this appeal may (or may not) satisfy Article 45.201, it does not confer jurisdiction upon this Court. The City must still satisfy the much more exacting requirement that the County Attorney must actually "make" the appeal himself. Tex. Code Crim. Proc. art. 44.01(d), (i). The record does not show such personal involvement by the County Attorney, and thus, the City's appeal must be dismissed.

[*3]

The Court of Appeals decided that the assertion in the City's amended notice of appeal that the County Attorney consented to this particular appeal under Article 45.201 failed to satisfy Article 44.01(d) requiring the County Attorney to "make" the appeal. *See Blankenship*, 123 S.W.3d at 105. n3 The Court of Appeals stated:

> The State argues that the assertion in the [amended] notice of appeal was sufficient to infer personal authorization by the county attorney for the appeal. We do not agree that it was an adequate substitution for the county attorney's personal, express, and specific making of an appeal as required by article 44.01. Article 45.201 relates to the consent of the county attorney for a city attorney or assistants to "handle" or prosecute an appeal. It does not trump the requirements of article 44.01 as to the notice of appeal.

Id. n4

n3 We exercised out discretionary authority to review this decision. Ground for review two of the City's discretionary review petition states:

> The Court of Appeals erred in holding, in effect, that the State's notice of appeal requires the personal signature of the "prosecuting attorney."

[*4]

n4 The Court of Appeals also decided that it could not consider the documents that the City filed in response to appellee's motion to dismiss the appeal because these documents were filed after the deadline for timely filing a notice of appeal. *See State v. Blankenship*, 123 S.W.3d at 106; *see generally State v. Riewe*, 13 S.W.3d 408 (Tex.Cr.App. 2000). We exercised out discretionary authority to review this decision. Ground for review one of the City's discretionary review petition states:

> The Court of Appeals erred in refusing to consider documents submitted by the State to clarify that an ambiguous sentence in the notice of appeal meant that the "prosecuting attorney" personally authorized the appeal within the State's appeal time.

In *Muller v. State*, this Court decided that Article 44.01(d) authorizes only the prosecuting attorney (in this case the County Attorney) "to make an appeal by personally authorizing-in some fashion-the specific notice of appeal in question" prior to the expiration of the deadline for perfecting an appeal. *See Muller v. State*, 829 S.W.2d 805, 810 (Tex.Cr.App. 1992) [*5] (internal quotes omitted). This Court stated in *Muller*, 829 S.W.2d at 810:

> We do not suggest that Article 44.01 necessarily requires that a State's notice of appeal must, in all cases, reflect the personal signature of the prosecuting attorney. However, the plain meaning of the literal text of Article 44.01(d) requires the prosecuting attorney to "make an appeal" by personally authorizing-in some fashion-the specific notice of appeal in question. More specifically, to comply with the statute, he must either physically sign the notice of appeal *or* n5 personally instruct and authorize a subordinate to sign the specific notice of appeal in question. [Footnote omitted]. Because of the jurisdictional limitations of Article 44.01 ... we further read the statute to require this personal authorization to occur prior to the expiration of the fifteen day window of appeal.

n5 Emphasis in original.

We do not agree with the suggestion in appellee's motion to dismiss and in the opinion of the [*6] Court of Appeals that an assertion in a notice of appeal such as the one at issue here cannot simultaneously comply with Article 45.201 and Article 44.01(d). In this case, we decide that the timely-made assertion in the City's amended notice of appeal that the "County Attorney has consented to the City Attorney prosecuting this appeal" is "in some fashion" a written express personal authorization by the County Attorney of this specific notice of appeal in this particular case. n6 *See Muller*, 829 S.W.2d at 810 n.6 (discussing requirement of some "other written expressed authorization" of a prosecuting attorney who has not actually signed the notice of appeal). It is not a general delegation of authority to an assistant. *See id.* (general delegation of authority does not qualify under the statute). And, it is more than a signature stamp. *See State v. Shelton*, 830 S.W.2d 605, 606 (Tex.Cr.App. 1992) (use of a "signature stamp, without more" does not comply with the statute).

n6 The terms "consent" and "authorize" contain common definitions. *See Roget's Desk Thesaurus*, Random House, Inc., RHR Press, New York (2001) at 41 (defining "authorize" as, among other things, to give authority for, approve, sanction, confirm) and at 111 (defining "consent" as, among other things, approve, sanction, confirm, ratify, endorse).

[*7]

Our decision makes it unnecessary to address ground one (which we dismiss). The judgment of the Court of Appeals is reversed and the cause is remanded there for further proceedings.

Hervey, J.

THE STATE OF TEXAS v. RACHEL GUEVARA, Appellee

NO. 1085-03

COURT OF CRIMINAL APPEALS OF TEXAS

137 S.W.3d 55; 2004 Tex. Crim. App. LEXIS 932

June 9, 2004, Delivered

NOTICE: [**1] PUBLISH

PRIOR HISTORY: ON STATE'S PETITION FOR DISCRETIONARY REVIEW. FROM THE FOURTH COURT OF APPEALS. BEXAR COUNTY. State v. Guevara, 110 S.W.3d 178, 2003 Tex. App. LEXIS 3901 (Tex. App. San Antonio, 2003)

DISPOSITION: Reversed and remanded.

LexisNexis(R) Headnotes

COUNSEL: For Appellant: Philip F. Benson-San Antonio, TX.
For State: Matthew Paul-State's Attorney-Austin, TX.

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

OPINIONBY: KELLER

OPINION:

[*55] This case involves an ordinance designed to maintain the free flow of pedestrian traffic on the San Antonio River Walk. One way the ordinance accomplishes this is by making it unlawful for a business to allow patrons to queue on, or wait for entrance into that business establishment on the public right-of-way of the River Walk area. n1 Under the ordinance "queue" means "to form a line or arrange in a line." n2 We granted review to answer the following question: Is an ordinance that penalizes a business establishment for allowing queuing unconstitutionally vague because it fails to specify methods that could be used to prevent queuing? We answer that question "no."

n1 City of San Antonio Code § 22-140.

n2 § 22-138.

A. Background

Park Ranger Fidencio Castillo was patrolling the east side of the river when he noticed [**2] people beginning to line up outside of Cafe Ole. He warned the hostess that the line needed to be moved and was assured that it would be taken care of. But about thirty minutes later the line was still there, with the same people waiting in line. Castillo issued a citation. When he returned later that evening, there was no line outside the restaurant.

Appellee was found guilty by the municipal court and ordered to pay a $ 100 fine. She appealed to the county court, where the case was submitted on the record made in municipal court, on briefs, and on [*56] oral argument. The county court found that appellee was not guilty of violating the ordinance, that the ordinance was unconstitutional and unenforceable, and that the map referred to in the ordinance was vague and did not clearly define the area intended to be designated as a public right-of-way. The State appealed.

The Court of Appeals noted that appellee made no complaint about the definitions of "business establishment," "queue," "right of way," and "River Walk Area." n3 Rather, appellee complained that the ordinance failed to describe with reasonable certainty what actions constitute allowing patrons to queue on the public right-of-way [**3] and that the phrase "to allow" is insufficient to establish intent for the purpose of charging a person with a penal offense. n4

n3 *State v. Guevara*, 110 S.W.3d 178, 180 (Tex. App.-San Antonio 2003).

n4 *Id.*

The Court of Appeals observed that appellee was charged with a crime of omission - failing to prevent patrons from queuing. n5 To determine whether the ordinance proscribed an omission with sufficient clarity to avoid a vagueness challenge, the court looked to our opinion in *Billingslea v. State*, which held that there must exist a statutory duty to act apart from a mere general statement that "an omission is an offense." n6 The court found that the ordinance ran afoul of *Billingslea*'s requirement because it did not "affirmatively impose on those subject to it the duty to adopt a particular system to prevent the queuing of patrons waiting for tables" nor did it "require those subject to the ordinance to adopt any system at all or otherwise inform them how they are to prevent [**4] queuing." n7

n5 *Id.* at 181.

n6 *Id.* (quoting and citing *Billingslea v. State*, 780 S.W.2d 271, 274-276 (Tex. Crim. App. 1989)).

n7 *Guevara*, 110 S.W.3d at 181.

B. Analysis

In *Billingslea*, the defendant lived in a house with his ninety-four year old mother. n8 He was prosecuted for injury to an elderly person by omission for failing to secure needed medical care. n9 At the time, the "injury to a child or elderly individual" statute provided:

A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that causes to a child who is 14 years of age or younger or to an individual who is 65 years of age or older:

(1) serious bodily injury;

(2) serious physical or mental deficiency or impairment;

(3) disfigurement or deformity;

(4) bodily injury. n10

We began our analysis by holding that a statute could not effectively designate an [**5] omission as an offense simply by stating "an omission is an offense." n11 Rather, for an omission to be an offense, "there must be a corresponding duty to act." n12 This duty to act could be contained within the same statute that proscribes the offense, as was the case for offenses such as interference with child custody, criminal nonsupport, [*57] and permitting or facilitating escape. n13 Or the duty to act could be found in a different statute, as was the case with the duty to provide a child with food, shelter, and medical care. n14

n8 *Billingslea*, 780 S.W.2d at 272.

n9 *Id.* at 273 n. 2.

n10 *Billingslea*, 780 S.W.2d at 273 (quoting TEX. PEN. CODE § 22.04(a)).

n11 *Id.*

n12 *Id.*

n13 *Id.*

n14 *Id.* at 275.

The "injury to a child or elderly individual" statute did not itself assign a duty of care to any particular person. n15 Unless one wanted to contend that the statute impliedly imposed [**6] upon every living person in the universe a duty to protect a child or elderly person from harm, the failure to assign a duty of care to any particular class of individuals meant the statute had not assigned a duty to anyone. n16 We concluded that we would have to look outside the "injury to a child or elderly individual" statute to find a duty to act. n17 For children, that duty could be found in the Family Code. n18 But no statutory duty of care for elderly persons existed, and we specifically rejected deriving duties from the common law. n19 Consequently, the State failed to establish the offense of injury to an elderly individual by omission because it could not show that the defendant had a duty to act. n20 We noted, however, that the Legislature had recently amended the "injury to a child or elderly individual" statute to impose a duty to care for an elderly person when the actor had assumed care, custody, or control of the elderly individual. n21

n15 *Id.* at 276.

n16 *Id.*

n17 *Id.* at 274.

n18 *Id.* at 275.

n19 *Id.* at 275-276. [**7]

n20 *Id.* at 276.

n21 *Id.* at 276, 276 n. 7.

We agree with the Court of Appeals that the *Billingslea* analysis applies here. But the ordinance before us is not like the statute in *Billingslea*. The statute in *Billingslea* did not restrict its application to those who had a duty to care for an elderly individual. It imposed a duty, if at all, upon "every living person in the universe."

The ordinance here is more like those statutes that we contrasted to the statute in *Billingslea*. For instance, in the statute proscribing permitting or facilitating escape, "an official or an employee *that is responsible* for maintaining persons in custody commits an offense if he...permits or facilitates the escape of a person in custody." n22 The ordinance in question here imposes a duty to prevent queuing upon a specific class of entities, businesses with entrances along the River Walk area, and then proscribes violation of that duty. n23

n22 *Id.* at 274 (quoting TEX. PEN. CODE § 38.08)(emphasis in *Billingslea*; ellipsis inserted). [**8]

n23 City of San Antonio Code § 22-138.

The fact that the ordinance did not suggest a method of preventing queuing is of no significance. Neither do the statutes proscribing permitting escape or interfering with child custody specify the method by which to avoid committing those offenses. n24 There are common-sense methods [*58] for preventing queuing, n25 and it is not necessary or desirable to require the City to codify those methods.

n24 *See Billingslea*, 780 S.W.2d at 274; TEX. PEN. CODE § § 38.08 (penalizing an institution official who "permits . . . the escape of a person in custody"; no suggested procedures for preventing escapes), 25.03 (penalizing a person who "retains . . . a child younger than 18 years" when he knows that retention violates a court order; no suggested procedures for returning a child to rightful custody).

n25 Castillo testified that other River Walk business establishments prevent queuing "by giving patrons a pager, moving them into a bar or other waiting area, or giving them a specific time to return to claim their table." *Guevara*, 110 S.W.3d at 180.

[**9]

We reverse the Court of Appeals's decision and remand the case for further proceedings consistent with this opinion.

KELLER, Presiding Judge

OCTAVIO CASTANEDA, d/b/a O. CASTANEDA'S BAIL BONDS CO., Appellant
v. THE STATE OF TEXAS

Nos. 2012-01, 2013-01 & 2015-01

COURT OF CRIMINAL APPEALS OF TEXAS

138 S.W.3d 304; 2004 Tex. Crim. App. LEXIS 1030

June 30, 2004, Delivered

NOTICE: [1]**

PUBLISH

PRIOR HISTORY: ON APPELLANT'S PETITIONS FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS HIDALGO COUNTY. *Castaneda v. State, 55 S.W.3d 729, 2001 Tex. App. LEXIS 6127 (Tex. App. Corpus Christi, 2001) Castaneda v. State, 138 S.W.3d 304, 2003 Tex. Crim. App. LEXIS 162 (Tex. Crim. App., July 2, 2003)*

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee State moved for bond forfeiture when the three principals failed to appear, and the trial court entered a judgment nisi in each case. The cases were consolidated, and appellant surety sought exoneration from liability, as the principals had been deported. Judgment was entered in favor of the State. The surety appealed, and the Thirteenth Court of Appeals of Hidalgo County, Texas, affirmed. The surety sought discretionary review.

OVERVIEW: On review, the surety argued that he was entitled to exoneration from liability pursuant to *Tex. Code Crim. Proc. Ann. art. 22.13(3)*, because the principals' failure to appear for their court settings was a result of an uncontrollable circumstance that arose through no fault of either the principals or the surety. The instant court found that the record did not reflect if it was not known when or even whether the principals were actually deported, or when or even whether they were released from the U.S. Immigration and Naturalization Service facility. Thus, the trial court could have reasonably concluded that the surety failed to prove by a preponderance of the evidence the first and third prongs of the art. 22.13(3) affirmative defense and failed to prove that the principals' failure to appear arose through no fault of their own, as they were apparently in the country illegally. Further, the surety failed to meet *Tex. Code Crim. Proc. Ann. art. 17.16*'s requirement that the surety deliver an affidavit to the sheriff stating that the accused were in federal custody.

OUTCOME: The judgments were affirmed.

LexisNexis(R) Headnotes

JUDGES: Holcomb, J., delivered the opinion of the Court, in which Keller, P.J., and Price, Womack, and Cochran, JJ., joined. Johnson, J., filed a dissenting opinion, in which Meyers, Keasler, and Hervey, JJ., joined. Johnson, J., filed a dissenting opinion, joined by Meyers, Keasler, and Hervey, JJ.

OPINIONBY: Holcomb

OPINION:

[*320] OPINION ON THE STATE'S MOTIONS FOR REHEARING n1

n1 Our opinion on original submission disposed of five bail bond forfeiture cases, Nos. 2012-01, 2013-01, 2014-01, 2015-01, and 2016-01. The State filed motions for rehearing in only

three of those cases, Nos. 2012-01, 2013-01, and 2015-01.

These are bail bond forfeiture cases. In each case, the Thirteenth Court of Appeals **[*321]** affirmed the trial court's final judgment for the State and against appellant. *Castaneda v. State, 55 S.W.3d 729, 732 (Tex.App.-Corpus Christi 2001)*. We affirm the judgments of the court of appeals. **[**2]**

The Relevant Facts

The principals in these cases - Mario Ortiz Hurtado, Carlos Javier Ramos Medrano, and Oscar Oviedo Gutierrez - were all Mexican nationals arrested in Hidalgo County and charged with felony drug possession. Appellant, the owner of a bail bond company, posted a bail bond for each of the principals. n2 Two of the bail bonds each contained a note to the effect that the principal had violated federal immigration regulations and would be taken into custody by the United States Immigration and Naturalization Service (INS). The third bail bond contained no such note, but it is undisputed that employees of the bail bond company knew that all three principals were subject to pre-existing INS detainers.

n2 Appellant posted bond for Hurtado on June 21, 1997, for Ramos on December 18, 1997, and for Gutierrez on March 9, 1998.

Once appellant posted the bail bonds, Hidalgo County officials released the principals from custody and handed them over to INS officials, who in turn incarcerated them in an **[**3]** INS facility in Los Fresnos. Subsequently, it appears, federal immigration judges ordered the principals deported, but the record evidence is silent as to when or whether those deportation orders were actually carried out. The record evidence is also silent as to when or even whether the principals were released from the Los Fresnos facility.

None of the principals appeared in the Hidalgo County court on the appointed day or on any day thereafter. n3 Consequently, the State moved, in each case, for bond forfeiture, and the trial court entered, in each case, a judgment *nisi*. The trial court later consolidated the cases for a bond forfeiture trial, and at that trial appellant sought exoneration from liability on the basis of *Article 22.13(3) of the Texas Code of Criminal Procedure. n4* Appellant argued that the principals had been deported and that those deportations amounted to "uncontrollable circumstances" within the meaning of *Article 22.13(3)*. The trial court rejected appellant's *Article 22.13(3)* affirmative defense, however, and entered final judgment for the State in each case. The final judgments awarded the State the full amounts of the bonds **[**4]** plus 6% interest calculated from the date the trial court signed the judgments *nisi*.

n3 Hurtado was scheduled to appear in court on September 23, 1997; Ramos was scheduled to appear in court on January 28, 1998; and Gutierrez was scheduled to appear in court on April 9, 1998.

n4 At the time of the hearing, *Article 22.13* provided in relevant part:

> The following causes, and no other, will exonerate the defendant and his sureties, if any, from liability upon the forfeiture taken:
>
> * * *
>
> 3. The sickness of the principal or some uncontrollable circumstance which prevented his appearance at court, and it must, in every such case, be shown that his failure to appear arose from no fault on his part. The causes mentioned in this subdivision shall not be deemed sufficient to exonerate the principal and his sureties, if any, unless such principal appear before final judgment on the bond to answer the accusation against him, or show sufficient cause for not so appearing.

On direct appeal, appellant reiterated **[**5]** his claim that he was entitled to exoneration from liability on the basis of *Article 22.13(3)* . **[*322]** Appellant also argued, for the first time, that the trial court erred in entering final judgments for the State because the bail bonds in question were "not ... valid and binding undertakings in law." Finally, appellant argued, again for the first time, that the trial court erred in entering final judgments "for the full amounts of the forfeited bail bonds plus interest ... at the rate of 6%."

The court of appeals rejected all of appellant's arguments and affirmed the judgments of the trial court. *Castaneda v. State, 55 S.W.3d at 732*. We granted appellant's petitions for discretionary review to determine whether the court of appeals erred. n5 See *Tex. R. App. Proc. 66.3(b)*.

n5 In all three cases, appellant's grounds for review are exactly the same, to wit:

> (1) Whether a bail bond surety is liable on a bail bond forfeiture when its principal is deported

prior to the time that the principal was required to appear in a Texas court.

(2) Whether a bail bond surety is liable after executing a bail bond in which the Sheriff never releases the principal on the bail bond but rather transfers the principal to the federal Immigration and Naturalization Service.

(3) Whether a bail bond forfeiture final judgment in which there is no remittitur can bear any interest.

[6]**

Analysis

On original submission, we held that the court of appeals erred in affirming the judgments of the trial court because, "by operation of law, appellant had been released from liability on the three bonds" before the State moved for bond forfeiture. *Castaneda v. State, 138 S.W.3d 304, 2003 Tex. Crim. App. LEXIS 162 at *8, Nos. 2012-01, 2013-01 & 2015-01 (Tex.Crim.App.-July 2, 2003)*, We explained further:

... By its plain language, *art. 17.16* n6 releases a surety from liability on a bond when verification of the principal's incarceration in another jurisdiction is requested and the sheriff is able to verify that incarceration. When incarceration in the receiving jurisdiction is verified, the surety is *automatically* released from liability; neither further action by the surety nor approval by the court is required...

In these cases, the other jurisdiction was federal. It appears from the record that appellant was hired to post bond so that the principals would be transferred to federal custody. After the bonds were posted and his principals transferred into INS custody, appellant filed ... the forms requesting verification by the Hidalgo County sheriff. In these three cases, the sheriff verified that **[**7]** the principal was in INS custody....

2003 Tex. Crim. App. LEXIS 162 at 4-5 (emphasis in original).

n6 *Article 17.16 of the Texas Code of Criminal Procedure* provides:

(a) A surety may before forfeiture relieve himself of his undertaking by:

(1) surrendering the accused into the custody of the sheriff of the county where the prosecution is pending; or

(2) delivering to the sheriff of the county where the prosecution is pending an affidavit stating that the accused is incarcerated in federal custody, or in the custody of any state, or in any county of this state.

(b) For the purposes of Subsection (a)(2) of this article, the bond is discharged and the surety is absolved of liability on the bond on the sheriff's verification of the incarceration of the accused.

In its motions for rehearing, the State correctly points out that in none of the three cases did appellant actually meet *Article 17.16*'s plain requirement that the surety "deliver[] to the sheriff ... an affidavit stating that the accused **[**8]** is incarcerated in federal custody." Consequently, our analysis on original submission was fatally flawed.

[*323] Furthermore, appellant did not assert an *Article 17.16* defense at trial. The trial court's judgments will not be reversed on the basis of *Article 17.16*. See *Hailey v. State, 87 S.W.3d 118, 122 (Tex.Crim.App. 2002)* (a trial court's decision will not be reversed on a theory the trial court did not have an opportunity to rule upon).

In ground for review n7 number one in each case, appellant argues two points: first, that, under *Article 17.16*, he was released from liability on the bond before the State moved for bond forfeiture; and second, that, for various reasons, the surety bond "was ... not a valid and binding undertaking in law." Since these two arguments were not raised in the trial court, we will not consider them. We overrule ground for review number one in each case.

n7 In his brief in this Court, appellant terms his grounds for review "points of error."

In ground for review number **[**9]** two in each case, appellant argues that he "was entitled to ... exoneration [from liability] pursuant to *Article 22.13 § 3* [sic] ... because the principal[s'] failure to appear for [their] court settings was a result of an uncontrollable circumstance which arose through no fault of either the principals or the appellant." n8 To prevail with the affirmative defense provided by *Article 22.13(3)*, appellant was required to prove, in each case, that (1) some uncontrollable circumstance prevented the principal's appearance at court; (2) the principal's failure to appear arose through no fault of his own; and (3) the principal appeared before final judgment to answer the accusation against him or had sufficient cause for not appearing. *Hill v. State, 955 S.W.2d 96, 101 (Tex.Crim.App. 1997)*. As we noted previously, the record evidence is silent with respect to what happened

to the principals once they were incarcerated in the INS facility in Los Fresnos. It is not known when or even whether they were actually deported, or when or even whether they were released from the INS facility. On this record, then, the trial court, as the trier of fact, could have reasonably **[**10]** concluded, in each case, that appellant failed to prove by a preponderance of the evidence the first and third prongs of the *Article 22.13(3)* affirmative defense. In other words, the trial court could have reasonably concluded that appellant failed to prove the principals' immigration status and whereabouts on the days they were scheduled to appear in state court. Even if the principals' incarceration in Los Fresnos or their alleged deportations were considered "uncontrollable circumstances" preventing their appearance in court, on this record the trial court could have reasonably concluded, in each case, that appellant failed to prove that the principals' failure to appear arose through no fault of their own, since they were apparently in this country illegally.

n8 See footnote three, *supra*.

Appellant also makes other arguments under ground for review number two in each case, but he failed to make those arguments in the trial court, so we will not consider them. We overrule ground for review number two in **[**11]** each case.

Finally, in ground for review number three in each case, appellant argues that, "under Texas law, the State is not entitled to recover interest on a bail bond forfeiture judgment in the full amount of the forfeited bail bond." Again, however, appellant failed to make such an argument in the trial court, so we will not consider it. See *Allright, Inc., v. Pearson, 735 S.W.2d 240, 30 Tex. Sup. Ct. J. 431 (Tex. 1987)* (plaintiff, who failed to complain to the trial court regarding its failure to award pre-judgment interest, may not **[*324]** complain of that fact on appeal). We overrule ground for review number three in each case.

We affirm the judgments of the court of appeals.

DISSENTBY: Johnson

DISSENT:

Johnson, J., *filed a dissenting opinion, joined by* Meyers, Keasler, and Hervey, JJ.

DISSENTING OPINION

For the reasons expressed in the Court's opinion on original submission, *Castaneda v. State*, Nos. 2012-01, 2013-01, 2014-01, 2015-01, 2016-01, *138 S.W.3d 304, 2003 Tex. Crim. App. LEXIS 162 (Tex. Crim. App. July 2, 2003)*, I respectfully dissent.

Johnson, J.

En banc

Filed: June 30, 2004

IN RE THURMAN BILL BARTIE, Justice of the Peace, Precinct 8, Port Arthur, Jefferson County, Texas

No. 90

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

138 S.W.3d 81; 2004 Tex. App. LEXIS 3479

April 16, 2004, Delivered
April 16, 2004, Filed

PRIOR HISTORY: [**1]

Review Tribunal, Appointed by the Supreme Court. n1.

n1 The Review Tribunal was composed of Hon. Kenneth Law, Chief Justice, Third District Court of Appeals, Austin, designated Presiding Justice; Hon. Bill Vance, Tenth District Court of Appeals, Waco; Hon. Jack Carter, Sixth District Court of Appeals, Texarkana; Hon. Catherine Stone, Justice, Fourth District Court of Appeals, San Antonio; Hon. David Wellington Chew, Eighth District Court of Appeals, El Paso; Hon. James T. Worthen, Chief Justice, Twelfth District Court of Appeals, Tyler; and Hon. John S. Anderson, Fourteenth District Court of Appeals, Houston.

DISPOSITION:

Affirmed.

LexisNexis(R) Headnotes

JUDGES: Opinion by: Catherine Stone, Justice. Sitting: Kenneth Law, Presiding Justice, Bill Vance, Justice, Jack Carter, Justice, Catherine Stone, Justice, David Wellington Chew, Justice, James T. Worthen, Justice, John S. Anderson, Justice.

OPINIONBY: Catherine Stone

OPINION:

[*82] This is an appeal from the recommendation of the Texas State Commission on Judicial Conduct that Respondent, Thurman Bill Bartie, be removed as Justice of the Peace, Precinct 8 of Port Arthur, Jefferson County, Texas, and further, that he be forever barred from holding judicial office [**2] in this State. n2 The Commission found that Respondent, while in his judicial capacity, used obscene language in the courtroom; failed to follow the law; exhibited incompetence in the law; attempted to interfere in the lawful arrest of an individual; and participated in or used corporal punishment in certain truancy matters before his court. Respondent has rejected the findings, conclusions, and recommendations of the Commission and in response, challenges the findings and ultimate recommendation that he be removed from office and permanently barred from seeking judicial office in the future. We affirm the Commission's recommendation

n2 On December 12, 2003, the Supreme Court appointed a Review Tribunal to review the Commission's recommendation regarding the removal of Respondent from office. The action was brought in accordance with TEX. CONST. art. V, § 1-a and the TEX. R. REM'L/RET. JUDGES, 56 TEX. B.J. 823 (1993), promulgated by the Texas Supreme Court on May 22, 1992.

APPELLATE COMPLAINTS [**3]

Respondent advances four reasons why this Review Tribunal should reverse the [*83] Commission's findings and reject the Commission's recommendation

that he be removed and forever barred from holding judicial office: (1) the Commission's findings omitted all of the Special Master's findings favorable to him; (2) the evidence is factually insufficient to support the Commission's findings; (3) the Commission acted outside the scope of its mission and authority when it actively worked with complaining witnesses to develop the initial complaints against him; and (4) the Commission's recommendations are not appropriate under the facts and circumstances. We note that Respondent has failed to cite any authority in support of his contentions. Ordinarily the failure to cite authority in support of a claim of error waives the complaint. TEX. R. APP. P. 38.1(h); *Leyva v. Leyva,* 960 S.W.2d 732, 734 (Tex. App. El Paso 1997, no writ). This is also true in the review of judicial discipline proceedings. *See In re Canales,* 113 S.W.3d 56, 68 (Tex. Rev. Trib. 2003). In light of the severity of the discipline imposed in this case, however, this Tribunal will address the merits [**4] of Respondent's claims even in the absence of cited authority. n3

n3 We note that Respondent resigned his position on December 19, 2003, to pursue "other political interests." Nevertheless, in the interest of justice and at his request, we address the Commission's decision to remove him from office.

SUMMARY OF THE EVIDENCE

The record before this Tribunal reveals several incidents giving rise to the complaints against Respondent. Because the factual sufficiency of the evidence is challenged, we review each incident.

The Bush Case

In May 2002 Tammie Bush and her daughters, Manya and Matya appeared before Respondent on charges stemming from the daughters' alleged truancy. During the course of the proceeding Respondent used obscene language in the courtroom. Additionally, Bush and her daughters were not asked to enter a plea regarding the charges, were not informed of their right to a jury trial, and were not asked to waive a jury trial. During the course of the proceedings, in an effort to [**5] maintain control in the courtroom, Respondent ordered that Bush and Matya be handcuffed for the duration of the proceedings. Ultimately, Respondent found Bush and Matya guilty of the charges against them, and imposed a fine of $ 582 against Bush and a fine of $ 3,496 against Matya. Without conducting an indigency hearing or otherwise inquiring about their ability to pay the fines, Respondent ordered both women to pay their fines in full that day or be sent to jail. Bush spent approximately three hours in jail before she was able to pay her fine. Matya was jailed for seven days in the Jefferson County Jail before she was released on bond.

The Lewis Case

Also in May of 2002, Gwen Lewis and her son appeared before Respondent on charges that her son had failed to attend school. Lewis attempted to dispute the school's attendance dates regarding her son, and according to Lewis, Respondent responded with obscene language. When Lewis objected to the use of such language, Respondent threatened to jail her son.

The Jerry Jordan Incident

While investigating allegations that Respondent was abusive to litigants in his courtroom, Jerry Jordan, a local newspaper reporter, [**6] attempted to observe proceedings in the court. Respondent had his clerk inquire about Jordan's purpose in the courtroom. Jordan verbally protested when he was asked to leave the courtroom. [*84] Respondent replied with obscene language and referred to Jordan as a racist.

Magistration Duties

On various occasions while magistrating inmates at the Jefferson County Correctional Facility, Respondent threatened defendants, in descriptive obscene language, that he intended to engage in sexual relations with the defendants' wives while the defendants were incarcerated.

The Lonnie McIntyre Incident

In February of 2002 Respondent approached two Port Arthur police officers as they were engaged in an investigative detention of Lonnie McIntyre for suspected driving while intoxicated. Respondent introduced himself as Judge Bartie and as McIntyre's brother-in-law. Respondent asked several times to be allowed to drive McIntyre's vehicle from the scene. Respondent abandoned his request to drive the vehicle away when two rocks of crack cocaine were found in the vehicle. Respondent ordered McIntyre's release on a personal recognizance bond, which Respondent himself later signed

[**7] Incidents of Corporal Punishment

The record reveals that in addition to the use of abusive obscene language, Respondent engaged in corporal punishment of juveniles who appeared before him on truancy charges. Respondent threatened to hit juveniles on the head with his gavel, punched a juvenile

in the chest, and hit another juvenile on the head with his knuckles. Respondent also took his belt off and handed it to parents and encouraged the parents to whip or beat their children with the belt. These events took place in the courtroom. On at least one occasion, Respondent brought juvenile twin brothers into his chambers and engaged in corporal punishment.

DISCUSSION

Sufficiency of the Evidence

Respondent's first, second, and fourth complaints essentially challenge the factual sufficiency of the evidence to support the Commission's findings. The Commission's adopted findings of fact are reviewable for factual sufficiency of the evidence to support them by the same standard applied in reviewing the factual sufficiency of the evidence supporting findings in a civil case, either by a trial court or by a jury. *In re Canales,* 113 S.W.3d at 68. Under [**8] a factual insufficiency issue, we examine all of the evidence to determine whether the finding in question is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Id.* at 68-69. "As in appeals of civil matters, this Review Tribunal cannot substitute its findings for those of the Commission." *Id.* at 69. We must sustain the Commission's findings and recommendations if there is sufficient competent evidence of probative force to support them. *Id.* "It is not within the province of this Review Tribunal to interfere with the Commission's resolution of conflicts in the evidence or to pass on the weight or credibility of the witnesses' testimony." *Id.* The findings of the Commission on such matters will be regarded as conclusive where there is conflicting evidence. *Id.*

Respondent contends that the Commission is biased against him because it adopted all of the Special Master's findings, except for three general findings of fact that Respondent says favor him. n4 Respondent [*85] also argues that the findings and conclusions are against the great weight and preponderance of the evidence. We disagree.

n4 The three findings not adopted by the Commission which Respondent claims favor him state as follows:

> 3. Judge Bartie's concept of his position, in part, is to try to motivate children in his courtroom.
>
> 4. Judge Bartie has members of his community that approve of his courtroom performance.
>
> 5. Judge Bartie truly believes that many of his actions were warranted in convincing truant children to regularly attend school.

[**9]

The overwhelming evidence in this case establishes that Respondent repeatedly utilized extremely obscene language in his courtroom. n5 Respondent admitted to his use of obscene language in the courtroom, although he did not admit to all of the instances found by the Commission. Dana Graham, who served as chief clerk in Respondent's court, testified that Respondent used obscene language throughout his tenure in office. Her testimony was echoed by the testimony of the deputy clerk, Ha Nguyen, and by a deputy constable and a deputy sheriff. All of these witnesses testified that Respondent's language and conduct exhibited disrespect for the litigants before him. We acknowledge Respondent's proclaimed subjective belief that his language was warranted to "get through" to the litigants, and his denial of certain instances of use of obscene language. However, the Commission is charged with making credibility determinations and resolving conflicts in the evidence, and this Tribunal will not interfere with those determinations. *See In re Barr,* 13 S.W.3d 525, 534 (Tex. Rev. Trib. 1998).

n5 Due to the offensive nature of the language utilized by Respondent, we have omitted the actual language used by Respondent from this opinion. We note, however, that the record clearly shows Respondent, while sitting in his judicial capacity, used some of the most vulgar and offensive language imaginable.

[**10]

The record overwhelmingly establishes that Respondent's use of obscene language constitutes a wilful violation of his duty to "be patient, dignified and courteous to litigants and others with whom the judge deals in an official capacity...." *See* TEX. CODE JUD. CONDUCT, Canon 3B(4), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1998). The term 'willful" as used in TEX. CONST. art. V, § 1-a(6) A is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross indifference to his conduct. *In re Thoma,* 873 S.W.2d 477, 489 (Tex. Rev. Trib. 1994). Respondent's repeated

use of obscene language is inconsistent with the proper performance of his duties and "casts public discredit upon the judiciary or administration of justice." *See* TEX. CONST. art. V, § 1. The nature and frequency of the extremely obscene language employed by Respondent are, standing alone, sufficient to warrant his removal from office and the prohibition from holding judicial office in the future. n6 Accordingly, we overrule Respondent's appellate issues one, two, and four.

n6 In light of our determination that the obscene language charges are alone sufficient to justify the removal and permanent bar from judicial office, we do not address the sufficiency challenges as they relate to the allegations of legal incompetence, interference with an arrest, and use of corporal punishment.

[**11]

Commission Authority

In his third appellate issue, Respondent contends the Commission exceeded its authority and mission of investigating allegations of judicial misconduct when it solicited testimony from certain witnesses and "reworked" witnesses' affidavits. In essence, Respondent claims the Commission provided legal assistance to the various complainants. The record, however, does not support his claim.

[*86] Matya Bush and her daughter Colitha Bush both testified that they provided the Commission's investigator with handwritten notes and provided videotaped statements. Ultimately they signed written affidavits typed by the investigator. They acknowledged their handwritten notes and the typewritten affidavits were not identical. Nonetheless, they emphatically testified their affidavits correctly reflected their statements, and that any differences between the two documents merely reflected attempts to correct spelling, grammar, repetition, and reference to statements that would not be admissible in court. Based on this record, we cannot say that the Commission exceeded its authority. Respondent's fourth issue is overruled.

This Tribunal is mindful that the primary purpose [**12] of the Texas Code of Judicial Conduct is to protect the citizens of this State, not to punish or discipline judges. *See In re Barr,* 13 S.W.3d at 533. This case illustrates that at times there is a dire need for the Commission to step in and protect the public. Through his use of abusive and obscene language, Respondent was able to intimidate juvenile litigants and their parents, criminal defendants, civil litigants, a newspaper reporter, and even his staff. As Respondent's court clerk stated, she knew "with this judge that we needed help, that Judge Bartie had gotten out of control. I hoped that the Judicial Conduct would come to my aid

I hoped that the Judicial Conduct would do what needs to be done." The Judicial Conduct Commission has done what needed to be done, and we affirm their recommendation in all regards.

Catherine Stone, Justice

IN RE MARTHA V. CHACON, Judge No. 89, Justice of the Peace, Precinct 2, Eagle Pass, Maverick County, Texas

NO NUMBER IN ORIGINAL

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

138 S.W.3d 86; 2004 Tex. App. LEXIS 3767

April 26, 2004, Delivered
April 26, 2004, Opinion Filed

SUBSEQUENT HISTORY: [**1] As Corrected April 29, 2004.

PRIOR HISTORY: On Appeal from the Findings, Conclusions, and Recommendations made by the State Commission on Judicial Conduct after a Hearing before Judge Frank Montalvo, 288th District Court, Bexar County, Texas, Presiding as Special Master July 21-23, 2003. In re Chacon, 2004 Tex. App. LEXIS 3768 (Tex. App. Houston 14th Dist., Apr. 26, 2004).

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

JUDGES: Adele Hedges, Chief Justice. Concurring Opinion by: Martin Richter, Justice. (Richter, J., concurring in an opinion joined by Speedlin, J.)

OPINIONBY: Adele Hedges

OPINION:

[*88] Before this Review Tribunal n1 is an appeal from the recommendations of the Texas [*89] State Commission on Judicial Conduct ("Commission") that Respondent Martha Chacon be removed as Judge No. 89, Justice of the Peace, Precinct No. 2, Eagle Pass, Maverick County, Texas, and further, that she be prohibited from holding State judicial office in the future. The Commission adopted the majority of the findings of the Special Master and found that Respondent exhibited incompetence in the law and misused her authority in the performance of her official duties. Respondent has rejected the findings, conclusions, and recommendations of the Commission and, in response, challenges the findings and ultimate recommendations that she be removed [**2] from office and prohibited from seeking judicial office in the future. We affirm the Commission's recommendations.

n1 The Review Tribunal appointed by the Supreme Court of Texas is composed of Hon. Lee Ann Dauphinot, Justice, Second Court of Appeals, Fort Worth, designated Presiding Justice; Hon. Adele Hedges, Chief Justice, Fourteenth Court of Appeals, Houston; Hon. Phylis Speedlin, Justice, Fourth Court of Appeals, San Antonio; Hon. Martin Richter, Justice, Fifth Court of Appeals, Dallas; Hon. Donald R. Ross, Justice, Sixth Court of Appeals, Texarkana; Don H. Reavis, Justice, Seventh Court of Appeals, Amarillo; and Hon. Felipe Reyna, Justice, Tenth Court of Appeals, Waco.

Procedural History

The record in the present case establishes that on October 7, 2002, Respondent was served with a Notice of Formal Proceedings. n2 On January 23, 2003, the Supreme Court of Texas, upon request of the Commission, appointed the Honorable Frank Montalvo as Special Master to hear evidence on the charges and report [**3] thereon to the Commission. On July 21-23, 2003, the Special Master conducted a formal hearing on the merits at the Maverick County Courthouse in Eagle Pass, Texas. On August 6, 2003, the Special Master filed

his Findings of Fact, in which he concluded that Respondent's judicial conduct exhibited incompetence in the law and the willful or persistent misuse of her authority by allowing her personal relationships to influence her judgment in the performance of her official duties.

n2 The action was brought in accordance with Article V, Section 1-a (1993) of the Texas Constitution and the Rules for Removal or Retirement of Judges, 56 Tex. B.J. 823 (1993), promulgated by the Supreme Court on May 22, 1992.

On October 8, 2003, a hearing before the Commission was held in Austin, Texas, regarding Respondent's Statement of Objections to the Report of the Special Master. On January 6, 2004, the Commission filed its Findings, Conclusions, and Recommendations, in which the Commission, taking its previous rulings [**4] on Respondent's objections into consideration, adopted and affirmed the Special Master's Findings of Fact. In a letter to the Supreme Court of Texas dated January 6, 2004, the Commission requested that the Court appoint a Review Tribunal as provided by Article V, Section 1-a(9) of the Texas Constitution. On January 14, 2004, the Supreme Court appointed this Review Tribunal to review the Commission's recommendations that Respondent be removed from office and prohibited from holding judicial office in the future.

Judicial Misconduct

The review of evidence concerning allegations of judicial misconduct is certainly not an obligation which the members of this Tribunal take lightly. An opinion issued by a previous Review Tribunal reminds us that the standards to which we hold ourselves must be higher than those observed elsewhere:

In a civilized society, members of the judiciary are significant public figures whose authority necessarily reaches all points within their respective jurisdictions, if not beyond. Members of the judiciary of the State of Texas, whether a municipal judge in Fort Stockton, a justice of the peace in Cameron County, the county court at law judge [**5] in Liberty County, a state district judge in Ozona, a [*90] justice on the Sixth Court of Appeals, Texarkana, or the Chief Justice of the Texas Supreme Court, all serve as the collective guidon of the banner representing fairness and impartiality in our state. It is for this reason, plus others, that the judiciary must nurture and maintain respect for their decisions, as well as the judiciary of the State of Texas as a whole. The Texas jurist must be held to the highest standards of integrity and ethical conduct, much more so than the standards to which members of the executive and legislative branches are held accountable. Consequently, the ultimate standard for judicial conduct in the State of Texas must be more than effortless obedience to the law, but rather, must be conduct which constantly reaffirms one's fitness for the high responsibilities of judicial office and which continuously maintains, if not furthers, the belief that an independent judiciary exists to protect the citizen from both government overreaching and individual self-help.

In re Barr, 13 S.W.3d 525, 532 (Tex. Rev. Trib. 1998). It is with this solemn reminder that we consider below Respondent's [**6] challenges to the Commission's Findings, Conclusions, and Recommendations.

Summary of the Evidence

The record before this Tribunal reveals several incidents giving rise to the complaints against Respondent. Because the factual sufficiency of the evidence is challenged, we review each incident below.

Jose Francisco Gonzalez and Melissa Villegas

In or around October 2000, Jose Francisco Gonzalez and Melissa Villegas executed a contract with Oscar Reyna ("Reyna") in which Reyna agreed to build a house on a lot they owned. Reyna had no interest in the real property. Upon completion of the house, the parties had a disagreement. Reyna filed a complaint for forcible entry and detainer in Respondent's court on or about May 15, 2001. Gonzalez was served with notice of the suit the next day, and the citation instructed him to appear in court on May 18, 2001, at 11:00 a.m. The citation was defective under Rule 739 of the Texas Rules of Civil Procedure n3 in that it gave him inadequate notice of the hearing and did not inform him of the right to request a jury trial. Villegas was never served. The attorney for Gonzalez and Villegas asserted in a legal brief that the court [**7] had no jurisdiction over this claim because it involved a question of title to land. Respondent granted Reyna his requested relief. Gonzalez's appeal to the county court was unsuccessful.

n3 That Rule provides: "When the party aggrieved or his authorized agent shall file his written sworn complaint with such justice, the justice shall immediately issue citation directed to the defendant or defendants commanding hm to appear before such justice at a time and place named in such citation, such time being not more than ten days nor less than six days from the date of service of the citation. The citation shall

> inform the parties that, upon timely request and payment of a jury fee no later than five days after the defendant is served with citation, the case shall be heard by a jury." TEX. R. CIV. P. 739.

On July 2, 2001, Respondent authorized the issuance of writ of possession for the property in favor of Reyna. The writ was served the next day. On July 10, at around 10:45 a.m., Maverick County Deputy Sheriff Juan [**8] Garcia executed the writ. Reyna and his employees helped remove the personal property of Gonzalez and Villegas from the house under the supervision of Deputy Garcia. Gonzalez and Villegas were not told where their personal property was being taken.

[*91] Sheriff dispatcher Alejandro Espinoza received a call at about 2:05 p.m. from Respondent. She advised him to instruct Deputy Garcia to arrest Gonzalez and Villegas for contempt of court arising from their interference with Deputy Garcia's duties. None of the actions taken by Gonzalez and Villegas took place in Respondent's court or in her presence. Gonzalez was arrested for contempt of court. At the Maverick County jail, he was processed on the charge of interfering with a peace officer's duties, not for contempt of court. On his booking card there is an unexplained white-out alteration.

Deputy Garcia testified as follows: he made a mistake regarding the actual charge. Based on Gonzalez's interference with the execution of the writ, Garcia made an independent judgment call to arrest Gonzalez. Although Garcia contacted Respondent's office for advice, the decision to arrest Gonzalez was his alone.

"Wrongful Accusations" Lawsuits [**9]

In or around May 2001, Reyna filed a number of suits in Respondent's court in which he alleged that the defendants had made wrongful accusations against him on a local television talk show. The citations Respondent caused to be issued in these cases failed to comply with Rule 534 of the Texas Rules of Civil Procedure: n4 the citations omitted the address of the plaintiff or his attorney as required under Rule 534, and many of the defendants were given less than ten days' notice before their court appearances.

n4 That Rule provides in pertinent part:

> (a) Issuance. When a claim or demand is lodged with a justice for suit, the clerk when requested shall forthwith issue a citation and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition if any is filed. Upon request, separate or additional citations shall be issued by the clerk.
>
> (b) Form. The citation shall (1) be styled "The State of Texas," (2) be signed by the clerk under seal of court or by the Justice of the Peace, (3) contain na.m.e and location of the court, (4) show date of filing of the petition if any is filed, (5) show date of issuance of citation, (6) show file number and na.m.es of parties, (7) state the nature of the plaintiff's demand, (8) be directed to the defendant, (9) show na.m.e and address of attorney for plaintiff, otherwise the address of plaintiff, (10) contain the time within which these rules require defendant to file a written answer with the clerk who issued citation, (11) contain address of the clerk, and (12) shall notify defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct defendant to file a written answer to plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of ten days after the date of service thereof. The requirement of subsections 10 and 12 of this rule shall be in the form set forth in section c of this rule.
>
> (c) Notice. The citation shall include the following notice to defendant: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of ten days after you were served this citation and petition, a default judgment may be taken against you.

TEX. R. CIV. P. 534.

[**10]

Jesus Garza

On May 30, 2000, Maria Hernandez filed a breach of contract action against Jesus Garza, alleging that Garza owed her 5,000 dollars. On June 14, 2000, Respondent authorized the issuance of a citation for Garza, instructing him to appear before her at 2:30 p.m. the next day to respond to the Hernandez suit. The citation was served on Garza at 1:28 p.m. on June 15, 62 minutes before he was scheduled to appear in Respondent's court. The citation failed to comply with Rule 534 in that notice was inadequate and the address of the plaintiff or her attorney was omitted. At Garza's request, Respondent rescheduled the matter.

[*92] It developed at trial that the issue centered on disputed title to real property. Garza introduced evidence that property taxes had been paid by, and title was in the name of, Maria Garza. No lease was introduced to establish a landlord/tenant relationship. Both Hernandez and Garza asserted ownership of the real property. In her judgment in favor of Hernandez, Respondent awarded possession of the real property to Hernandez.

Oscar Reyna

Reyna, who was on probation in Maverick County for felony theft, was scheduled to meet with his probation [**11] officer, Nelida Martinez, on on December 9, 1999. Sometime before the scheduled meeting, Martinez was informed by Border Patrol agents that they intended to serve Reyna with paperwork regarding deportation proceedings. A few days before December 9, Respondent telephoned Martinez to discuss a letter Martinez had sent to Reyna scheduling the December 9 meeting. Respondent specifically inquired whether there was an outstanding warrant for Reyna in connection with his felony theft probation. Apprized by Martinez that there was none, Respondent stated that Reyna would honor the appointment. During the December 9 meeting, Border Patrol agents served Reyna with an arrest warrant and took him into custody.

On January 7, 2000, Reyna, his son, and Respondent appeared in Martinez's office. Respondent asked Martinez why Reyna had been arrested at the December 9 meeting. After Martinez explained the circumstances of the arrest, she asked Respondent and Reyna's son to leave her office so that she could speak to Reyna in private. They complied. Respondent had not been summoned to Martinez's office for any reason, and Respondent conducted no official business during the visit.

Rebecca Ramirez [**12]

In or around July 2001, Oscar Reyna, Jr. ("Reyna, Jr."), the son of Oscar Reyna, filed a complaint against Ramirez for aggravated assault, allegedly committed at an Eagle Pass nightclub. According to Ramirez, she punched Reyna, Jr. in the mouth after he touched her in a sexually offensive way. Based on the complaint, Respondent issued a felony arrest warrant for Ramirez. About one month later, Ramirez was arrested. Respondent magistrated Ramirez and set bond at 40,000 dollars. Ramirez had no prior criminal record above a Class C misdemeanor, and there was no indication that she was a flight risk.

While Ramirez was in jail, someone contacted one of her relatives, Eddie Sandoval, who was a member of the Maverick County Commissioners' Court. Sandoval phoned Respondent and asked her to revisit the amount of Ramirez's bond. Respondent then approached Ramirez in jail and made the remark that Ramirez should have told her that Ramirez was related to Sandoval. Respondent then reduced the bail amount to four thousand dollars. After about 30 hours in jail, Ramirez was released on personal recognizance. She was not prosecuted for aggravated assault.

Sufficiency of the Evidence

Respondent [**13] challenges the factual sufficiency of the evidence to support the conclusions and recommendations of the Commission.

Standard of Review

The procedures established for the initial proceeding before the special master are to be conducted as nearly as practicable in accordance with the Texas Rules of Civil Procedure. TEX. R. REM'L/RET. JUDGES, 56 Tex. B.J. 823 (1993). During the course of any hearing conducted in [*93] the furtherance of formal proceedings, whether before a special master or the Commission, only legal evidence is to be received. *In re Thoma*, 873 S.W.2d 477, 485 (Tex. Rev. Trib. 1994) . Absent a statement of objections to the report of the special master, the Commission may adopt the findings of the special master as its own. TEX. R. REM'L/RET. JUDGES, 56 Tex. B.J. 823 (1993), Rule 10(j). The record in this case shows that the Commission considered Respondent's objections to the Special Master's Findings of Fact prior to issuance of its Findings, Conclusions, and Recommendations. Consequently, we hold that the findings of the Special Master, as adopted by the Commission, are tantamount to findings of fact ordinarily filed [**14] by a trial judge in a bench trial, and are therefore reviewable as such. *See Thoma*, 873 S.W.2d at 485.

In reviewing for factual sufficiency, we examine all of the evidence to determine whether the finding in question is against the great weight and preponderance of the evidence such as to be considered manifestly unjust. *Thoma*, 873 S.W.2d at 485. This Review Tribunal may not substitute its views for those of the Commission. *Id.* If there is sufficient competent evidence of probative force to support the findings and recommendations, they must be sustained. *Id.* It is not within the province of this Tribunal to interfere with the Commission's resolution of conflicts in the evidence or to pass on the weight or credibility of the testimony of witnesses. *Id.* Where there is conflicting evidence, the findings of the Commission on such matters will be regarded as conclusive. *Id.*

Factual Sufficiency Complaints

The Commission concluded that Respondent's conduct constituted incompetence in violation of Article V, Section 1-a(6)(A) of the Texas Constitution, which provides in relevant part, that any judge may be removed from office, [**15] disciplined, or censured for "incompetence in performing the duties of the office" TEX. CONST. Art. V, § 1-a(6)(A); and of Canon 3(B)(2) of the Texas Code of Judicial Conduct, which provides in relevant part that a judge "shall maintain professional competence" in the law. TEX. CODE JUD. CONDUCT, Canon 3(B)(2), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon Supp. 2003). It also concluded that Respondent's conduct constituted willful or persistent conduct in violation of Canons 2B of the Texas Code of Judicial Conduct, which provides in relevant part that a judge "shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." TEX. CODE JUD. CONDUCT, Canon 2(B), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1998); and of 3(B)5 of the Texas Code of Judicial Conduct, which provides that: "[a] judge shall perform judicial duties without bias or prejudice." [**16] TEX. CODE JUD. CONDUCT, Canon 3(B)(5), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon Supp. 2003).

Incompetence Conclusions

Defective Citations

In Conclusion on Charge 2, the Commission concluded that "in the matter of Jose Francisco Gonzalez and Melissa Villegas, Respondent failed to issue a citation that was in compliance with the requirements of [Texas Rule of Civil Procedure] 739." There is undisputed evidence that the citation served on Gonzalez did not provide for proper notice under Rule 739, nor did it inform Gonzalez of his right to [*94] request a jury trial. In Conclusion on Charge 3, the Commission concluded that "in the matter of the 'wrongful accusations' lawsuits, Respondent caused citations to be issued in a number of matters wherein the citations were defective in several elementary ways, in violation of [Texas Rules of Civil Procedure] 534." There is undisputed evidence that each of these citations failed to give proper notice under Rule 534 and failed to list the address of the plaintiff or his attorney as required under Rule 534. In Conclusion on Charge 4, the Commission concluded that "in the matter of Jesus Garza, Respondent caused a citation to [**17] be issued in a matter wherein the citation was defective in several elementary ways, in violation of [Texas Rules of Civil Procedure 534." There is undisputed evidence that the citation served on Garza gave inadequate notice of the his required appearance and did not list the address of the plaintiff or her attorney as required by Rule 534.

Respondent does not dispute the fact that she issued defective citations in these matters; rather, she attempts to shift the blame to others, including her predecessor (who left her with no forms for her usage), her staff (including the clerk of the court, who is responsible for issuing citations), the sheriff's department (which is responsible for timely service of citations), and the software company (which produced the alleged faulty software used to produce citations). But this argument does not overcome her own admission that she is responsible for the training and monitoring of her staff, as well as the testimony of Maria Corrales Chacon, her court clerk, that the members of Respondent's staff, and not the software, were responsible for calculating and inserting dates in the citations. Respondent's complaint that the sheriff's department [**18] was dilatory in serving defendants does not excuse her from the duty to issue proper citations: no amount of diligence by the sheriff's department can cure defective citations.

Adjudication of Dispute over Title to Real Property

In Conclusion to Charge 5, the Commission concluded that "in the matter of Jesus Garza, Respondent adjudicated a dispute over title to real property, which is a dispute not lying within the jurisdiction of a justice court." Hernandez sued Garza for breach of contract. As part of her judgment in favor of Hernandez, Respondent awarded possession of the real property to Hernandez. Garza had claimed ownership of the property. There was no evidence to substantiate a landlord-tenant relationship between Hernandez and Garza, and there was evidence which showed taxes paid on the property and title in the name of Maria Garza. The dispute concerned ownership

of real property, not the relationship between a landlord and a tenant.

Respondent exercised jurisdiction in a matter in which she had none. Respondent argues that she dealt in good faith with what she perceived to be a confusing case, and that the issue she believed to be before her was possession of [**19] the property, not title to the real property. Therefore, she contends, the issue appeared to be one involving a landlord/tenant relationship, thereby implicating her jurisdiction. We find her position unpersuasive. It should have been clear to Respondent that Hernandez's claim lay outside the realm of landlord/tenancy. The underlying complaint was for damages for breach of contract, and the parties contentiously disputed title to the real property. There was evidence of ownership by Garza, and there was no evidence of a lease between Garza and Hernandez.

Improper Contempt Charge

In its Conclusion to Charge 6, the Commission concluded that "respondent's [*95] telephonic finding that Francisco Gonzalez was in contempt of court at the time of execution of the writ of possession, and Francisco's subsequent incarceration, were contrary to the laws relating to contempt." The record shows that the sheriff's dispatcher testified that Respondent advised him to instruct the deputy executing the writ of attachment to arrest Gonzalez for contempt. Although Gonzalez was ultimately processed for interference with a peace officer's duties, there is an unexplained alteration of his booking card. [**20] It is undisputed that none of Gonzalez's actions took place in Respondent's presence or in her court. Respondent claims that she never used the word *contempt* in instructing the appropriate charges to be filed against Gonzalez and was never linked to the white-out appearing on Gonzalez's booking card. While there is conflicting evidence, this record supports a finding that Respondent ordered Gonzalez arrested for contempt notwithstanding the lack of any legal basis for such order.

The evidence detailed above is factually sufficient to support the Commission's conclusion that Respondent exhibited incompetence in the performance of her official duties.

Respondent's Improper Relationships

Oscar Reyna

In Conclusion to Charge 8, the Commission concluded, "Regarding the contacts with Nelida Martinez of the Maverick County Supervision and Corrections Department, Respondent wrongfully attempted to use her status as a justice of the peace to favorably influence the handling of Oscar Reyna's status as a felony probationer." Respondent's telephone call to Reyna's probation officer is undisputed, as is her appearance with Reyna and his son at the probation officer's [**21] office.

Respondent asserts that the evidence is factually insufficient to establish that she had a personal relationship with Reyna that could have improperly influenced her performance of official duties. We disagree. Respondent admitted (1) speaking to Reyna at a party, (2) having spoken to Reyna by telephone and during a visit to Reyna's office, and (3) having been contacted by Reyna's son to intervene in Reyna's probationary matter. She also points to evidence that Reyna's probation officer denied that she was influenced regarding the handling of Reyna's felony probationary status. The probation officer's denial that Respondent influenced her handling of Reyna's status is irrelevant in this case. The Commission's conclusion is that Respondent *attempted* to influence Martinez's handling of Reyna's probationary status. The fact that Martinez resisted Respondent's influence has nothing to do with Respondent's conduct.

Eddie Sandoval

In its Conclusion to Charge 11, the Commission concluded that "Respondent allowed her relationship with Eddie Sandoval to influence her judicial judgment in reducing the bail amount that she had previously set for Ramirez." The record is [**22] clear that Respondent initially set a high bond for Ramirez, spoke with County Commissioner Sandoval about the bond, then reduced the bond tenfold and released Ramirez on her own recognizance. She personally visited Ramirez at the jail and specifically referenced Ramirez's relationship with Sandoval. Respondent counters with Sandoval's testimony that he did not attempt to influence Respondent about Ramirez's bail. She argues that she testified that her conversation with Sandoval did not influence her performance of her professional duties.

The Special Master clearly disbelieved Sandoval's testimony that he did not intend [*96] to influence Respondent's decision as to Ramirez's bail amount and Respondent's argument that she herself did not indicate that that the conversation had such influence. Sandoval's intent is irrelevant in this case, and the fact that Respondent did not admit to any such influence is of little import.

Most of Respondent's challenges focus on witness credibility, circumstantial evidence, and common sense inferences. The evidence detailed above is factually sufficient to support the Commission's conclusion that Respondent willfully and persistently allowed her

improper [**23] relationship with Reyna and Sandoval to influence her judgment in the performance of her duties.

Complaints on Sanctions

Having determined that the evidence is factually sufficient to support the Commission's conclusions that Respondent's conduct constituted incompetence in the performance of her official duties and willfully or persistently allowed her improper relationship with Oscar Reyna to influence her judgment in the performance of her duties, we address the propriety of the sanctions imposed. The Commission recommended that Respondent be removed from office and prohibited from holding State judicial office in the future. Respondent argues that the actions with which she is charged do not rise to the level of requiring removal from office and a prohibition against holding office in the future, citing *In re Davis*, 82 S.W.3d 140 (Tex. Spec. Ct. Rev. 2002); *Barr*, 13 S.W.3d 525; *In re Lowery*, 999 S.W.2d 639 (Tex. Rev. Trib. 1998); and *Thoma*, 873 S.W.2d 477. We disagree.

In the present case, we are faced with not just a single incident, but with many instances of judicial misconduct. The evidence [**24] supports the findings that Respondent was in fact incompetent in the performance of her judicial duties, had knowledge of her own incompetence, and remained incompetent despite her willful and persistent violations of the law. Moreover, by allowing a personal relationship to influence her judicial judgment, she has violated the trust of the people who placed her in office. *See Markowitz v. Markowitz,* 118 S.W.3d 82, 86 (Tex. App. - Houston [14th Dist.] 2003, pet denied). Her conduct has resulted, among other things, in wrongful arrest and incarceration, denial of the right to trial by jury, and deprivation of a family's own home. If integrity is the very essence of the judicial vocation, Respondent's conduct leads this Tribunal to conclude that she ought to seek a new and different vocation. *See In re Canales*, 113 S.W.3d 56, 73 (Tex. Rev. Trib. 2003).

Respondent's conduct is particularly egregious in that her constituency, litigants in justice court, are the citizens most in need of a fair and competent judge. Given the limited jurisdiction of the justice court, litigants are unlikely to be able to afford legal counsel. They must depend on the judge [**25] to inform them of their rights and to protect those rights. Justice court is the gateway to American justice for many people. It is not too much to demand that a justice of the peace competently and fairly carry out the duties of the office to which the voters have elected her. The rule of law demands no less.

Because Respondent has repeatedly failed in her most basic obligation of protecting the most fundamental rights of those she was elected to serve, we find that the recommendations that Respondent be removed from office and prohibited from holding future office are appropriate and not excessive.

Conclusion

We affirm the recommendation of the State Commission on Judicial Conduct that [*97] Respondent Martha Chacon be sanctioned. We accept the recommendation that Respondent be removed as Judge No. 89, Justice of the Peace, Precinct No. 2, Eagle Pass, Maverick County, Texas. We further accept the recommendation that she be prohibited from holding State judicial office in the future.

We deny the Commission's motion that we refuse to entertain Respondent's motion for reconsideration, should she choose to file one.

/s/ Adele Hedges

Chief Justice

CONCURBY: MARTIN RICHTER

CONCUR:

CONCURRING [**26] **OPINION**

I join the majority opinion of the review tribunal accepting the State Commission on Judicial Conduct's n1 recommendation to remove Respondent from office and bar her from holding judicial office in the future. I write separately, however, because I believe the majority opinion applies an incorrect standard of review to be utilized by a review tribunal appointed by the Supreme Court of Texas. I have grave concerns about the legal and factual sufficiency standard of review enunciated for the very first time in *In re Thoma*, 873 S.W.2d 477 (Tex. Rev. Trib. 1994). The *Thoma* tribunal, unsupported by any legal precedent, deviated and changed the standard of review from one of *de novo* review to one of legal and factual sufficiency, which standard has been followed by every subsequent review tribunal, including the majority in this case. *See In re Bartie*, 2004 Tex. App. LEXIS 3479, No. 90, 138 S.W.3d 81 (Tex. Rev. Trib. April 16, 2004); *In re Canales*, 113 S.W.3d 56 (Tex. Rev. Trib. 2003, pet. denied); *In re Barr*, 13 S.W.3d 525, 559-60 (Tex. Rev. Trib. 1998); *In re Lowery*, 999 S.W.2d 639 (Tex. Rev. Trib. 1998) [**27] . Until *Thoma*, the standard of review was *de novo*. *See In re Brown*, 512 S.W.2d 317, 17 Tex. Sup. Ct. J. 370 (Tex. 1974); *In re Davila*, 631 S.W.2d 723, 25 Tex. Sup. Ct. J. 172 (Tex. 1982). For the reasons that follow, and after reviewing the history of the Commission and formal removal

proceedings, I conclude the proper standard of review that should be applied in all review tribunal proceedings, including this case, is *de novo*.

n1 Hereafter referred to as the "commission."

Following California's lead, Texas became the second state to create an independent commission to enforce ethical standards for judges. 1995 ST. COMM'N JUD. CONDUCT ANN. REP. 15. This new commission was created in 1965 by amendment to article five of the Texas Constitution, patterned the California commission's organization, and was named the Judicial Qualifications Commission. n2 *Id.* at 16-17; [*98] *see also* TEX. CONST. art. V, § 1-a(2) [**28] (amended 1977, 1984). Like its California counterpart, n3 section 1-a of article 5 authorized the commission to investigate complaints, hold formal proceedings and have a special master appointed, and recommend the removal or retirement of a judge. n4 TEX. CONST. art. V, § 1-a(6), (8) (amended 1977, 1984). At the time, section 1-a provided that the recommendation for removal or retirement of a judge be made to the supreme court. n5 *Id.* § 1-a(8). Specifically, section 1-a mandated the commission, upon determining to recommend the removal or retirement of a judge, to file promptly its entire record with the supreme court. *Id.* Section 1-a also provided the following standard of review to be employed by the supreme court:

> The *Supreme Court* shall review the record of the proceedings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence and shall order public censure, retirement or removal, as it finds just and [**29] proper, or wholly reject the recommendation.

Id. § 1-a(9)(emphasis added).

n2 For purposes of this opinion, there is no functional difference between the former Judicial Qualifications Commission and the present State Commission on Judicial Conduct. Hence, both will be referred to interchangeably as the "commission."

n3 *See Geiler v. Comm'n on Judicial Qualifications,* 10 Cal. 3d 270, 110 Cal.Rptr. 201, 515 P.2d 1 (1973) (citing to various constitutional provisions concerning the authority delegated to California's judicial commission, the burden of proof in proceedings before the judicial commission, and the standard of review in removal proceedings).

n4 Prior to this time, there was no formal complaint system, although the Constitution provided for other methods of removal. *See In re Bates*, 555 S.W.2d 420, 20 Tex. Sup. Ct. J. 452 (Tex. 1977); *see also* TEX. CONST. art. XV, § § (1)-(5) (impeachment), (6) (original action of supreme court after hearing on causes presented by sworn testimony of not less than ten lawyers practicing in accused judge's court), (8) (by governor, on address of two-thirds of each house of legislature). Far from where the complaint system is today, the amendment to section 1-a of article 5 granted the Commission jurisdiction only over appellate and district judges and limited the "corrective measures" the Commission could take to recommending the removal or retirement of a judge. *See* 1995 ST. COMM'N JUD. CONDUCT ANN. REP. 16. [**30]

n5 This was consistent with California's constitutional provision concerning removal proceedings. *See Geiler*, 110 Cal.Rptr. at 202 n.1, 203.

The first formal removal proceeding under article 5, section 1-a was *In re Brown*, 512 S.W.2d 317, 17 Tex. Sup. Ct. J. 370 (Tex. 1974). In *Brown*, the supreme court set out the procedural aspects of the complaint process. *Id.* at 318-320. The court noted the commission had the authority to recommend the removal or retirement of a judge and that the proceedings before the commission were not criminal in nature, since the commission's function was not to punish but to maintain the high quality of the judiciary. n6 *Id.* at 319. The court also noted that the burden of proof before the commission was preponderance of the evidence. *Id.* at 319-20. The court then determined that, although the commission had "fact-finding power," the language in section 1-a limiting the commission's authority concerning removal to a [**31] *recommendation* "manifested an intent to leave the court unfettered in its adjudication" and conferred on the court the authority to make "the ultimate decision." *Id.* at 320. Stating that its [*99] "constitutional responsibility" for making the ultimate decision would not be "abandoned by the delegation of the fact finding power to an administrative agency or the master," the court then concluded it "must make its own *independent evaluation* of the evidence adduced [before the commission]." n7 *Id.* (emphasis added). Although there was one concurring opinion and two dissenting opinions

in *Brown*, none of them challenged the majority's determination of the court's standard of review. *See id.* at 325 (Daniel, J., concurring), 325-27 (Reavley, J., dissenting), 327-33 (Johnson, J., dissenting). In fact, all applied a *de novo* review, agreeing the court was the trier of fact. *Id.* at 325 (Daniel, J., concurring), 325-27 (Reavley, J., dissenting), 327-33 (Johnson, J., dissenting).

n6 At the time of *Brown*, the commission's jurisdiction had increased to include county and county court-at-law judges, justices of the peace, and municipal court judges, as well as judges of special courts. 1995 ST. COMM'N JUD. CONDUCT REP. 17; *see also* TEX. CONST. art. V, § 1-a(6) (amended 1977, 1984). The sanctions available to the commission had also increased to include a private reprimand or public censure. 1995 ST. COMM'N JUD. CONDUCT REP. 17; *see also* TEX. CONST. art. V, § 1-a(8) (amended 1977, 1984). [**32]

n7 In reaching this conclusion, the court cited *Geiler*, 110 Cal.Rptr. at 201, which interpreted California's constitutional provision concerning formal proceedings. As stated in note 3, *supra*, at the time *Geiler* was issued, the California Constitution authorized the supreme court to review recommendations that a judge be retired or removed for wilful misconduct in office. *Geiler*, 110 Cal.Rptr. at 202 n.1 (quoting California Constitution article VI, section 18(c) then in effect). Noting its commission was vested with the power to recommend to the court censure, removal or retirement, but that the ultimate dispositive decision was entrusted to the court, the court concluded that "in exercising that authority and in meeting [the court's] responsibility [the court] must make [its] own, independent evaluation of the record evidence adduced below." *Id.* at 204. In other words, "it is to be the court's findings of fact and conclusions of law, upon which [the court is] to make [its] determination of the ultimate action to be taken." *Id.*

[**33]

Following *Brown*, there were three other reported removal proceedings before the supreme court: *In re Carrillo*, 542 S.W.2d 105, 19 Tex. Sup. Ct. J. 404 (Tex. 1976), *In re Bates*, 555 S.W.2d 420, 20 Tex. Sup. Ct. J. 452 (Tex. 1977), and *In re Davila*, 631 S.W.2d 723, 25 Tex. Sup. Ct. J. 172 (Tex. 1982). n8 None of these cases discussed or altered the standard of review enunciated in *Brown*. In fact, in *Carrillo*, the court reviewed the commission's findings and noted several "differences in [the court's] own findings." *Carrillo*, 542 S.W.2d at 109. And, in *Davila*, the court reiterated that its duty was "to determine whether the evidence taken by the master and by the commission supported the charges and constituted grounds for removal." *Davila*, 631 S.W.2d at 725.

n8 During this time, there were also a few constitutional amendments to section 1-a. *See* 1995 ST. COMM'N JUD. CONDUCT REP. 17. However, none affected the supreme court's standard of review in removal proceedings. *Id.* The amendments included changes in the commission's membership and in the sanctions available to the commission. *See* TEX. CONST. art. V, § 1-a(2),(6) (amended 1984).

[**34]

In 1984, the constitution was again amended. It was at this time that the supreme court transferred its authority over removal proceedings to a new reviewing body - the review tribunal. *See* TEX. CONST. art. V, § 1-a(8),(9). The amendment provided in relevant part as follows:

> The *review tribunal* shall review the record of the proceedings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence. Within 90 days after the date on which the record is filed with the review tribunal, it shall order public censure, retirement or removal, as it finds just and proper, or wholly reject the recommendation.

Id. art. V, § 1-a(9)(emphasis added).

Although the amendment completely rewrote two subsections of section 1-a, *see id.* art. V, § 1-a(6),(9), the commission's authority concerning the removal or retirement of a judge remained limited to *recommendations*. *See id.* art. V, § 1-a(8) [**35] (emphasis added). Additionally, the [*100] 1965 standard of review the supreme court was mandated to employ in removal proceedings and which was interpreted as a *de novo* review in *Brown* did not change. The amendments changing the reviewing body from the supreme court to the review tribunal did not alter the requirement that the record be reviewed "*on the law and facts.*" I find nothing in the amendments to section 1-a that should alter that standard of review for the tribunal.

Thoma was the first reported opinion of a review tribunal. That case abruptly departed from the *de novo* standard of review enunciated in *Brown*. *Thoma*, 873 S.W.2d at 485. Although *Thoma* cited the *Brown* opinion for other propositions of law, *Thoma* did not address the standard of review in light of *Brown* and its progeny. *Id.* As discussed below, I believe the *Thoma* court erroneously viewed the review tribunal proceeding as an appellate proceeding. *Id.* (see discussion heading entitled "Standard of Review on Appeal" in *Thoma* opinion).

In arriving at a traditional legal and factual sufficiency standard of review as applied [**36] in civil cases, the tribunal in *Thoma* noted that the special master and the commission are required to conduct formal removal proceedings as nearly as practicable in accordance with established rules of civil procedure. *Id.* The tribunal also noted the special master and the commission can receive only "legal evidence" at these proceedings, and that the commission can adopt the master's findings as its own. *Id.*

The *Thoma* tribunal then concluded, without reference to any legal authority, that the master's findings were "tantamount to findings of fact filed by a trial judge in a trial without a jury" and it would review them under the same standards an appellate court would review a trial judge's findings of fact in a civil case. *Id.* This unsupported assertion appears to be the linchpin upon which *Thoma* concluded that commission findings are reviewed for factual and legal sufficiency. Thereafter, the *Thoma* tribunal relied exclusively on general civil cases, rather than judicial removal cases, when it held that the legal and factual sufficiency standard of review was applicable. *Id.*

Furthermore, I note that review of informal proceedings of the commission [**37] by the three-judge special court of review is set by statute as *de novo*. TEX. GOV'T CODE ANN. § 33.034(d) (Vernon 2004); *see also* TEX. R. REM'L/RET. JDG. 9 (West 2004). A special court of review can impose various sanctions short of removal; only the review tribunal can order a judge removed from the bench and bar him or her from ever holding judicial office again. TEX. CONST. art. V, § 1-a(6)-(11); TEX. R. REM'L/RET. JDG. 9-12 (West 2004). It would seem illogical to allow *de novo* review of charges that cannot result in the removal of a judge, while mandating the stricter review posture of legal and factual sufficiency when a judge's forced removal from office is at stake.

By equating the commission's findings to those of a trial judge, the tribunal in *Thoma* improperly elevated the commission to a court of law and lowered the tribunal's responsibility in reviewing removal proceedings to a balancing act - one where the judge's favorable conduct is weighed against the specific acts of judicial misconduct. [**38] *See Brown*, 512 S.W.2d at 333 (Johnson, J., dissenting) ("the function of [the supreme court in removal proceedings] is not to make [the removal] determination by weighing in the balance a judge's favorable and commendable conduct against the specific acts of misconduct with which he is charged; it is not to weigh a judge's good and bad characteristics . . . If the act or acts at issue seriously violate the public interest in an unbiased and dedicated [*101] judiciary, then the judge must be removed regardless of the attributes of his other conduct.").

The commission is not a court of law and, by constitutional mandate, the tribunal *is* the trier of fact. n9 The error in *Thoma* lies in its characterization of the commission's hearing as a civil trial and the proceedings before the tribunal as an appeal. Were the commission's removal recommendations self-effectuating, the standard of review enunciated in *Thoma* might apply. n10 However, they are not. They merely trigger the proceedings before the review tribunal leading to the eventual determination of whether a judge should be retired or removed. The proceeding before the tribunal is a continuation of the [**39] removal process begun before the commission and must occur regardless of the parties' desire, unlike a civil appeal.

> n9 Further credence for this lies in the tribunal's authority, in its discretion and for good cause shown, to permit the introduction of additional evidence. *See* TEX. CONST. art. V, § 1-a(9). This is not to say, however, that the tribunal will conduct an entirely new proceeding. Good cause must be shown for why this evidence was not presented to the Commission and, even if good cause is shown, the tribunal retains discretion in allowing the evidence. *Id.*
>
> n10 In *Geiler*, the California Supreme court suggested that the proper standard of review in such a situation might be substantial evidence. *Geiler*, 110 Cal.Rptr. at 204. This is the standard our supreme court employs in reviewing tribunal proceedings. *See* TEX. R. REM'L/RET. JUDG. 13.

Following *Thoma*, all reported review tribunal [**40] decisions adopt without analysis the legal and factual sufficiency standard of review articulated therein. Like a train pulling cars having no independent power of their own, *Thoma* has taken a spur not found on the constitutional map of this state. For the foregoing reasons, I conclude that the review tribunal cannot and must not make a decision to remove or retire a judge

without complying with its constitutionally mandated duty of conducting an *independent* evaluation of the record.

For these reasons, I would apply a *de novo* standard of review in removal proceedings.

MARTIN RICHTER

JUSTICE

BETTY PRESTON, Appellant, v. THE STATE OF TEXAS, Appellee.

NUMBERS 13-03-00616-CR, 13-03-00617-CR, 13-03-00618-CR, 13-03-00619-CR

COURT OF APPEALS OF TEXAS, THIRTEENTH DISTRICT, CORPUS CHRISTI

2004 Tex. App. LEXIS 7217

August 12, 2004, Delivered
August 12, 2004, Opinion Filed

NOTICE: [*1] PUBLISH. SEE TEX. R. APP. P. 47.2(b).

PRIOR HISTORY: On appeal from the County Criminal Court at Law Number Eleven of Harris County, Texas.

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

COUNSEL: For Appellant (Pro se): Ms. Betty Preston, Houston, TX.

For Appellee: Hon. Ronald J. Beylotte, Chief Prosecutor, Houston, TX, Hon. Anthony W. Hall, Jr., City Attorney, Houston, TX, Hon. Bonita Carol Tolbert, Assistant City Attorney, Houston, TX,

JUDGES: Before Chief Justice Valdez and Justices Hinojosa and Castillo.

OPINIONBY: FEDERICO G. HINOJOSA

OPINION: Opinion by Justice Hinojosa

These are appeals from a municipal court of record. See TEX. GOV'T CODE ANN. ch. 30, subch. A (Vernon 2004). The Municipal Court Number Two of the City of Houston found appellant, Betty Preston, guilty of the following offenses: (1) failure to display a valid Texas driver's license; n1 (2) use of an expired license number plate; n2 (3) failure to establish financial responsibility; n3 and (4) use of an invalid inspection sticker. n4 The municipal court assessed the following punishment: (1) a $ 100 fine for the failure to display a valid driver's license; (2) a $ 50 fine for the use of an expired license number plate; (3) a $ 175 fine for the failure to establish financial responsibility; (3) and a $ 50 fine for the use of an invalid inspection sticker. Preston appealed to the county criminal court at law of Harris County. Sitting as an appellate court, County Criminal Court at Law Number Eleven of Harris County [*2] affirmed Preston's convictions. She now appeals from the judgments of the county criminal court at law. n5

n1 Municipal court cause number 05428305-6-5; county criminal court at law appeal number 5386; court of appeals cause number 13-03-00616-CR.

n2 Municipal court cause number 05248305-6-6; county criminal court at law appeal number 5387; court of appeals cause number 13-03-00617-CR.

n3 Municipal court cause number 05428305-6-7; county criminal court at law appeal number 5388; court of appeals cause number 13-03-00618-CR.

n4 Municipal court cause number 05428306-5-8; county criminal court at law appeal number 5389; court of appeals cause number 13-03-00619-CR.

n5 On appeal to the county criminal court at law, review was limited to the basis of the errors as set forth in Preston's motion for new trial and in the transcript and statement of facts prepared

from the proceedings leading to the convictions on appeal. An appeal from a municipal court of record may not be by trial de novo. *See* TEX. CODE CRIM. PROC. ANN. art. 45.042(b) (Vernon Supp. 2004); TEX. GOV'T CODE ANN. § 30.00014(b) (Vernon 2004).

[*3]

Unless the sole issue is the constitutionality of the statute or ordinance on which the conviction is based, we only have jurisdiction over such an appeal from a county criminal court at law if (1) the fine assessed against appellant exceeds $ 100 and (2) if the judgment is affirmed by the appellate court. TEX. CODE CRIM. PROC. ANN. art. 4.03 (Vernon Supp. 2004); TEX. GOV'T CODE ANN. § 30.00027(a) (Vernon 2004).

A. CAUSE NUMBERS 13-03-00616-CR, 13-03-00617-CR, AND 13-03-00619-CR

In cause numbers 13-03-00616-CR, 13-03-00617-CR, and 13-03-00619-CR, the fines assessed do not exceed $ 100 and the county criminal court at law affirmed the three judgments of the municipal court. Thus, we have jurisdiction over these three cases only if the issue before us is the constitutionality of the statute or ordinance on which the conviction is based.

Because Preston did not challenge the constitutionality of the statutes or ordinances on which these convictions are based in the brief she filed in the county criminal court at law, we conclude we have no jurisdiction over the appeals in these three cases. Accordingly, we dismiss the appeals [*4] in cause numbers 13-03-00616-CR, 13-03-00617-CR, and 13-03-00619-CR for want of jurisdiction.

B. CAUSE NUMBER 13-03-00618-CR

In cause number 13-03-00618-CR, the fine assessed by the municipal court exceeds $ 100 and the county criminal court at law affirmed the judgment. Thus, we have jurisdiction to review appellant's conviction for failure to establish financial responsibility.

The record reflects that the county criminal court at law affirmed the municipal court conviction in this case because appellant failed to provide either an agreed statement of facts, an agreed statement of the case, or a reporter's record. We review only those issues appellant raised before the reviewing county criminal court at law. *See* TEX. GOV'T CODE ANN. § 30.00027 (Vernon 2004) (the record and briefs on appeal in the county court at law constitute the record and briefs on appeal to the court of appeals).

The record shows that appellant failed to bring forward a statement of facts. n6 Without a statement of facts, a reviewing court cannot determine whether a trial court erred. The record on appeal from a municipal court conviction must conform substantially to the provisions [*5] governing appellate records under the appellate rules and the Code of Criminal Procedure. TEX. GOV'T CODE ANN. § 30.00016 (Vernon 2004). In a municipal court of record, a court reporter is not required to record testimony in a case unless the judge or one of the parties requests a record. TEX. GOV'T CODE ANN. § 30.00010(c) (Vernon 2004). We do not know whether appellant requested that the proceedings be recorded or whether appellant requested a statement of facts for appeal, although the record before us suggests that no statement of facts exists. Further, appellant has failed to file an agreed statement of facts or statement of the case. *See* TEX. R. APP. P. 34.2, 34.3.

n6 The appellate rules now refer to the "clerk's record" (formerly known as the "transcript") and the "reporter's record" (formerly known as the "statement of facts"). *See* TEX. R. APP. P. 34.5 and 34.6. However, chapter 30 of the government code continues to use the terms "transcript" and "statement of facts." *See* TEX. GOV'T CODE ANN. § § 30.00017, 30.00019 (Vernon 2004). For purposes of this opinion, we will use the government code terms.

[*6]

Because appellant has failed to file a complete record, and the record before us does not demonstrate error requiring review in the interest of justice, we affirm the judgment of the county criminal court at law in cause number 13-03-00618-CR.

FEDERICO G. HINOJOSA

Justice

Robert Lee Coggin, Appellant v. The State of Texas, Appellee

NO. 03-02-00690-CR

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

123 S.W.3d 82; 2003 Tex. App. LEXIS 8678

October 9, 2003, Filed

NOTICE: [**1] PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF MEMORANDUM OPINIONS AND UNPUBLISHED OPINIONS.

PUBLISH

SUBSEQUENT HISTORY: Petition for discretionary review refused by In re Coggin, 2004 Tex. Crim. App. LEXIS 682 (Tex. Crim. App., Apr. 21, 2004)

PRIOR HISTORY: FROM THE COUNTY COURT AT LAW NO. 1 OF CALDWELL COUNTY. NO. 29,925, HONORABLE EDWARD L. JARRETT, JUDGE PRESIDING.

DISPOSITION: Reversed and Rendered.

LexisNexis(R) Headnotes

COUNSEL: For Appellant: Mr. Donald T. Cheatham, Austin, TX.

For Appellee: Mr. Todd A. Blomerth, Blomerth & Payne, Lockhart, TX.

JUDGES: Before Chief Justice Law, Justices Patterson and Dally *: Opinion by Justice Patterson; Dissenting Opinion by Chief Justice Law

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

OPINIONBY: Jan P. Patterson

OPINION:

[*85] Robert Lee Coggin appeals his conviction for the offense of disorderly conduct. A jury found that he intentionally or knowingly made an offensive gesture by raising his middle finger in a public place, which tends to incite an immediate breach of the peace. *See* Tex. Pen. Code Ann. § 42.01(a)(2) (West 2003). In his first three points of error, appellant contends that his conviction should be overturned because the statute is unconstitutional: facially unconstitutional by impermissibly restricting protected free speech, void for vagueness and overbreadth, and unconstitutional as applied [**2] by punishing protected free speech. In his fourth and fifth points of error, appellant challenges the legal and factual sufficiency of the evidence. For the reasons stated below, we reverse the judgment of conviction and render a judgment of acquittal.

BACKGROUND

On October 25, 2001, appellant was driving in the left lane south on Colorado Street (U.S. Highway 183) in Lockhart. Appellant's vehicle was a white car with spotlights on the side and handcuffs hanging from the rearview mirror. Appellant came upon another vehicle in the left lane that was traveling more slowly. There is nothing in the record to show that other persons or automobiles were present. Appellant proceeded to tailgate the car, flash his headlights, and motion for the car to move into the right lane so that he could pass. The other vehicle was driven by twenty-two-year-old John Pastrano, a jailer with the Caldwell County Jail; his wife, Robin, was a passenger. Pastrano, thinking that he was

being pulled over by an unmarked police car, moved into the right lane. As appellant passed Pastrano's car, he allegedly gestured with his raised middle finger--or "shot the bird" **n1** --at Pastrano and his [**3] wife.

> **n1** The "bird" is "an obscene gesture of contempt made by pointing the middle finger upward while keeping the other fingers down." *Merriam-Webster OnLine*, at http://www.m-w.com. This gesture is of ancient origin:
>
> The middle-finger jerk was so popular among the Romans that they even gave a special name to the middle digit, calling it the impudent finger: *digitus impudicus*. It was also known as the obscene finger, or the infamous finger, and there are a number of references to its use in the writings of classical authors. . . . The middle-finger jerk has survived for over 2,000 years and is still current in many parts of the world, especially the United States.
>
> Desmond Morris et al., *Gestures* 81-82 (1979). This symbolic gesture has come to mean many things to many people in many contexts, including "displeasure" and "mild annoyance." *See* Martha Irvine, *Is the Middle Finger Losing Its Badness?*, AP Online, Feb. 23, 2003, *available at* 2003 WL 13367718 (reprinted in several newspapers). See also the cover of the September 20, 2003 issue of
>
> *The Economist* magazine, depicting a cactus in a desert panorama giving the gesture because of displeasure with the outcome of the Cancun trade talks.

[**4]

[*86] Pastrano, who testified that the incident "made [him] angry," called 911 and made a report of reckless driving. Officer James Cowan with the Lockhart Police Department responded to the dispatch and pulled appellant over soon after the call. After speaking with Pastrano, who had been called to the scene by the dispatcher, Cowan issued appellant a citation for the class C misdemeanor of "disorderly conduct - gesture." Appellant pled not guilty and initially waived a jury trial and counsel. He later retained counsel and in a one-day jury trial on October 21, 2002, was found guilty of the offense of disorderly conduct and fined $ 250.

ANALYSIS

That this conviction rests upon the unseemly gesture alone is clear from the charging instrument. Thus, appellant was not accused of threatening or otherwise endangering others on the road, or of reckless driving or tailgating. Nor does the State contend that the conduct is obscene. Appellant was charged solely with disorderly conduct by the gesture of extending his middle finger.

Constitutionality of Texas Penal Code Section 42.01(a)(2)

In his first and second points [**5] of error, appellant contends that section 42.01(a)(2) is unconstitutional on its face because it impermissibly proscribes rights of free speech and expression protected by the First and Fourteenth Amendments to the United States Constitution and Article I, section 8 of the Texas Constitution and is also vague and overbroad. Ordinarily, we do not reach constitutional issues unless necessary. We will nevertheless discuss these points of error in the interest of fully addressing the parties' primary arguments.

Before addressing the substance of appellant's constitutional claims, we conclude that we need not address appellant's Texas constitutional claims. Appellant has proffered no argument or authority concerning the protection afforded by the Texas Constitution or how that protection differs from the protection afforded by the United States Constitution. State and federal constitutional claims should be argued in separate grounds, with separate substantive analysis or argument provided for each ground. *Muniz v. State*, 851 S.W.2d 238, 251 (Tex. Crim. App. 1993); *Heitman v. State*, 815 S.W.2d 681, 690-91 n.23 (Tex. Crim. App. 1991). We will not make appellant's [**6] state constitutional arguments for him. *Muniz*, 851 S.W.2d at 252.

We begin with the presumption that a statute is constitutional. Tex. Gov't Code Ann. § 311.021(1) [*87] (West 1998). A facial challenge to the constitutionality of a statute imposes a heavy burden because the challenger must establish that no set of circumstances exists under which the act would be valid. *Briggs v. State*, 789 S.W.2d 918, 923 (Tex. Crim. App. 1990); *Ex parte Anderson*, 902 S.W.2d 695, 699 (Tex. App.--Austin 1995, pet. ref'd).

The statute under which appellant was charged provides:

§ 42.01. Disorderly Conduct

(a) A person commits an offense if he intentionally or knowingly:

(2) makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace.

Tex. Pen. Code Ann. § 42.01(a)(2). The First Amendment prohibits laws that abridge freedom of speech. **n2** U.S. Const. amend. I. There are, however, certain classes of speech that are not afforded the protection of the First Amendment. "Fighting words" are one such class of speech, [**7] which are "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971). Texas courts have uniformly held that section 42.01 applies to fighting words. *Jimmerson v. State*, 561 S.W.2d 5, 7 (Tex. Crim. App. 1978) (holding that section 42.01(a)(4), by implication, applies only to fighting words); *Duran v. Furr's Supermarkets, Inc.*, 921 S.W.2d 778, 785 (Tex. App.--El Paso 1996, writ denied) (holding that section 42.01(a)(1) applies only to fighting words); *Ross v. State*, 802 S.W.2d 308, 314-15 (Tex. App.--Dallas 1990, no pet.); *Estes v. State*, 660 S.W.2d 873, 875 (Tex. App.--Fort Worth 1983, pet. ref'd) (holding that section 42.01(a)(1) and (2) apply only to fighting words). Accordingly, we hold that the conduct proscribed under section 42.01(a)(2) falls within the "fighting words" exception and does not violate rights of free speech and expression protected by the First and Fourteenth Amendments to the United States Constitution. [**8] We overrule appellant's first point of error.

> **n2** The gesture of extending one's middle finger can be construed as speech because it has a well-known connotation. *See Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997) (citing *Spence v. Washington*, 418 U.S. 405, 411, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974)) ("Nonverbal conduct constitutes speech if it is intended to convey a particularized message and the likelihood is great that the message will be understood by those who view it, regardless of whether it is actually understood in a particular instance in such a way.").

Concerning appellant's second point of error challenging the constitutionality of section 42.01(a)(2) for vagueness and overbreadth, a statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that the statute forbids the contemplated conduct and if it encourages arbitrary and erratic arrests and convictions. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972). [**9] To determine whether the doctrine applies, we use a two-step process. First, we determine if the law gives a person of ordinary intelligence fair warning of the prohibited act. Second, we determine if the law provides explicit standards for enforcement by those who apply them. *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972). However, if the literal scope of the statute impinges on a First Amendment freedom, "the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974). On the other hand, [*88] the right of free speech is not absolute at all times and under all circumstances. A statute is impermissibly overbroad when, "'in addition to proscribing activities which may constitutionally be forbidden, it sweeps within its coverage speech or conduct which is protected by the First Amendment.'" *Bynum v. State*, 767 S.W.2d 769, 772 (Tex. Crim. App. 1989) (quoting *Clark v. State*, 665 S.W.2d 476, 482 (Tex. Crim. App. 1984)).

A statute narrowly drawn to define and punish specific conduct lying within [**10] the domain of state power, such as the use in a public place of words likely to cause a breach of the peace, is not unconstitutionally vague. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-74, 86 L. Ed. 1031, 62 S. Ct. 766 (1942). However, the Supreme Court has struck down statutes not limited in scope to fighting words that by their very utterance inflict injury or tend to incite an immediate breach of the peace. *See City of Houston v. Hill*, 482 U.S. 451, 462, 96 L. Ed. 2d 398, 107 S. Ct. 2502 (1987); *Gooding v. Wilson*, 405 U.S. 518, 523, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972).

Appellant urges that section 42.01(a)(2) is vague and overbroad because it does not define "offensive gesture or display," "incite," "immediate," or "breach of the peace." A statute is not unconstitutionally vague merely because it fails to define words or phrases. *Engelking v. State*, 750 S.W.2d 213, 215 (Tex. Crim. App. 1988); *Ahearn v. State*, 588 S.W.2d 327, 338 (Tex. Crim. App. 1979). Statutory words are to be "read in context and construed according to the rules of grammar and common usage." Tex. Gov't Code Ann. § 311.011(a) [**11] (West 1998). When words are not defined in a statute, they are ordinarily given their plain meaning unless the statute clearly shows that they were used in some other sense. *Daniels v. State*, 754 S.W.2d 214, 219 (Tex. Crim. App. 1988); *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. 1979). Words defined in dictionaries with meanings so well known as to be understood by a person of ordinary intelligence have been held not to be vague and indefinite. *Floyd v. State*,

575 S.W.2d 21, 23 (Tex. Crim. App. 1978); *Anderson*, 902 S.W.2d at 700. What we must do, then, is "to find the meaning of some not very difficult words." *Northern Sec. Co. v. United States*, 193 U.S. 197, 401, 48 L. Ed. 679, 24 S. Ct. 436 (1904) (Holmes, J., dissenting).

The courts have defined some of the terms which appellant challenges as vague. The language "offensive gesture or display" is somewhat similar to the statute the Supreme Court upheld in *Chaplinsky*, prohibiting an "offensive, derisive or annoying word." 315 U.S. at 569. In that case, the Supreme Court cited with approval the test for offensiveness set forth by the New Hampshire [**12] court: "what men of common intelligence would understand would be words likely to cause an average addressee to fight." *Id.* at 573. Texas courts have defined and interpreted the term "breach of the peace" to mean an act that "'disturbs or threatens to disturb the tranquility enjoyed by the citizens.'" *Woods v. State*, 152 Tex. Crim. 338, 213 S.W.2d 685, 687 (Tex. Crim. App. 1948) (quoting *Head v. State*, 131 Tex. Crim. 96, 96 S.W.2d 981, 982 (Tex. Crim. App. 1936)).

We next look to common definitions of "gesture," "incite," and "immediate." A gesture is the "use of motions of the limbs or body as a means of intentional expression," *Webster's Third New International Dictionary* 953 (1986) (hereinafter *Webster's*), or a "motion of the body calculated to express a thought or emphasize a certain point," *Black's Law Dictionary* 696 (7th ed. 1999) (hereinafter *Black's*). To incite is to "move to a course of action; stir [*89] up; spur on," *Webster's* 1142, or to provoke, *Black's* 765. Immediate means "occurring, acting, or accomplished without loss of time; made or done at once; instant," *Webster's* 1129, or "occurring without [**13] delay," *Black's* 751. The statute does not clearly show that the words "gesture," "incite," and "immediate" were used in a sense different from their plain meaning; rather, these words are so well known that, in the context of the statute, it would be difficult to attribute any other meaning to them. Given these common, plain definitions, we cannot say that the statute fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Floyd*, 575 S.W.2d at 23.

Section 42.01(a)(2) is narrowly drawn to give a person of ordinary intelligence a fair warning that the State prohibits the use of fighting words in a public place. The statute also provides explicit standards for enforcement by only limiting the use of these words in public places when they disturb or threaten to disturb the tranquility enjoyed by the citizens. Thus, the statute is not too vague for a criminal law. Furthermore, because the statute applies only to fighting words, it is not overbroad in proscribing conduct protected by the First Amendment. We overrule appellant's second point of error.

In his third point of error, appellant contends that section 42.01(a)(2) [**14] is unconstitutional as applied to him because there was no evidence of any "immediate danger or threat" from the people who witnessed his gesture. The State responds that appellant has waived this point of error because he did not raise it below. We agree. A contention that a statute is unconstitutional as applied to an accused must be asserted in the trial court or it is waived. *See Curry v. State*, 910 S.W.2d 490, 496 n.2 (Tex. Crim. App. 1995); *Garcia v. State*, 887 S.W.2d 846, 861 (Tex. Crim. App. 1994); *Bader v. State*, 15 S.W.3d 599, 603 (Tex. App.--Austin 2000, pet. ref'd). Here, there was no objection in the trial court to the constitutionality of section 42.01(a)(2) "as applied" to appellant. Thus, appellant did not preserve this point of error for our review.

Sufficiency of the Evidence

In his fourth point of error, appellant challenges the legal and factual sufficiency of the evidence. The State responds that appellant failed to preserve error on these challenges. To the contrary, an appellant may challenge both the legal and factual sufficiency of the evidence for the first time on appeal. *Rankin v. State*, 46 S.W.3d 899, 901 (Tex. Crim. App. 2001); [**15] *Grayson v. State*, 82 S.W.3d 357, 358-59 (Tex. App.--Austin 2001, no pet.) (citing *Givens v. State*, 26 S.W.3d 739, 741 (Tex. App.--Austin 2000, pet. ref'd)). Furthermore, appellant requested a motion for instructed verdict at trial, which is a challenge to the legal sufficiency of the evidence. *Grayson*, 82 S.W.3d at 358 (citing *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996)).

When both the legal and factual sufficiency of the evidence are challenged, we must first determine whether the evidence is legally sufficient to support the judgment. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). When reviewing legal sufficiency, we view the evidence in the light most favorable to the judgment and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). We do not examine the fact finder's weighing of the evidence, but merely determine whether there is evidence supporting the judgment. *Clewis*, 922 S.W.2d at 132 n.10.

[*90] For a [**16] rational trier of fact to have found appellant guilty of the offense of disorderly conduct by gesture, the State must have adduced proof to establish, beyond a reasonable doubt, that

(a) appellant

(b) intentionally or knowingly

(c) made an offensive gesture

(d) in a public place

(e) that tends to incite an immediate breach of the peace.

See Tex. Pen. Code Ann. § 42.01(a)(2). Two of the elements were not at issue. The Pastranos and appellant testified that the incident occurred on a highway, which is a public place--albeit here the people involved were in their respective vehicles. *Id.* § 1.07(a)(40) (West 2003). Whether the gesture is offensive was also not at issue. "The extended middle finger, or *digitus impudicus*, is an ancient opprobrious gesture that often has obscene implications." Betty J. Bauml & Franz H. Brauml, *A Dictionary of Gestures* 71 (1975). Both of the Pastranos testified that the gesture means "f--- off" or "f--- you," which is generally considered to be offensive. **n3** Appellant did not testify about his understanding of the meaning of the gesture.

> **n3** Nevertheless, the opprobrium of this gesture may be in decline. *See* Irvine, *supra* note 1 ("These days, 'the bird' is flying everywhere--and, in many instances, losing its taboo status, especially among the younger set.").

[**17]

Whether appellant made the gesture was in question. John Pastrano testified that appellant "shot me the bird" with his right hand when passing Pastrano's vehicle. Robin Pastrano testified similarly: "I looked, because I was curious to see who it was, and I saw him flipping us off." Both positively identified appellant in the courtroom as the man who made the gesture. Appellant denied making the gesture, although he testified that he has "given the bird to people on many occasions." Viewing the evidence in the light most favorable to the judgment, the evidence was legally sufficient to establish that appellant made the gesture.

Thus, we are left with the question of whether appellant's gesture tends to incite an immediate breach of the peace. "Actual or threatened violence is an essential element of a breach of the peace." *Woods*, 213 S.W.2d at 687. The test is whether the words, "when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen*, 403 U.S. at 20; *see also Virginia v. Black*, 538 U.S. 343, 155 L. Ed. 2d 535, 123 S. Ct. 1536, 1547 (2003).

Whether particular words constitute [**18] fighting words is a question of fact. *Duran*, 921 S.W.2d at 785. This "requires careful consideration of the actual circumstances surrounding the expression, asking whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *Texas v. Johnson*, 491 U.S. 397, 409, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969)). Language that is merely harsh and insulting does not generally rise to the level of fighting words; derisive or annoying words only rise to such level when they plainly tend to excite the addressee to a breach of the peace. *Duran*, 921 S.W.2d at 785. It is not enough that the words merely arouse anger or resentment. *See Skelton v. City of Birmingham*, 342 So. 2d 933, 937 (Ala. Crim. App. 1976). Anything short of the use of fighting words does not constitute a violation of the statute. *Jimmerson*, 561 S.W.2d at 7.

[*91] Here, the record and circumstances of this case do not demonstrate that appellant's gesture "tends to incite an [**19] immediate breach of the peace." Tex. Pen. Code Ann. § 42.01(a)(2). John Pastrano, one of two witnesses to the incident, testified as follows:

Q. What was your reaction when this happened, sir?

A. It made me angry. It kind of, you know, resulted back into, you know, as if I wanted to react to it, as in an angry mode, you know, to somewhat defend, you know, myself, as well as the disrespect of my wife.

Q. And what did you do as a result of that?

A. I went ahead and dialed 9-1-1 due to the fact-because the vehicle had went on after that.

Although the gesture may have been provocative, there is no evidence that Pastrano was moved to violence or restrained himself from retaliating. Instead, he had the composure to call 911 on his cell phone and report not the gesture but reckless driving. Robin Pastrano similarly testified that she was angry:

Q. How-what did you think of that gesture? How did that affect you?

A. I was angry and scared and upset all at one time.

Q. Okay. Do you find that-that gesture offensive to you, ma'am?

A. Yes, sir.

* * *

Q. How long did you stay upset about this?

A. A few days, it [**20] made me upset, maybe two or three days. Not that not [sic] long, but it did make me very upset.

There is no showing that Pastrano and his wife were in fact violently aroused or that appellant intended such a result. *See Cohen*, 403 U.S. at 20. Taking serious offense does not necessarily lead to disturbing the peace, and we may not prohibit conduct on that ground alone. *See Johnson*, 491 U.S. at 408-09. "The fact that speech arouses some people to anger is simply not enough to amount to fighting words in the constitutional sense." *Cannon v. City & County of Denver*, 998 F.2d 867, 873 (10th Cir. 1993).

The State attempts to equate Pastrano's reaction to that of the high school principal in *Estes*, who testified that when a student directed the gesture at him at a graduation ceremony, he reacted with "shock and anger, but . . . resisted 'an animal instinct to retaliate.'" 660 S.W.2d at 874. The circumstances in *Estes* differ. There, the setting was a formal ceremony in a public arena, which carries with it an expectation of decorum and civility. The principal was in a position of authority over the student, and they [**21] knew each other. Moreover, the student made the gesture "at a distance of not more than a few inches from the principal's face," in disregard of the principal and the ceremony. *Id.* Here, a motorist, one stranger to another, **n4** made the gesture as he sped past the other car. The incident was over in a matter of seconds, and the encounter was not in close proximity or in the context of a public gathering.

n4 Both appellant and Pastrano testified that they had never seen the other before.

We agree that the gesture--repugnant, distasteful, and crass as it is--could tend to incite an immediate breach of the peace in a different context. In some circumstances, it may accompany or be attendant to "road rage" or reckless driving, which may be prosecuted under Texas law. *See* Tex. Transp. Code Ann. § 545.401(a) [*92] (West 1999) (person drives recklessly if "drives a vehicle in wilful or wanton disregard for the safety of persons or property"); *see also Benge v. State*, 94 S.W.3d 31, 35-36 [**22] (Tex. App.--Houston [14th Dist.] 2002, pet. ref'd) (citing Tex. Pen. Code Ann. § 22.02(a)(2) (West 2003)) (reckless driving can be lesser-included offense of aggravated assault with motor vehicle). But given the circumstances--the brief exposure to the gesture as one car passed the other, made stranger to stranger, causing momentary hostility on Pastrano's part--we cannot conclude that appellant's conduct tends to incite an immediate breach of the peace. There was no actual or threatened violence, "which is an essential element of a breach of the peace." *Woods*, 213 S.W.2d at 687. That the gesture may be thrust upon unsuspecting or sensitive viewers falls short of the type of conduct in a public place that would incite those present to violence. *See Cohen*, 403 U.S. at 21-22 (in the presence of many people at a courthouse, wearing jacket bearing the term "F--- the draft" did not constitute fighting words).

Furthermore, to incite an immediate breach of the peace contemplates a face-to-face encounter, such as occurred in *Estes*, or at least something more than the impersonal, brief encounter of one motorist passing another. [**23] For example, a motorist shouting an obscenity and making the same gesture to a group of abortion protestors did not rise to the level of fighting words because the vehicle was across the street from the group and traveling at a high rate of speed. *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997). When a passing motorist shouted "sooey" to a police officer, he did not violate the statute because there was "no direct face-to-face contact or other exigent circumstances." *Garvey v. State*, 537 S.W.2d 709, 711 (Tenn. Crim. App. 1976); *see also Matter of Welfare of S.L.J.*, 263 N.W.2d 412, 420 (Minn. 1978) (when young girl shouted obscenity to police officer who was standing fifteen feet away "rather than eye-to-eye, there was no reasonable likelihood that [the words] would tend to incite an immediate breach of the peace or to provoke violent reaction by an ordinary, reasonable person"); *Hershfield v. Commonwealth*, 14 Va. App. 381, 417 S.E.2d 876, 877-78, 8 Va. Law Rep. 2867 (Va. App. 1992) (when one neighbor shouted obscenity to another, "distance and barriers" precluded an immediate breach of the peace).

Viewing the evidence in [**24] the light most favorable to the jury's verdict, a jury rationally could not have found beyond a reasonable doubt that appellant's gesture tends to incite an immediate breach of the peace. In making this determination, we have adhered to a scrupulous reading of the facts, a standard not met by the dissent's departure from and over-characterization of the record. **n5** We therefore sustain appellant's fourth point of error that the evidence was legally insufficient to support the judgment of conviction. In light of our disposition, we need not address appellant's factual sufficiency challenge or his fifth point of error challenging probable cause to charge him with a crime.

n5 For example, nowhere in the record does it state that Coggin forced the Pastranos over. Pastrano testified that he "put on [his] signal light

and moved to the outside lane" after Coggin flashed his headlights.

CONCLUSION

We hold that the evidence was legally insufficient to establish that appellant's gesture tends to [**25] incite an immediate breach of the peace. Because the evidence is legally insufficient to support appellant's guilt, we reverse the judgment of conviction and render a judgment of acquittal. [*93] *Burks v. United States*, 437 U.S. 1, 16-18, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978) (holding that double jeopardy bars retrial when reviewing court finds evidence legally insufficient); *Clewis*, 922 S.W.2d at 133 (reviewing court must render judgment of acquittal upon determination of legal insufficiency).

Jan P. Patterson, Justice

DISSENTBY: W. Kenneth Law

DISSENT:

DISSENTING OPINION

Few principles are as basic as the general notion that a reviewing court, when reviewing issues of fact, should never substitute its judgment for that of the jury when *some* evidence exists to support the finding made by the jury. Because the majority today violates that principle, I respectfully dissent.

The majority opinion concludes that no rational trier of fact could have found the elements of the offense of disorderly conduct beyond a reasonable doubt by asserting that no evidence exists to support such a finding. *See* Tex. Pen. Code Ann. § 42.01(a)(2) (West [**26] 2003). In doing so, the majority strays from the basic mandate that a reviewing court should so find only when the evidence is insufficient as a matter of law to support a finding of guilt and that the issue therefore should never have been submitted to the jury. *See Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996).

The penal statute in question provides that "[a] person commits an offense if he intentionally or knowingly: . . . makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace." Tex. Pen. Code Ann. § 42.01(a)(2) (West 2003). The only element at issue in this case is whether the offensive gesture "tends to incite an immediate breach of the peace." *See id.* Thus, we should not assess the result of the incident, but rather assess the potential for violence as a result of the gesture. Clearly, the state may prohibit speech or conduct which has a tendency to incite or produce immediate violence. *See Texas v. Johnson*, 491 U.S. 397, 409, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989); *Gooding v. United States*, 405 U.S. 518, 522, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972); [**27] *Cohen v. California*, 403 U.S. 15, 20, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971); *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 86 L. Ed. 1031, 62 S. Ct. 766 (1942); *Cantwell v. Connecticut*, 310 U.S. 296, 308, 84 L. Ed. 1213, 60 S. Ct. 900 (1940). Whether the offensive gesture "tends to incite an immediate breach of the peace" is a question of fact. *See Woods v. State*, 152 Tex. Crim. 338, 213 S.W.2d 685, 687 (Tex. Crim. App. 1948); *State v. Rivenburgh*, 933 S.W.2d 698, 701 (Tex. App.--San Antonio 1996, no pet.); *Estes v. State*, 660 S.W.2d 873, 875 (Tex. App.--Fort Worth 1983, pet. ref'd) ("We must consider if the gesture in this case, under all of the attendant circumstances, amounted to fighting words."). In determining whether an offensive gesture tends to incite imminent violence, we must "consider the gesture as being directed to an average person" and not the intended recipients. *Estes*, 660 S.W.2d at 875. That the intended recipients did or did not become violent is [**28] irrelevant. Rather, we are to consider how the *average* person would have reacted when considering whether the offensive gesture amounted to fighting words. *Id.*; *see also Johnson*, 491 U.S. at 409 (stating that the expressive conduct at issue must fall within the narrow class of speech constituting fighting words likely to provoke an average person to retaliate). Of course, the determination of how an average person [*94] would react is properly made by the jury and it "is not the function of this court to substitute its finding for that of the jury." *Estes*, 660 S.W.2d at 876.

Even if the majority's approach--measuring the degree to which the Pastranos reacted to appellant's gesture--were applicable, there is evidence in the record that John Pastrano restrained himself from violence. John Pastrano said he was so angered by the gesture he wanted to defend himself and his wife. If the measure is whether a particular recipient reacted violently, there could be no uniform application of this law because its application would rest on whether there was, in fact, violence and not on whether the speech or conduct would have a tendency to produce violence [**29] in the average person. *See Cohen*, 403 U.S. at 20 (describing fighting words as speech or gestures that, "when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"); *Woods*, 213 S.W.2d at 687 (defining disorderly conduct as "acts such as intend to excite violent resentment or to provoke or excite others to break the peace"). The majority's application of the standard would defeat the purpose for the law--to prevent

gestures, words, and conduct that incite violence. *See Woods*, 213 S.W.2d at 687.

The majority then commits its second error in conducting its legal sufficiency review of the case at hand. A review of a criminal conviction under a legal sufficiency standard requires a court to consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). Thus, an appellate court must look at all the evidence and consider which evidence supports the verdict. [**30] *Clewis*, 922 S.W.2d at 132 n.10. Of the evidence which tends to support the verdict, the appellate court must determine if that evidence rationally supports a finding of each element of the offense. *Id.* at 132.

In this case, there is ample testimony supporting the jury's conclusion that the offensive gesture, in these circumstances, would tend to incite an average person to immediate violence. John Pastrano was driving in the inside lane of U.S. Highway 183 in Lockhart with his wife, Robin Pastrano. At one point, John looked into his rearview mirror and noticed behind him a white Crown Victoria driven by appellant. John estimated he was traveling fifty miles per hour during the time appellant was behind him. Robin estimated their speed at seventy miles per hour. John testified that appellant was flashing the bright lights of the car on and off and motioning for John to move over. Appellant tailgated the Pastranos, at a distance of two to three feet, for approximately one-quarter mile. John, thinking that he was being pulled over by a police officer, moved into the right lane. Both John and Robin testified that as appellant passed them, he directed [**31] the obscene gesture at them. **n1**

> **n1** John Pastrano testified that Appellant nearly caused two more accidents after he passed them. Robin Pastrano testified that after Appellant passed them, he moved into the slow lane to pass a tractor trailer then moved back into the fast lane.

Appellant admitted that he was the driver of the car tailgating the Pastranos. Appellant said he was running late for his *tae kwan do* class in Lockhart when he came up behind the Pastranos in the left lane of the road. As appellant explained the incident:

[The Pastranos were] in the passing lane. There was no traffic in the right [*95] lane. I wasn't going to pass him on the right because I've been told that's illegal here. So I pulled up behind him. I didn't get real close to him initially. I gave him time to see my car and pull over. He did not pull over.

I got behind him a little closer and I flashed my lights. I flashed my brights. They don't wig-wag. They just go like this (indicating). And he didn't pull over [**32] even after that. I so motioned in my windshield, "Hey, could you please get over?" He eventually pulled over . . . .

Finally, when asked in court if he had told the officer issuing the citation, "Yeah I was on his ass because he was in the left lane and was going slow[,]" Appellant testified, "that sounds like something I would say." Appellant denied making the gesture.

Given these facts and attendant circumstances, the issue is whether a jury could reasonably find that these circumstances are likely to incite an average person to violence. For the majority to conclude that no rational trier of fact could reach the conclusion reached by this jury is quite simply a substitution of its judgment for that of the jury. Looking at the evidence and attendant circumstances in a light most favorable to the verdict reveals that appellant rode the Pastranos' bumper for a distance of one-quarter mile at a speed somewhere between fifty and seventy miles per hour. Appellant could have passed the Pastranos in the right lane but instead chose to tailgate them and force them over at the risk of an accident. Appellant was so impatient and so unyielding that he began motioning and signaling the [**33] Pastranos to pull over. He then pulled alongside of the Pastranos and raised his middle finger in an obscene gesture universally understood to mean "f--- you." Given these facts, a jury could reasonably believe that the gesture, in the context of its attendant circumstances, would have a tendency to incite immediate violence in an average person.

That these facts and attendant circumstances did not incite the Pastranos to immediate violence is inconsequential, and reversing the verdict premised on the fact that the Pastranos did not retaliate with their own breach of the peace is erroneous. The majority opinion is premised on the following: because the Pastranos were not moved to violence, appellant's gesture did not constitute fighting words. Yet, as the majority opinion correctly sets out, the test is whether the words, "when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *See Cohen*, 403 U.S. at 20; *Virginia v. Black*, 538 U.S. 343, 155 L. Ed. 2d 535, 123 S. Ct. 1536, 1547 (2003).

The facts of this case are distinguishable from the cases in which courts held the evidence failed to support [**34] a breach of the peace. In *Cohen*, the Supreme

Court reversed a conviction of a man wearing a jacket bearing the words "F--- the Draft" because "no individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult." *Cohen*, 403 U.S. at 21. In *Cantwell*, the Supreme Court reversed a conviction of members of Jehovah's Witnesses charged with breaching the peace in distributing religious materials because there was no showing that in disseminating the material the appellants were "noisy, truculent, overbearing or offensive." *Cantwell*, 310 U.S. at 309. In *Johnson*, the Supreme Court reversed the conviction of a man accused of burning the American flag because the circumstances surrounding the flag burning indicated that the act was generally directed at inducing a condition of unrest, creating dissatisfaction and [*96] even stirring people to anger about the policies of the federal government. 491 U.S. at 410. In *Cannon*, the Tenth Circuit reversed the conviction of appellants accused of breaching the peace by carrying signs stating "The Killing Place" outside an abortion [**35] clinic. 998 F.2d 867, 873 (10th Cir. 1993). The majority cites these opinions for the proposition that conduct that angers some people could not constitute fighting words. Generally, that proposition is true depending on the circumstances, such as where the conduct was intended as an impetus to change. *See Johnson*, 491 U.S. at 410; *Terminiello v. Chicago*, 337 U.S. 1, 4, 93 L. Ed. 1131, 69 S. Ct. 894 (1949). *Cannon* does not stand for the general proposition, though, that conduct that angers people to the point of violence is constitutionally protected. A necessary prerequisite to retaliatory violence is anger, so it goes without saying that speech arousing anger may amount to fighting words in some circumstances.

In addition, I believe that the *Rivenburgh* case from the San Antonio Court of Appeals supports my position. *See State v. Rivenburgh*, 933 S.W.2d 698 (Tex. App.--San Antonio 1996, no pet.). In that case, the court upheld a trial court's order suppressing evidence that a woman made a vulgar gesture with her middle finger and mouthed an obscenity toward drivers stopped behind her at a red light in a breach [**36] the peace action. *See Rivenburgh*, 933 S.W.2d at 701. *Rivenburgh* is an affirmance of a suppression order and a perfect example of how an appellate court should review a fact finder's conclusion on the issue of whether particular conduct could tend to incite imminent violence. The court of appeals said, "we presume the trial court applied the elements of the offense of disorderly conduct to the facts and found that a prudent man would not believe that Rivenburgh had committed the offense." *Id.* In addition, "the trial judge was free to disbelieve any or all of the testimony" of the one witness who saw the offensive gesture and heard the obscenities even though there was no indication the witness was, in fact, lying. *Id.* The court concluded that "though it may even rise to the level of common knowledge that this gesture and these words mouthed by a Texas motorist has led to breaches of the peace and even the loss of life, the trial court could have found that the gesture did not tend to incite an immediate breach of the peace *at this time and place*." *Id.* (emphasis added).

In our case, the majority concedes that, in some circumstances, appellant's gesture [**37] could tend to incite an immediate breach of the peace--but not in this case because the contact was brief, the participants were strangers, and the Pastranos experienced only momentarily feelings of hostility. That an offensive gesture made and similar words mouthed by a Texas motorist might have a tendency to lead to a breach of the peace and even the loss of life at another time and in another place is left open both in *Rivenburgh* and in the majority's opinion--and rightly so. What the majority fails to consider is that once a fact finder has reviewed the evidence, believed the testimony of the witnesses, observed their demeanor, considered the attendant circumstances and concluded that at the time and place in question the defendant did engage in conduct an average person could find would tend to incite an immediate breach of the peace, then a reviewing court must defer to that determination except for instances where no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The majority also relies on the fact that appellant and the Pastranos did not have a face-to-face encounter, stating that more [*97] than an "impersonal, brief [**38] encounter" is needed. Left unstated is the supposition that only a face-to-face encounter can provide the scenario needed to produce the setting for an immediate breach. In *Sandul v. Larion*, for example, a man was accused of shouting the words "f--- you" to a group of abortion protesters and giving them the finger as he drove by. 119 F.3d 1250, 1252 (6th Cir. 1997). A police officer, who was talking with the protesters on the street when the defendant drove by and was the only witness to the gesture and the only person who heard the epithet, pursued the man and caught up with him at his home. *Id.* After being acquitted of a charge of disorderly conduct, the defendant sued the officer for unlawful arrest. *Id.* The district court granted the officer summary judgment on the false arrest charge finding the officer had probable cause to arrest the defendant and was thus immune from suit. *Id.* The Sixth Circuit, though, noted that an official loses his immunity where a reasonable person would have known the defendant had a "clearly established" right to engage in the challenged conduct. *Id.* at 1254. The Sixth Circuit held that the arresting officer [**39] should have known that the defendant's speech was constitutionally protected; consequently, the

officer did not qualify for immunity. *Id.* at 1255. The court also concluded the defendant's words were not fighting words because the conduct and speech was shouted from the window of a motorist "traveling at a high rate of speed on the opposite side of the street, a considerable distance away from the protesters to whom the language was directed" and thus could not have had a tendency to incite immediate violence. *Id.* Also relevant to the court's conclusion was the fact that none of the protesters heard the insult or saw the gesture. *See id.*

In the present case, all of the ingredients for immediate violence were present. Both parties were in automobiles, and both automobiles were traveling in the same direction. Pastrano had the capacity to react immediately by accelerating in pursuit of appellant. One must ignore the reality of modern life to not recognize that many instances of "road rage" begin in just such a manner, and consideration of "road rage" easily could have factored into the thought process of the jury.

The majority cites numerous cases to support [**40] the proposition that a face-to-face encounter is required. None of the cited cases dictates that factor as a prerequisite, and a close look at these cases reveals that distinguishing factors are present in each. In *Garvey v. State*, the Tennessee Court of Criminal Appeals reversed a woman's conviction for disturbing the peace by shouting "sooey" to a police officer. 537 S.W.2d 709, 711 (Tenn. Crim. App. 1975). The court concluded:

Under the evidence here, the defendant's conduct (words) did not amount to 'fighting' words as contemplated by the statute. There was no direct, face-to-face conduct or other exigent circumstances here. This word addressed to a police officer trained to exercise a higher degree of restraint than the average citizen would not be expected to cause a breach of the peace.

Id. (referring, in part, to *Lewis v. New Orleans*, 408 U.S. 913, 913, 33 L. Ed. 2d 321, 92 S. Ct. 2499 (1972) (Powell, J., concurring) (proposing that words spoken by one citizen to another, face-to-face, might, in some circumstances, amount to fighting words but that those same words, in other circumstances, spoken by a citizen to a police officer [**41] might not amount to fighting words)).

In *Matter of Welfare of S.L.J.*, the Minnesota Supreme Court reversed the conviction of a fourteen-year-old girl accused [*98] of shouting the words "f--- you pigs" to two police officers. *Matter of Welfare of S.L.J.*, 263 N.W.2d 412, 415 (Minn. 1978). The reversal of conviction in that case was premised on two grounds: the relevant statute was overbroad and the speech did not rise to the level of fighting words because the attendant circumstances were such that "there was no reasonable likelihood that they would tend to incite an immediate breach of the peace." *Id.* at 420.

In *Hershfield v. Commonwealth*, the Virginia court of appeals reversed the conviction of a man accused of disorderly conduct for telling his neighbor to "go f--- yourself." 14 Va. App. 381, 417 S.E.2d 876, 876, 8 Va. Law Rep. 2867 (Va. Ct. App. 1992). In reversing the conviction, the court looked at the attendant circumstances and noted that when the defendant made the comment at issue he was standing fifty-five to sixty feet away from his neighbor and was separated from her by a chain-link fence. *Id.* at 877. The particular statute at issue stated that "if any [**42] person shall, in the presence or hearing of another, curse or abuse such other person, or use any violent abusive language to such person concerning himself or any of his relations, or otherwise use such language, under circumstances reasonably calculated to provoke a breach of the peace, he shall be guilty of a Class 3 misdemeanor." *See id.* Prevailing state supreme court precedent required the confrontation to be "face to face." *See id.* at 878. The court concluded that because an essential element of the offense was "in the presence or hearing of another," the distance separating the neighbors circumstantially precluded immediate violence. *Id.*

As a result, the cases cited by the majority support my contention that whether the offensive conduct constituted fighting words and thus would tend to incite an average person to violence is determined by looking at the attendant circumstances. There are as many cases affirming breach of the peace convictions as there are ones reversing those convictions. Although the majority contends the facts in *Estes* are distinguishable, that case is squarely on point. *See* 660 S.W.2d 873. In *Estes*, the defendant "extended [**43] the middle finger of his right hand" a few inches from the school principal's face as he received his high school diploma from the principal. 660 S.W.2d at 874. The majority contends *Estes* is inapplicable because the setting in that case was civil and formal, the gesture was made only inches away from the recipient's face and was prolonged, and the parties were in close proximity to each other and knew each other. *See id.* However, the only circumstance here at odds with *Estes* is whether or not the parties knew each other. And the most significant similarities between the two cases compel a similar outcome. Here, appellant and the Pastranos were only feet away from each other at all times relevant to their encounter. Likewise, unlike the circumstances in *Sandul* and more like the circumstances in *Estes*, Pastrano was in a position, if he chose, to chase appellant down. It is even possible to conclude that, as a jailer in the sheriff's department, Pastrano, like the principal in *Estes* and the police officer in *Lewis*, was self-controlled and able to restrain himself from

retaliation. **n2** The entire incident spanned fifteen to twenty seconds, [**44] given speeds of fifty to seventy-five miles per hour for a distance of a quarter mile. All told, because enough evidence exists for a reasonable jury to believe that the gesture, coupled with its attendant circumstances, would have a tendency to incite immediate violence [*99] in an average person, appellant's arguments should fail to persuade this court to reverse the conviction under a legal sufficiency review.

n2 In fact, John Pastrano testified that he restrained himself from retaliating.

Appellant also claims that the evidence is factually insufficient to support a conviction for disorderly conduct. **n3** A factual sufficiency review considers whether "a neutral review of the evidence, both for and against the finding" shows the evidence to be so obviously weak as to undermine confidence in the jury's determination or that the evidence supporting the conviction is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). An appellate court reviews [**45] the fact finder's weighing of the evidence. *Id.* The appellate court is then free to disagree with the fact finder's determination. *Clewis*, 922 S.W.2d at 133. Although the appellate court should be properly deferential to the fact finder's judgment so as avoid a substitution of judgment, the court should consider all of the evidence to prevent a "manifestly unjust result." *Id.* at 133, 135. In other words, to find that the evidence is factually insufficient means that the court "determines that the verdict is against the great weight of the evidence . . . so as to be *clearly wrong and unjust.*" *Id.* at 135.

n3 Because the majority reversed the conviction under a legal sufficiency review, it never reached Appellant's factual sufficiency claim or his fifth issue concerning probable cause for the issuance of the citation.

I fail to see, given all the evidence available in this case, that appellant's conviction of disorderly conduct resulted in manifest [**46] injustice. Although appellant denied making the gesture in question, his testimony was contradicted by both John and Robin Pastrano. He offered no other evidence in support of his assertion. In addition, he readily admitted to all of the "attendant circumstances" that I found compelling in my review of the legal sufficiency of the evidence. As a result, I would find no basis to determine that a conviction in this case was clearly wrong and unjust. As a result, I would reject appellant's argument that the evidence is factually insufficient to support a conviction and therefore would overrule appellant's fourth issue in its entirety.

Finally, in his fifth issue appellant argues that no probable cause existed for officers to issue a citation. *See Torres v. State*, 868 S.W.2d 798, 801 (Tex. Crim. App. 1993). However, appellant does not cite the record in support of his proposition, nor does he identify what relief he is claiming under this argument. As a result, appellant has not provided sufficient argument for us to reach the merits of the claim. *See* Tex. R. App. P. 38.1(h).

While I concur in the majority's analysis of the first three issues, because I would overrule [**47] appellant's legal and factual sufficiency challenges, I would affirm the judgment of the trial court.

I respectfully dissent.

W. Kenneth Law, Chief Justice

MICHAEL WAYNE CRAWFORD, Appellant v. THE HONORABLE JOHN CAMPBELL and THE HONORABLE BECKIE MARINO, Appellees

NO. 01-02-01010-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

124 S.W.3d 778; 2003 Tex. App. LEXIS 9840

November 20, 2003, Opinion Issued

PRIOR HISTORY: [**1] On Appeal from County Court at Law No. 3. Galveston County, Texas. Trial Court Cause No. 216,162.

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

COUNSEL: For Appellant: Mark J. Kelly, Texas City, TX.

For Appellee: Hon. John H. Campbell, Galveston County Municipal Court, Galveston, TX. Becky Marino, Galveston County Municipal Clerk, Galveston, TX.

JUDGES: Panel consists of Taft, Jennings, and Hanks.

OPINIONBY: Tim Taft

OPINION:

[*779] Appellant, Michael Wayne Crawford, challenges the order denying his petition for writ of mandamus, which requested Galveston County Court at Law Number 3 to order the City of Galveston municipal court to allow him to appeal his conviction for public intoxication. In one point of error, we determine whether the county court erred in denying appellant's petition on the basis that his appeal was moot. We affirm.

Facts

On February 9, 2002, appellant was arrested in the City of Galveston for public intoxication. n1 On the day of his arrest, appellant posted a $ 222 bond and was released from custody. On April 4, 2002, a municipal court found appellant guilty of the charged offense and assessed a $ 150 fine. The fine and court costs totaled $ 237. Appellant paid the fine and costs with his $ 222 bond and an additional [**2] $ 15 in cash.

n1 A person 21 years of age or older commits the offense of public intoxication if he appears in a public place while intoxicated to the degree that he may endanger himself or another person. *See* TEX. PEN. CODE ANN. § 49.02(a) (Vernon 2003).

Appellant obtained counsel and attempted to give notice of appeal and to post an appeal bond. The municipal court refused to accept the notice of appeal or the appeal bond. Appellant then filed a petition for writ of mandamus in the county court, requesting that the county court issue an order compelling the municipal judge and clerk to approve appellant's appeal bond and to forward his case to the county court for a trial de novo. The county court [*780] denied appellant's petition for writ of mandamus.

Denial of Appeal

In one point of error, appellant contends that the county court erred in denying his petition for writ of mandamus on the basis that his appeal was moot. Appellant argues that, because he satisfied the requirements [**3] for perfecting appeal under article 45.0426(a) of the Code of Criminal Procedure, his appeal was not moot. *See* TEX. CODE CRIM. PROC. ANN. art. 45.0426(a) (Vernon 2003).

"An appeal from a proceeding for a writ of mandamus initiated in the trial court is treated differently from an appeal from a proceeding for a writ of mandamus initiated in a court of appeals." *Harris v. Jones*, 8 S.W.3d 383, 385 (Tex. App.--El Paso, 1999, no

pet.); *see Anderson v. City of Seven Points*, 806 S.W.2d 791, 792 n.1, 34 Tex. Sup. Ct. J. 356 (Tex. 1991). "We do not review the trial court's findings of fact and conclusions of law under the abuse of discretion standard applicable to mandamus actions originating in appellate courts." *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.). Rather, "we review them in accordance with the standards generally applicable to trial-court findings and conclusions. That is, we review findings of fact for legal and factual evidentiary support . . . and we review conclusions of law de novo." *Id.*

The trial court did not [**4] provide findings of fact or conclusions of law. There is no dispute as to the facts. Appellant argues that he is entitled to appeal as a matter of law under article 45.0426. Because the issue is purely a question of law, our review is de novo. *See Harris County Appraisal Dist. v. Tex. Gas Transmission Corp.*, 105 S.W.3d 88, 91 (Tex. App.--Houston [1st Dist.] 2003, no pet. h.).

In *Fouke v. State*, the Court of Criminal Appeals held that "the voluntary payment of the fine in a misdemeanor case renders the appeal from the judgment in that case moot." *Id.*, 529 S.W.2d 772, 773 (Tex. Crim. App. 1975). Notwithstanding that longstanding rule, appellant asserts that he was entitled to an appeal because the plain language of article 45.0426 allows an appeal to the county court as long as the appeal is perfected within 10 days after the judgment was entered. *See* TEX. CODE CRIM. PROC. ANN. art. 45.0426(a). However, the statute does not address whether an appeal can still be perfected after a judgment has been satisfied. Appellant contends that he did not voluntarily satisfy the judgment because the clerk's office [**5] paid the fine and costs with the cash bond that appellant had posted on the night of his arrest. However, appellant still owed $ 15 after the bond had been applied. It is undisputed that appellant paid the remaining $ 15 in cash and signed a receipt for it. There is no indication in the record that this payment was involuntary. By voluntarily paying the fine and costs assessed against him, appellant rendered his appeal moot: his election to satisfy the judgment left him nothing from which to appeal. *See Fouke*, 529 S.W.2d at 773.

Although appellant wishes to distinguish this case from *Fouke* on the basis that the appeal attempted in *Fouke* was from a county court to the Court of Criminal Appeals, appellant did not direct this Court to any precedent suggesting that *Fouke* should not apply to an appeal attempted from a municipal court to a county court. Further, the policy grounds behind the *Fouke* decision--avoiding the necessity of advisory opinions and suppressing frivolous litigation--are applicable here as well. *See id.* Thus, the fact that appellant had complied with the statutory requirements for filing an appeal from the municipal court judgment [**6] did not entitle appellant to [*781] an appeal after he had voluntarily satisfied the judgment.

Appellant also argues that payment of the fine and court costs should not render his appeal moot because there are serious collateral legal consequences from his conviction. Appellant stated that, because of his conviction, there was a possibility that he could be passed over for a promotion with the Texas City Fire Department and that he was embarrassed by his conviction. Embarrassment and the possibility of losing a promotion do not rise to the level of serious collateral consequences. *See id.* (holding that when the consequences of the conviction are not "severe and imminent," an appeal is moot when the judgment is voluntarily satisfied). Because appellant voluntarily paid the municipal court's fine and costs, we hold that the county court was correct in denying appellant's petition for writ of mandamus.

We overrule appellant's point of error.

Conclusion

We affirm the judgment of the trial court.

Tim Taft

Justice

THE STATE OF TEXAS, Appellant v. LEE MICHAEL ALLEY & PATRICIA A. DELAROSA, Appellees

NO. 01-03-00017-CR, NO. 01-03-00018-CR

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

137 S.W.3d 866; 2004 Tex. App. LEXIS 4585

May 20, 2004, Opinion Issued

NOTICE: [**1] PUBLISH. TEX. R. APP. P. 47.2.

PRIOR HISTORY: On Appeal from Precinct 5, Place 2 of the Justice Court. Harris County, Texas. Trial Court Cause No. TR52X3199063, Trial Court Cause No. TR52X3204827.

DISPOSITION: Appeals dismissed.

LexisNexis(R) Headnotes

COUNSEL: For Appellant: Alan Curry, Assistant District Attorney, Houston, TX. Charles A. Rosenthal, Jr., District Attorney, Harris County, Houston, TX.

For Appellee: David R. Lee, Bellaire, TX. George McCall Secrest, Jr., Bennett & Secrest, L.L.P., Houston, TX. Robert V. Rosenberg, Houston, TX.

JUDGES: Panel consists of Chief Justice Radack and Justices Alcala and Bland.

OPINIONBY: Jane Bland

OPINION: [*867] In this case, we consider whether the State may appeal a justice court's ruling dismissing a Class-C misdemeanor complaint for failure to stop at a stop sign directly to the court of appeals. In November 2002, the justice court dismissed criminal complaints alleging that, on separate occasions, appellees Lee Michael Alley and Patricia Delarosa failed to stop at a stop sign. Neither complaint specified the location where the alleged offense occurred. The State appealed in a notice providing that, "The State of Texas now gives written Notice of Appeal to the Court of Appeals sitting at Houston, Texas." We conclude [**2] that the State should have brought these appeals to the county courts in the first instance, and therefore dismiss for lack of jurisdiction.

Jurisdiction

Alley and Delarosa each contend that this Court lacks jurisdiction to consider the State's appeal at this stage of the proceedings, and that the State is attempting to circumvent review by a county court. Alley and Delarosa rely upon Articles 4.08 and 45.042 of the Texas Code of Criminal Procedure in support of their contention that county courts have appellate jurisdiction of all appeals from justice courts. Article 4.08 of the Code of Criminal Procedure provides that "the county courts shall have appellate jurisdiction in criminal cases of which justice courts and other inferior courts have original jurisdiction." TEX. CODE CRIM. PROC. ANN. art. 4.08 (Vernon 1977); *see also* TEX. GOV'T CODE ANN. § 26.046 (Vernon 1988) (vesting county courts with appellate jurisdiction "in criminal cases of which justice courts and other inferior courts have original jurisdiction"). Article 45.042 provides in pertinent part:

(a) Appeals from a justice or municipal court, including appeals from final judgments in bond forfeiture proceedings, [**3] shall be heard by the county court except in cases where the county court has no jurisdiction, in which counties such appeals shall be heard by the proper court.

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

TEX. CODE CRIM. PROC. ANN. art. 45.042 (Vernon Supp. 2004).

The State concedes that these provisions appear to confer jurisdiction to county courts, but contends nonetheless that it may appeal the justice court's ruling

directly [*868] to this court through the State's rights of appeal set forth in Article 44.01of the Code of Criminal Procedure. Article 44.01(a)(1) allows the State to appeal an order of a court in a criminal case if that order "dismisses an indictment, information, or complaint or any portion of an indictment, information, or complaint." TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon Supp. 2004). Article 44.01, however, does not specify to which court such an appeal should be brought. The State contends that Article 44.01 "contemplates" that a State's appeal may be heard by the courts of appeals, but it concedes that Article 44.01 does not designate the [**4] court of appeals as having initial appellate jurisdiction over cases arising out of the justice and municipal courts. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(1), (f) (Vernon Supp. 2004) (providing that "the court of appeals shall give precedence in its docket to an appeal filed under Subsection (a) or (b) of this Article"). Instead, Article 4.08 vests county courts with appellate jurisdiction in criminal cases for which justice courts have original jurisdiction. TEX. CODE CRIM. PROC. ANN. art. 4.08.

The State asks us to hold Article 4.08 inapplicable on a theory that "the appeal from a justice court to a county court is clearly intended to be an appeal by the defendant because such appeals are required to be trials *de novo*." *See* TEX. CODE CRIM. PROC. ANN. art. 44.17 (Vernon Supp. 2004) (providing for trial *de novo* in all appeals from justice courts); *see also* TEX. CODE CRIM. PROC. ANN. art. 45.042(b). The State contends that Article 44.01 therefore "effectively prevails" over Article 4.08.

We disagree. Articles 4.08 and 45.042 control, because both provisions, in specific and unambiguous terms, provide that an appeal from a justice court is to the county [**5] court. When a statute is clear and unambiguous, courts may not strain the plain meaning of the wording in order to give the statute a different reading. *Smith v. State,* 789 S.W.2d 590, 592 (Tex. Crim. App. 1991). Similarly, we construe Article 44.01(f) according to its plain textual meaning unless such a construction would result in absurd consequences. *See State v. Gutierrez,* 129 S.W.3d 113, 114 (Tex. Crim. App. 2004) (court must construe Article 44.01(a)(2) of the Code of Criminal Procedure according to its plain textual meaning, unless text is ambiguous, or construing it according to that meaning would lead to absurd consequences).

Moreover, if a general provision of a statute conflicts with a special or local provision, the provisions should be construed, if possible, to give effect to both provisions. TEX. GOV'T CODE ANN. § 311.026 (Vernon 1998); *Dillehey v. State,* 815 S.W.2d 623, 632 (Tex. Crim. App. 1991). If the statutes are unable to be reconciled, the specific statute will prevail as an exception to the general statute, unless the general statute is the later enactment and the manifest intent is that the general provisions [**6] prevail. TEX. GOV'T CODE ANN. § 311.026(b) (Vernon 1998).

In this case, the provisions in Articles 44.01, 4.08, and 45.042 of the Texas Code of Criminal Procedure, in the context of an appeal by the State from a justice court, can be read to give effect to all, with Article 44.01 *allowing* the State to appeal, and Articles 4.08 and 45.042 establishing the court with the initial appellate jurisdiction to hear the case. *Compare* TEX. CODE CRIM. PROC. ANN. art. 44.01 *with* TEX. CODE CRIM. PROC. ANN. art. 4.08 *and* TEX. CODE CRIM. PROC. ANN. art. 45.042. Articles 4.08 and 45.042 specifically address appeals from a justice court, and provide that such appeals must be taken to the county courts, whereas Article 44.01 confers upon the State the general power to appeal certain rulings in a criminal proceeding. TEX. CODE CRIM. PROC. ANN. arts. 44.17, 45.042.

[*869] Such a construction is consistent with the jurisdictional provisions of the Texas Constitution. The Texas Constitution confers appellate jurisdiction on both Article V, § 6 courts and Article V, § 16 courts. *See* TEX. CONST. art. V, § 6 ("Said Courts of Appeals shall have appellate jurisdiction co-extensive with the [**7] limits of their respective districts, which shall extend to all cases of which the District or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law."); *see also* TEX. CONST. art. V, § 16 ("The County Court has jurisdiction as provided by law."); *State v. Morse,* 903 S.W.2d 100, 102 n.2 (Tex. App.--El Paso 1995, no pet.) (observing that county court was acting as a court of appellate review of proceedings from a municipal court).

We therefore hold that Article 44.01 authorizes the State to appeal certain legal rulings in criminal cases, and requires the court exercising appellate jurisdiction to expedite appeals authorized by Articles 44.01(a) and 44.01(b). *See* TEX. GOV'T CODE ANN. § 311.026; *Dillehey,* 815 S.W.2d at 632. We further hold that Article 4.08, which specifically provides that "the county courts shall have appellate jurisdiction in criminal cases of which justice courts and other inferior courts have original jurisdiction," requires that the State bring any appeal authorized by Article 44.01 from the justice court first to the county court. TEX. CODE CRIM. PROC. [**8] ANN. art. 4.08.

Only one intermediate appellate court has addressed the interplay between Article 44.01 and Article 4.08. *See State v. Boseman,* 805 S.W.2d 922, 923 (Tex. App.--Beaumont 1991), *rev'd on other grounds,* 830 S.W.2d

588 (Tex. Crim. App. 1992). In *Boseman*, the State appealed pursuant to Article 44.01 of the Code of Criminal Procedure to the county court. *Boseman,* 805 S.W.2d at 923. The county court dismissed the two complaints for lack of jurisdiction, and the State appealed that decision to the Beaumont Court of Appeals. The appellate court, with one justice dissenting, held that the county court had jurisdiction to consider the State's appeal, and remanded the case to the county court. *Id.* at 928. n1

> n1 The dissent in *Boseman* concluded that Article 44.01 does not give the State the right to appeal from a justice or municipal court ruling. *Boseman,* 805 S.W.2d at 928-29. The Texas Court of Criminal Appeals did not determine the jurisdictional question because the State's notice of appeal did not comply with Article 44.01. *Boseman*, 830 S.W.2d at 591. The Court of Criminal Appeals was "troubled by the lack of a clear-cut mechanism for appeals by the State from a non-record municipal court," but reserved the resolution of that issue for another day. *Id.*

[**9]

Our interpretation is consistent with the Legislature's stated purpose of Article 44.01, enacted when the Texas Constitution prohibited the State from appealing *any* adverse rulings in criminal cases. HOUSE COMM. ON CRIM. JURISPRUDENCE, Bill Analysis, Tex. H.B. 1035, 70th Leg., R.S. (1987). In that report, the committee explained that the purpose of Article 44.01 is to "define the parameters of the State's right to appeal in criminal cases." *Id.* In so doing, the Legislature stated that it intended to give the State the right to appeal in "certain specific situations." *Id.* The Legislature did not, however, change existing jurisdictional provisions by designating the courts to hear such appeals, and the Legislature's committee reports reveal no intent that Article 44.01 abrogate existing jurisdictional provisions of the Code.

Finally, there are inherent practical problems with a direct appeal from a non-record court. Here, the State developed a reporter's record in a "non-record" court, but such is not the general course of proceedings in justice courts, because justice courts are not courts of record. *Gano v.* [*870] *State*, 466 S.W.2d 730, 733 (Tex. Crim. App. 1971). [**10] The following excerpt from the record explains the unusual existence of a reporter's record here:

[State]: Thank You, Judge. Uh, and initially I'd like the record to reflect that the reason why we're doing this is because with all due respect, Your Honor does routinely dismiss . . . cases involving running a stop sign. So the two cases that we're discussing -- the three - I'm sorry. The three cases that we're discussing now are just a microcosm of something that's been ongoing.

***

[State]: Uh, as Your Honor is aware our intent in this case is to go directly to the Court of Appeals under Article 44.01 of the Code of Criminal Procedure. We do not intend on facing a trial *de novo* in the County Court.

***

[State]: Again, I think we already know what the outcome of Your Honor's decision is going to be which is why the court reporter is here today.

The presence of a record in this case, however, does not transform a justice court into a court of record for all proceedings. Rather, the jurisdictionally appropriate course is one in which the State appeals to the county court, a court of record. The county court can review a motion to quash the complaint [**11] anew. If granted, the State then may appeal to the court of appeals. If denied, the State then may proceed with the prosecution it sought in the justice court.

Conclusion

Our construction of Article 44.01 harmonizes that provision with Articles 4.08 and 45.042 of the Code of Criminal Procedure, which specifically provide that an appeal from a justice court or municipal court is brought in the first instance to the county court. We conclude that the State must first bring its appeal to the county court before any appeal to the courts of appeals. We therefore dismiss this appeal for lack of jurisdiction.

Jane Bland

Justice

R. Robert WILLMANN, Jr., Brigid Sheridan, and Ed Minarich, Appellants v. CITY OF SAN ANTONIO, Appellee

No. 04-02-00853-CV

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

123 S.W.3d 469; 2003 Tex. App. LEXIS 8611

October 8, 2003, Delivered
October 8, 2003, Filed

NOTICE: PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF MEMORANDUM OPINIONS AND UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: [**1] As Corrected October 17, 2003. Petition for review filed by, 12/18/2003
Petition for review denied by Willmann v. City of San Antonio, 2004 Tex. LEXIS 160 (Tex., Feb. 20, 2004)

PRIOR HISTORY: From the 285th Judicial District Court, Bexar County, Texas. Trial Court No. 1999-CI-04626. Honorable David Peeples, Judge Presiding. n1

> n1 The Honorable David A. Berchelmann, Jr., signed the order on the City's motion for partial summary judgment which appellants also appeal.

DISPOSITION: REVERSED AND REMANDED IN PART; AFFIRMED IN PART.

LexisNexis(R) Headnotes

COUNSEL: FOR APPELLANTS: Harry A. Nass, Jr., Attorney At Law, San Antonio, TX. James M. Parker Attorney At Law, San Antonio, TX.

FOR APPELLEE: John E. Clark, Goode Casseb Jones Riklin Choate & Watson P.C., San Antonio, TX. Michael R. Hedges, Hedges & Associates, P.C., San Antonio, TX.

JUDGES: Opinion by: Phylis J. Speedlin, Justice. Sitting: Alma L. Lopez, Chief Justice, Karen Angelini, Justice, Phylis J. Speedlin, Justice.

OPINIONBY: Phylis J. Speedlin

OPINION:

[*470] Robert Willmann, Jr., Brigid Sheridan, and Ed Minarich (collectively "appellants"), challenge the method used by the City of San Antonio ("the City") in appointing municipal court judges. Appellants contend on appeal that the trial court erred in granting the City's no-evidence motion for partial summary judgment. Appellants also challenge the trial court's judgment that Ordinance No. 86503 does not violate Article 16, section 17 of the Texas Constitution. We agree with the trial court that the ordinance does not violate the Texas Constitution; however, we find that appellants raised a genuine issue of material fact with regard to whether the City Council violated the [**2] Texas Open Meetings Act ("TOMA") in passing Ordinance No. 86503 (the "Ordinance") relating to the appointment and reappointment of municipal court judges in August 1997. Accordingly, we reverse the trial court's order on that claim and remand for further proceedings. We, however, affirm the trial court's judgment as to appellants' state constitutional claim.

[*471] **BACKGROUND**

The essential facts are undisputed by the parties. The City Council of San Antonio consists of eleven members -- ten council members and one mayor. R. Robert Willmann was first appointed as a part-time municipal court judge on July 5, 1990. Brigid Sheridan was first appointed as a full-time municipal court judge on December 19, 1991. Ed Minarich was first appointed as a part-time municipal court judge on December 21, 1993. Pursuant to an ordinance passed and approved on August 31, 1995, appellants were each reappointed to their

positions for a subsequent two-year term beginning on September 1, 1995.

In 1997, consistent with prior practice, the City Council appointed five of its members to comprise the Municipal Court Committee ("the Committee"). The Committee was chaired by Councilman Roger Flores, II. The Committee [**3] met on at least six occasions in July and August 1997 to review and discuss applicants for appointment and reappointment as municipal court judges. The meetings were attended by the presiding municipal court judge at the time, Judge Stella Ortiz Kyle. Judge Kyle took notes at the Committee meetings. The Committee meetings did not comply with the notice and recording requirements of TOMA.

In subsequent interdepartmental correspondence, the Committee advised the Mayor and City Council of the names of individuals the Committee recommended for appointment and reappointment as municipal court judges. Specifically, the Committee recommended three new full-time judges and the reappointment of eight full-time and four part-time judges. All the Committee members agreed with the individuals recommended for reappointment. Councilman Jeff Webster, however, did not sign in support of the new appointments. In its correspondence, the Committee requested the City Council's concurrence with its selection of candidates by ordinance at an open meeting to be held on August 28, 1997. Prior to the City Council meeting, by letter dated August 22, 1997, Councilman Flores informed appellants that the Committee [**4] had not recommended their reappointment, thanked them for their years of service, and wished them well in the future.

According to the deposition testimony of Councilman Flores, a copy of the interdepartmental correspondence and a draft of Ordinance No. 86503 were given to each City Council member a few days prior to the meeting of the full City Council. The draft ordinance included the names of the same individuals the Committee had recommended for appointment and reappointment in the Committee's interdepartmental correspondence. The ordinance was placed on the City Council's agenda for a meeting to be held on August 28, 1997. n2 The tape recording from the City Council meeting held on that date reflects that only the three new individuals recommended for full-time positions were discussed in depth. Councilman Ed Garza remarked that the Committee had assessed more than twenty applicants and had narrowed the field to seven. Councilman [*472] Webster acknowledged that as a Committee member he did not support the new appointees because he had reservations. He also stated that some changes were made with the current judges serving on municipal court and called it a "difficult situation." Councilman [**5] Flores reminded the City Council that they needed eight votes to pass the ordinance as an emergency vote. After this discussion, Ordinance No. 86503 was passed and approved by a vote of nine in favor and one against. n3 Under this ordinance, the appointments and reappointments were to run for a two-year term beginning September 1, 1997 and ending August 31, 1999. The ordinance provided that all persons presently holding an appointed position as judge but who were not listed in the ordinance would not be reappointed to their office. Appellants were not listed in the ordinance.

n2 Ordinance No. 86503 contains the date of August 27, 1997. The summary judgment evidence included the agenda for a City Council meeting held on August 28, 1997. Item 40 of that agenda reflects that the City Council would be considering an ordinance appointing three new full-time municipal court judges, and reappointing eight full-time municipal court judges and four part-time municipal court judges. Additionally, the voting sheet reflecting each councilman's vote on Ordinance No. 86503 is dated August 28, 1997. Thus, it would appear that the ordinance was actually passed and approved on August 28, 1997. [**6]

n3 One member of City Council was absent for the vote. Councilman Webster voted against passing the ordinance.

Appellants sued the City, alleging that Ordinance No. 86503 was void because all meetings of the Committee were in violation of Section 11 of the City Charter n4 and TOMA. Also, appellants claimed that because Ordinance No. 86503 failed to name successors to their positions, they had not been removed from office and their successors had not been duly appointed and qualified as required by Article 16, section 17 of the Texas Constitution. The City timely answered and subsequently filed a motion for partial summary judgment, asserting there was no evidence "that [the] City did not do something that it was legally required to do as to the City municipal court committee meeting(s) or as to passing this Ordinance." Appellants responded and filed an amended original petition, alleging, among other things, that the City Council's action was a "rubber stamp" approval of the Committee's recommendations in violation of TOMA.

n4 Section 11 of the City Charter of San Antonio provides the following:

> All meetings of the Council shall be held at such times as may be prescribed by ordinance or resolution; but not less than one regular meeting shall be held each week, unless postponed for reasons to be spread [sic] on the minutes which shall be kept of all Council meetings. Special meetings of the Council shall be called by the City Clerk upon the written request of the Mayor, the City Manager or three members of Council. All meetings of the Council and of any committees thereof shall be in compliance with the Texas Open Meetings Act as it may be amended from time to time.
>
> SAN ANTONIO, TEX. CITY CHARTER, art. II, § 11.

[**7]

The trial court granted the City's motion, ruling that "there is no evidence or law to support the Plaintiffs' allegations that the Defendant City violated the Texas Open Meetings Act." A trial was held before the court on the remaining issue of whether appellants continued to hold office pursuant to Article 16, section 17 of the Texas Constitution. The trial court entered final judgment in favor of the City. Appellants filed a timely appeal to this court.

STANDARD OF REVIEW

Our review of the trial court's rendition of summary judgment is *de novo*. *Reynosa v. Huff*, 21 S.W.3d 510, 512 (Tex. App.--San Antonio 2000, no pet.). We look at the evidence in the light most favorable to the non-movant against whom the summary judgment was rendered, disregarding all contrary evidence and inferences. *See Gomez v. Tri City Cmty. Hosp., Ltd.*, 4 S.W.3d 281, 283 (Tex. App.--San Antonio 1999, no pet.); *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App.--San Antonio 1998, pet. denied). A no-evidence summary judgment is improperly granted if the respondent brings forth more than a [*473] scintilla of probative evidence to raise a genuine [**8] issue of material fact. *Id.*; *see also* TEX. R. CIV. P.166a(i). Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *See Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63, 26 Tex. Sup. Ct. J. 383 (Tex. 1983). More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711, 40 Tex. Sup. Ct. J. 846 (Tex. 1997).

TEXAS OPEN MEETINGS ACT

With certain exceptions, n5 TOMA provides that every "regular, special, or called meeting of a governmental body shall be open to the public." TEX. GOV'T CODE ANN. § 551.002 (Vernon 1994). A core purpose of TOMA is to enable the public to have access to the actual decision-making process of its governmental bodies. *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 765, 34 Tex. Sup. Ct. J. 804 (Tex. 1991); *Cox Enter., Inc. v. Board of Tr. of Austin Ind. Sch. Dist.*, 706 S.W.2d 956, 960, 29 Tex. Sup. Ct. J. 316 (Tex. 1986). As such, TOMA requires "openness at every stage of a governmental [**9] body's deliberations" because the citizens of Texas are entitled to know not only what government decided but also to observe how and why every decision is enacted. *See Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 300, 33 Tex. Sup. Ct. J. 449 (Tex. 1990). The provisions of TOMA are mandatory and are to be liberally construed in favor of open government. *See Toyah Ind. Sch. Dist. v. Pecos-Barstow Ind. Sch. Dist.*, 466 S.W.2d 377, 380 (Tex. Civ. App.--San Antonio 1971, no writ).

> n5 For example, TOMA provides that a governmental body is not required to conduct an open meeting "to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee." TEX. GOV'T CODE ANN. § 551.074(a)(1) (Vernon 1994). The City in the instant case did not seek to invoke this exception.

Appellants maintain summary judgment was improper because there was a genuine issue of material fact that the City violated TOMA in passing the challenged [**10] Ordinance. Appellants specifically point to both the actions of the five-member Committee (one less than a quorum of the entire City Council) which considered all applicants for the office of municipal court judge in closed sessions, and to the actions of the City Council which, in turn, simply "rubber-stamped" the Committee's recommendations. Appellants contend the process as a whole raises a fact question that the Ordinance was passed in violation of TOMA.

In its response, the City stresses the Ordinance was clearly passed by the City Council in an open public meeting. Accordingly, there can be no evidence that the City violated TOMA. Furthermore, the City maintains the Municipal Court Committee was a proper advisory committee and not a "governmental body" subject to the requirements of TOMA.

At the onset, we recognize that no Texas court of appeals has directly addressed a claimed violation of

TOMA under the circumstances presented in this case. Therefore, we are faced with a matter of first impression. In conducting our analysis, we will first review relevant Texas Attorney General's opinions which, although are not binding on an appellate court, are considered persuasive. [**11] *Comm'rs Court of Titus County v. Agan*, 940 S.W.2d 77, 82, 40 Tex. Sup. Ct. J. 355 (Tex. 1997); *City of San Antonio v. Baer*, 100 S.W.3d 249, 252 (Tex. App.--San Antonio 2001, no pet.). We then will consider the relevant Texas case law.

[*474] *A. Attorney General Opinions*

The Texas Board of Mental Health and Mental Retardation (the "Board"), a state-level governmental body, asked the Texas Attorney General in 1973 if it could divide its membership into several subcommittees to "more efficiently manage its affairs." Op. Tex. Att'y Gen. No. H-3 at 1 (1973). The Board proposed that various committees would meet with staff to discuss and study matters before the Board. These committee meetings would not be open to the public, and notice regarding the meetings would not be given. The committee recommendation would then be considered by the full Board at its open public meeting. *Id.* The question before the Attorney General was whether this proposal would violate TOMA. *Id.* at 2. While the proposed committees did not constitute a quorum of the full Board and therefore could not bind the Board, the Attorney General opined that "a real danger existed that the full Board [**12] might become merely the 'rubber stamp' of one or more of its committees and thereby deprive public access to the effective decision making process." *Id.* at 4. Citing prior attorney general opinions, the Attorney General concluded that "a committee of Board members may not meet privately and without complying with the provisions" of TOMA for the purpose of formulating recommendations to be made to the full Board. *Id.* at 5.

In a later opinion, the Attorney General stated opinion H-3 was based, in part, on the concern that "if the public were excluded from such committee meetings, it would be deprived of access to the actual decision-making process and the purpose of the Act would be thwarted." Op. Tex. Att'y Gen. No. H-238 at 3 (1974). The Attorney General further reiterated that TOMA applies to the deliberations of committees into which a governmental entity has divided itself because they are an important part of the entity's decision-making process. *See id.* According to the Attorney General, TOMA does not contemplate *pro forma* approval by governmental bodies of matters already privately determined by its members sitting in closed committee meetings. *Id.*; *see* [**13] *also* Op. Tex. Att'y Gen. No. 96-116 at 4 (1996) (stating a committee constituting less than a quorum may be subject to TOMA where the governmental body is likely to simply rubber stamp the committee's recommendation). On this basis, the Attorney General opined that the standing committees of a hospital district, when composed of members of the governing board, must comply with notice and open meeting requirements of TOMA. Op. Tex. Att'y Gen. No. H-238 at 4 (1974); *see also* Op. Tex. Att'y Gen. JM-1072 at 3-4 (1989) (committees compromised of one or more members of the board of trustees were subject to TOMA if they performed functions regarding matters affecting the school district).

In Opinion H-994, the Attorney General examined both the committee's stated purpose and actual practices to determine whether a committee appointed by the chairman of the University of Texas System Board of Regents was subject to TOMA. *See* Op. Tex. Att'y Gen. No. H-994 at 1 (1977). In its analysis, the Attorney General noted that TOMA does apply if the committee meets to discuss public business or policy; but does not apply to a purely advisory body which has no power to supervise or control public [**14] business. *Id.* at 2. The Attorney General then examined the resolutions that defined the committee's powers and the committee's actual practices to determine if additional authority was exercised as a matter of practice. *Id.* In addition, the Attorney General considered the committee's overall membership composed of three Regents and twelve other individuals outside the governmental body. According to the Attorney [*475] General, the presence of individuals not related to the parent governmental body diminished the danger of rubber stamping. *Id.*

We think that this danger is diminished in the present case by the appointment of twelve other members who might represent different viewpoints within the university system. We strongly caution, however, that should the council actually function as a committee of the Board or as something more than an advisory body, and in fact supervise or control public business or policy, it will have to comply with the Act's provisions on notice and public meetings.

Id. at 2-3.

This same analysis is repeated in opinion JC-0060 in which the Attorney General opined that the initial work of a committee containing two members of a commissioners [**15] court and seven other individuals, which evaluated architectural firm applicants, did not fall under TOMA because of its advisory nature. *See* Op. Tex. Att'y Gen. No. JC-0060 at 3 (1999).

The Evaluation Committee's mission is to perform evaluations of architectural firm applicants and submit a recommendation in the form of a ranking of the firms to

the commissioners court. As you indicate, the committee's recommendation is not binding in any way on the court. Even though two members of the commissioners court are members of the committee, the presence of seven other individuals attests to the likelihood that other viewpoints will be considered. In these circumstances, the commissioners court is less likely to "rubber-stamp" the committee's choice. On the contrary, . . . even if the committee ranked one firm in last place, the court could nevertheless award that firm the contract. The committee's initial work thus appears to be that of an advisory body, without power to supervise or control public business.

Id. at 3. In that same opinion, however, other work done by the committee to negotiate a contract with the selected firm was determined to be more than advisory. [**16] *Id.* at 3.

Unlike the ranking of architectural firms in the initial stage of the process, from which the commissioners court is at liberty to select the firm that the Evaluation Committee ranked in last place, the result of the negotiating process leaves no room for the commissioner's input: the court must either adopt or reject the contract negotiated by the Evaluation Committee.

Id. at 4. The Attorney General further reasoned that if the two commissioner court members that served on the committee approved the terms negotiated on a contract, only one more vote would be needed from the remaining commissioner court members to adopt the privately negotiated terms. *Id.* at 3. Accordingly, the Attorney General held the Evaluation Committee, under the facts described, was subject to TOMA. *Id.* at 5.

Consistent with these opinions, the Attorney General devotes a section to "Committees and Subcommittees of Governmental Bodies" in the *Open Meetings Handbook* published in 2002. JOHN CORNYN, OFFICE OF THE ATTORNEY GENERAL - STATE OF TEXAS, OPEN MEETINGS HANDBOOK 14 (2002). In that publication, the Attorney General begins with the general proposition that members of a governmental [**17] body meeting in numbers less than a quorum are not subject to TOMA. He cautions, however, that there may be exceptions to that general rule including the following:

A committee or subcommittee appointed by a governmental body and [*476] granted authority to supervise or control public business or public policy may itself fall within the definition of "governmental body." (Citations omitted).

* * *

Even a committee or subcommittee without formal control over public business or public policy may be deemed a governmental body subject to the act if its decisions are in fact "rubber stamped" by the parent body. (Citations omitted).

Id. We next consider the relevant Texas case law.

B. Texas Cases

In *Hitt v. Mabry*, 687 S.W.2d 791, 796 (Tex. Civ. App. --San Antonio 1985, no writ), this court modified certain aspects of an injunction, but maintained a permanent injunction against the Board of Trustees of the San Antonio Independent School District ("SAISD") enjoining them from arriving at decisions involving public business or public policy affecting the SAISD by way of private informal meetings or telephone polls of board members. Mabry sought to prevent [**18] the mailing of a letter to all parents residing in the SAISD advising them of their voting rights and stating the message was a service of the Board of Trustees. *Id.* at 793. The letter was drafted by the board president after he had conducted an informal telephone poll of the board members. *Id.* Justice Cadena, in his dissent, disagreed with the majority's decision on the basis that the circumstances presented did not give rise to a violation of TOMA.

Plaintiffs alleged that the use of the telephone polls was a conspiracy to circumvent the provisions of the Open Meetings Act. . . . As applicable to this case, the "governmental body" which is required to meet publicly is the Board of Trustees, and the requirements that meetings of that body be public applies only when a quorum is present, since in the absence of a quorum there is no "meeting." Notice of deliberations is required only where the deliberation involves a quorum.

Id. at 798 (Cadena, J., dissenting). Essentially, Justice Cadena expressed the view that a violation of TOMA did not occur unless a quorum of the governmental body was physically present in one place. *See id.* Therefore, [**19] according to Justice Cadena, telephone polling did not involve a quorum and did not violate TOMA. *Id.* While not expressly addressed by the majority, it appears that the majority took the opposing view that the telephone polls conducted by Board members did violate TOMA. *See id.* at 796; *see also* Op. Tex. Att'y Gen. No. DM-95 at 5 (1992) (discussing *Hitt*).

In *Harris County Emergency Serv. Dist. No. 1 v. Harris County Emergency Corps*, 999 S.W.2d 163 (Tex. App.--Houston 14th Dist. 1999, no pet.), the court of appeals was faced with the issue of whether members of

the Harris County Emergency Service District violated TOMA, and thereby could be enjoined from discussing district policy or business over the telephone with other board members. The court held that in order for there to be a violation there needed to be evidence of a "meeting" as defined under TOMA. *Id.* at 168. The court held that no violation occurred where the evidence reflected that less than a quorum of the district was involved in the telephone conversations. *Id.* at 169. The evidence also reflected that board members had merely discussed [**20] the matters they needed to put on the agenda for future meetings. *Id.* The evidence did not show that board members were using the telephone to avoid meeting as a quorum and thereby attempting to circumvent TOMA. *Id.* According to the [*477] court, unlike the circumstances in *Hitt,* there was "no evidence that the district members were attempting to circumvent TOMA by conducting telephone polls with each other." *Id.* Accordingly, the court held the provision of the injunction prohibiting board members from discussing policy or business over the telephone with other board members was too broad. *Id.*

In *Finlan v. City of Dallas*, 888 F. Supp. 779 (N.D. Tex. 1995), the federal district court addressed whether TOMA covered an ad hoc committee of the Dallas City Council. In that case, the federal district court enjoined the Downtown Sports Development Committee from meeting in closed sessions with third parties. The committee consisted of five city council members who met with constituents for the purpose of negotiating the establishment of a new arena. *Id.* at 781-82. Nine council members constituted a quorum of the city council. *Id.* The evidence [**21] considered by the district court in enjoining the city council included the city council's own rules that provided the committees were subject to TOMA with no exception made for ad hoc committees. *Id.* at 784. This led the district court to conclude that the city treated the ad hoc committee as a governmental body. On this basis, the district court rejected the city's argument that the committee did not constitute a quorum of city council, noting that only three members were needed to make a quorum of the committee. *Id.* With five members of the committee in favor of an arena, as well as the Mayor who appointed them, only two more votes would be needed from the remaining members of city council to agree to the deal negotiated by the committee. *Id.* at 786. According to the district court, the city's argument raised the concern that "a real danger exists that the full city council is merely a 'rubber stamp' of the Committee." *Id.* at 785. Important to the district court's decision was the fact that it did not receive a clear answer to its inquiry regarding why there was no quorum of the full city council. *Id.* at 786. [**22] The district court considered this circumstantial evidence that the committee was designed to circumvent TOMA. *Id.*

Finally, in *Esparanza Peace and Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 2001 U.S. Dist. LEXIS 6259, SA-98-0696-OG, 2001 WL 685795, at *30 (W.D. Tex. May 15, 2001), the mayor of San Antonio met with several city council members and spoke with others on the phone in the City Manager's office regarding the city budget the night before an open city council meeting. The evidence reflected that the participants in these discussions carefully avoided the physical presence of a quorum of city council. *Id.* For example, on several occasions, the City Manager informed the group that there were too many people together and that they risked violating TOMA. *Id.* In response, one or more city council members would leave the office. *Id.* The discussions led to a unanimous agreement encompassed in a consensus memorandum regarding the city budget changes. *Id.* at *31. All council members signed the draft consensus memorandum to be considered at the open city council meeting. *Id.* While the members understood that the memorandum was not binding, no amendments were offered and [**23] no debate occurred at the open meeting. *Id.* The budget adopted essentially reflected the agreement in the consensus memorandum. *Id.*

The City argued that no violation of TOMA occurred because a quorum was never present in the City Manager's office. *Id.* at *32. The district court disapproved of this argument by stating, in part, the following:

[*478] If a governmental body may circumvent the Act's requirements by "walking quorums" or serial meetings of less than a quorum, and then ratify at a public meeting the votes already taken in private, it would violate the spirit of the Act and would render an unreasonable result that was not intended by the Texas legislature. Thus, a meeting of less than a quorum is not a "meeting" within the Act when there is no intent to avoid the Act's requirements. *On the other hand, the Act would apply to meetings of groups of less than a quorum where a quorum or more of a body attempted to avoid the purposes of the Act by deliberately meeting in groups less than a quorum in closed sessions to discuss and/or deliberate public business, and then ratifying their actions as a quorum in a subsequent public meeting.*

Id. at *35 (emphasis added). [**24] The district court then assessed whether the evidence established an intentional violation of TOMA. The district court considered the fact that the mayor met with council members constituting less than a quorum to reach a conclusion; the City Manager kept track of the number of council members present so as to avoid a formal quorum; the consensus reached was memorialized in a memorandum containing the signatures of each council

member; and the consensus was "manifested" when adopted at an open meeting. *Id.* In light of this evidence, the district court concluded "a clearer manifestation of intent to reach a decision in private to avoid the technical requirements of the Act [could] hardly be imagined." *Id.*

C. Analysis

Appellants argue summary judgment was improper because there was a genuine issue of material fact that the City violated TOMA in passing the challenged Ordinance. The City maintains the summary judgment was proper because it is undisputed that the attacked ordinance was passed in an open meeting by the only governmental body of the City of San Antonio, the City Council. Furthermore, the City argues the municipal court committee was not required to comply [**25] with open meeting requirements of TOMA because it was not a governmental body under the Act, but was a proper and necessary advisory committee allowed under the City Charter.

In support of its arguments, the City stresses that TOMA relies heavily on defined terms, and requires only a "meeting" of a governmental body to be open to the public. According to the City, the members of the Committee did not engage in a "meeting" as that term is defined since it is undisputed the Committee was made up of less than a quorum of the City Council. *See* TEX. GOV'T CODE ANN. § 551.001(4) (Vernon 1994) (defining "meeting" as a deliberation between a quorum of a governmental body). In essence, the City would have us find that meetings are required to be public only when a quorum is present, since in the absence of a quorum there is no "meeting." We disagree.

Contrary to the City's position, a governmental body does not always insulate itself from TOMA's application simply because less than a quorum of the parent body is present. *Esparanza Peace and Justice Ctr.*, 2001 U.S. Dist. LEXIS 6259, 2001 WL 685795 at *30; *Finlan*, 888 F. Supp. at 782 & 785 (N.D. Tex. 1995); [**26] *Hitt*, 687 S.W.2d at 796; JOHN CORNYN, OFFICE OF THE ATTORNEY GENERAL - STATE OF TEXAS, OPEN MEETINGS HANDBOOK 14 (2002). A committee appointed by a governmental body constituting less than a quorum of its members may be subject to TOMA because it falls either within a definition of the term "governmental body" or as a subcommittee of a governmental body. *See* Op. Tex. Att'y Gen. No. JC-0060 at 3 [*479] (1999). Accordingly, we reject the City's strict reading of the definition of "meeting" under TOMA, because it would be contrary to our mandate to liberally construe TOMA's provisions in order to safeguard the public's interest in open government. *See Acker*, 790 S.W.2d at 300. Furthermore, our conclusion is consistent with the language in section 551.143(a) which specifically prohibits members of a governmental body from knowingly conspiring to circumvent TOMA by meeting in numbers *less than a quorum.* "Indeed it would appear that the legislature intended expressly to reach deliberate evasions of these definitions in enacting [section 551.143(a)]." Op. Tex. Att'y Gen. No. DM-95 at 5 (1992); *see* Op. Tex. Att'y Gen. No. JC-0307 at 5-6 (2000).

The [**27] City also argues that the Municipal Court Committee is not a "governmental body" as defined under TOMA because it is not "a deliberative body that has rule making authority or quasi-judicial power." TEX. GOV'T CODE ANN. § 551.001(3)(D) (Vernon 1994). The City points to the City Charter which provides that the City Council may create boards and committees to assist it in an advisory capacity in the performance of its duties. *See* SAN ANTONIO, TEX. CITY CHARTER, art. V, § 49. We agree with the City that the definition of a governmental body generally comprehends an entity with the power to supervise or control public business. We also agree that the City Charter of San Antonio enables the City Council to create committees to assist it in a purely advisory capacity. n6 The critical issue before us, however, is whether the evidence presented at summary judgment raises a question of fact that the Committee was more than an advisory committee in actual practice and, thus, subject to the open meeting requirements of TOMA.

> n6 We recognize that in *Finlan*, the trial court considered the fact that the City Charter of Dallas required council committee meetings to be open and that the city council's rules of procedure mandated that committee meetings must be conducted in accordance with TOMA. 888 F. Supp. at 784. Similarly, in this case, section 11 of Article II of the City Charter provides that meetings of any committees of the City Council must be in compliance with TOMA. In this case, however, we do not consider section 11of the San Antonio City Charter to be evidence in support of appellants' position because the section was not presented as evidence for the trial court to consider.

[**28]

It is undisputed that the Committee was established by the City Council. According to Councilman Flores, the Committee consisted of five members because the City Council would be in violation of TOMA if it had six members. When asked in deposition why the Committee consisted of five members, Councilman Flores responded as follows:

Q: Why were there only five?

A: Five? Usually that's the - that was the way that the committees were set up. Because you can't have six people. You can only have five. Otherwise it would be I guess like having a meeting of Council.

Q: In other words, if they had a committee of six, under your recollection of it, it would then have to abide by the provisions of the Open Meetings Statute.

A: Right. Yeah. Exactly.

Q: I don't mean to be putting words in your mouth.

A. No. But that's right. Because you couldn't hold a meeting with six people because then that would be a violation. Exactly.

Q: Unless there was a public notice and agenda and all that and everything published?

[*480] A. Right. Like we do for the City Council meetings.

Councilman Flores's testimony regarding the composition of the Committee could be viewed one of two ways. Councilman Flores's [**29] testimony could be construed as merely his understanding of TOMA. On the other hand, his testimony could also be construed as an attempt by City Council to avoid the presence of a quorum and, therefore, avoid application of TOMA to Committee meetings. The evidence also shows the Committee was made up exclusively of city council members who met on several occasions to review the applicants for municipal court judges. Notice was not posted regarding the Committee's meetings, and tape recordings were not made. After assessing the various applicants for appointment and reappointment, the Committee compiled a list of individuals recommended for the position of municipal court judges in the form of a draft ordinance to be voted on at an open meeting of the City Council. Letters informing appellants they were not recommended for reappointment, thanking them for their years of service, and wishing them well in the future were sent out six days *before* the City Council's vote on Ordinance No. 86503. At the open meeting, the Committee's recommendations were approved without meaningful discussion by the City Council. The tape recording for the City Council meeting held on August 28, 1997, begins [**30] with the Mayor ordering "up and quickly" agenda item number 40, which was the draft of Ordinance No. 86503. There was no discussion regarding all the individuals who had applied and reapplied for appointment, the individuals who were not recommended, or the criteria the Committee used in determining its recommendations. Instead, the discussion centered on the three new individuals recommended for full-time appointments. Finally, there was evidence the City Council had consistently passed and approved the Committee's recommendations without change from July 1990 through November 1998.

Arguably, the evidence suggests *pro forma* public approval or "rubber stamping" by the City Council of matters already determined by the Committee sitting in closed meetings which the Attorney General and Texas courts have warned can violate TOMA. *See Finlan*, 888 F. Supp. at 785-86; Op. Tex. Att'y Gen. No. JC-0060 at 3-5 (1999); Op. Tex. Att'y Gen. No. H-238 at 3 (1974); JOHN CORNYN, OFFICE OF THE ATTORNEY GENERAL - STATE OF TEXAS, OPEN MEETINGS HANDBOOK 14 (2002). The letters informing appellants they would not be reappointed suggest an assumption by the Committee that its decision [**31] was final and, therefore, not advisory. Further, there was no substantive discussion regarding the various applicants at the open meeting. Finally, there was a pattern of the City Council consistently passing and approving the Committee's recommendations for municipal court judges over an eight-year period. In light of our standard of review, we conclude the evidence rises to the level that would enable reasonable and fair-minded people to differ in their conclusions.

Accordingly, we hold the trial court erred in granting the City's no-evidence motion for partial summary judgment. We sustain appellants' first four issues.

ARTICLE 16, SECTION 17 OF THE TEXAS CONSTITUTION

Appellants also argue that the wording of Ordinance No. 86503 violates Article 16, section 17 of the Texas Constitution and section 160 of the City Charter. The parties went to trial on these claims. At trial, the parties stipulated to certain facts, including the following: (1) no specific [*481] individuals were named as appellants' successors; (2) appellants were not removed from office for cause as provided by the Texas Government Code; (3) appellants did not give the City a notice of resignation; and (4) [**32] the City has not passed or approved an ordinance that abolished the municipal court offices held by appellants. Additionally, Ordinance No. 86503 did not specifically name appellants as being removed. Appellants contend that under these facts they remain municipal court judges as required by the Texas Constitution and the City Charter.

In asserting that the trial court erred in refusing to find Ordinance No. 86503 violates the Texas Constitution and the City Charter, appellants appear to be challenging the trial court's conclusion of law. We review questions of law under a *de novo* standard of review without deference to the trial court's conclusion.

See Interstate Northborough P'ship v. State, 66 S.W.3d 213, 220, 44 Tex. Sup. Ct. J. 724 (Tex. 2001); *State v. Heal*, 917 S.W.2d 6, 9, 39 Tex. Sup. Ct. J. 221 (Tex. 1996).

Under Section 160 of the City Charter of San Antonio, officers are to hold over until their successors are appointed and qualified.

Whenever under the provisions of this Charter any officer of the City, judge or member of any board or commission is appointed for a fixed term, such officer, judge or member shall continue to hold office until his successor is appointed and [**33] qualified.

SAN ANTONIO, TEX. CITY CHARTER art. XII, § 160. The Texas Constitution states that "all officers within the State shall continue to perform the duties of their offices until their successors shall be duly qualified." TEX. CONST. art. XVI, § 17. The commentary to this section provides that this provision was placed in the Texas Constitution, in part, to "prevent public convenience from suffering because of a vacancy in the office . . . ." TEX. CONST. art. XVI, § 17 interp. commentary (Vernon 1993); *see also Plains Common Consol. Sch. Dist. No. 1 v. Hayhurst*, 122 S.W.2d 322, 326 (Tex. Civ. App.--Amarillo 1938, no writ). Even where an officer resigns, under this section, he or she is held over in the performance of their duties until a successor is elected or appointed and has been qualified. *See* Op. Tex. Att'y Gen. H-161 at 2 (1973). This holdover provision becomes operative only after the officer's term has expired. Op. Tex. Att'y Gen. JC-0293 at 3 (2000). On the other hand, the right to holdover does not reside in one who has been removed from office. *See* [**34] *Manning v. Harlan*, 122 S.W.2d 704, 707 (Tex. Civ. App.--El Paso 1938, writ dism'd). Ordinance No. 86503 effectively removed appellants from office. Because appellants were removed from office, Article 16, section 17 does not apply to the instant circumstances. The facts, as agreed to by the parties, reflect that there were the same number of judges after appellants' terms had expired as there were when appellants were in office. Therefore, no vacancy occurred in the office of municipal court judge that resulted in public inconvenience to warrant the application of Article 16, section 17 of the Texas Constitution. n7

n7 By asking this court to hold that Ordinance No. 86503 violates Article 16, section 17 of Texas Constitution, appellants are asking us to hold that this provision prohibits a governmental entity from removing an officer from office. However, appellants do not cite nor can we find case law to suggest that section 17 prohibits a governmental body from removing an officer from office. Additionally, appellants argue that Ordinance No. 86503 violates Article 16, section 17 because successors were not specifically named as replacing them. While Article 16, section 17 contemplates that a successor be "duly qualified," it does not expressly state that this means successors must be specifically named. We refuse to read into this provision such a requirement.

[**35]

[*482] Because we hold that Article 16, section 17 of the Texas Constitution does not apply to the circumstances presented, we overrule appellants' fifth and sixth issues.

CONCLUSION

We hold that appellants presented sufficient evidence to raise a genuine issue of material fact on their claim that the City violated the Texas Open Meetings Act in passing and approving Ordinance No. 86503. We also hold, that the trial court did not err in concluding that Ordinance No. 86503 does not violate Article 16, section 17 of the Texas Constitution. We reverse the trial court's judgment as to appellants' claim under the Texas Open Meetings Act and remand that claim to the trial court for further proceedings consistent with this opinion. We affirm the trial court's judgment in all other respects.

Phylis J. Speedlin, Justice

CITY OF ROMAN FOREST, Appellant v. GARY MICHAEL STOCKMAN, Appellee

NO. 09-03-408 CV

COURT OF APPEALS OF TEXAS, NINTH DISTRICT, BEAUMONT

141 S.W.3d 805; 2004 Tex. App. LEXIS 6931; 21 I.E.R. Cas. (BNA) 1063

March 25, 2004, Submitted
July 29, 2004, Opinion Delivered

PRIOR HISTORY: [*1] On Appeal from the 221st District Court. Montgomery County, Texas. Trial Cause No. 03-04-02609-CV.

DISPOSITION: REVERSED AND DISMISSED.

LexisNexis(R) Headnotes

JUDGES: Before McKeithen, C.J., Burgess and Gaultney, JJ. DISSENTING AND CONCURRING OPINION BY DAVID B. GAULTNEY.

OPINIONBY: STEVE MCKEITHEN

OPINION:

This is an interlocutory appeal from the trial court's denial of a plea to the jurisdiction. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (a)(8) (Vernon Supp. 2004). Gary Michael Stockman sued the City of Roman Forest for wrongful termination under the Whistleblower Act, for breach of contract, and for intentional infliction of emotional distress. The City says the trial court lacks jurisdiction because the City is immune from suit.

The case arises out of Stockman's work for the City while he was a municipal court judge. A municipal court judge's term of office is two years. *See* TEX. GOV'T CODE ANN. § 29.005 (Vernon 2004). Stockman was appointed municipal judge of Roman Forest and served in that capacity from 2001 until 2003. n1 Stockman claims the mayor requested that Stockman dismiss certain traffic tickets; Stockman refused to do so and reported the incidents [*2] to the chief of police. As a result of his refusal to dismiss the tickets, Stockman claims his pay was docked. He also alleges he conducted an audit of the court system at the prior mayor's request and found irregularities, but when he pursued the corruption investigation he was threatened by a council member and told to stop. Stockman claims the City terminated him as a result of his reports of illegal activity. The City says his term ended, and he was not reappointed.

> n1 By affidavit, Stockman says he was appointed municipal court judge in November 2000 and became the "presiding municipal judge" in January 2001. We understand this to mean his term began in 2001.

Stockman sued the City and the individuals involved. n2 A governmental unit is immune from suit unless the immunity is waived. *See Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542, 46 Tex. Sup. Ct. J. 595 (Tex. 2003). Governmental immunity from suit defeats a trial court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. [*3] *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26, 47 Tex. Sup. Ct. J. 386 (Tex. 2004). Immunity from suit may be waived by statute. *See generally Travis County v. Pelzel & Assocs.*, 77 S.W.3d 246, 249, 45 Tex. Sup. Ct. J. 623 (Tex. 2002).

> n2 Stockman sued the mayor and two members of the governing council, but they are not before us in this interlocutory appeal.

The law of governmental immunity has traditionally distinguished between a municipality's governmental and proprietary functions. *See City of Galveston v. Posnainsky*, 62 Tex. 118 (1884); *Gates v. City of Dallas*, 704 S.W.2d 737, 738-39, 29 Tex. Sup.

Ct. J. 200 (Tex. 1986). Generally, unless the immunity is waived, a municipality is immune from suit for the exercise of a governmental function. *See City of Mission v. Cantu*, 89 S.W.3d 795, 801 (Tex. App.--Corpus Christi 2002, no pet.) (tort); *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 730 (Tex. App.--Corpus Christi 1994, writ denied) (tort); *International Bank of Commerce v. Union Nat'l Bank*, 653 S.W.2d 539, 545-46 [*4] (Tex. App.--San Antonio 1983, writ ref'd n.r.e.) (contract).

This suit arises out of the City's performance of a governmental function. Stockman asserts three types of claims -- a tort claim, a contract claim, and a Whistleblower claim. He cites three statutory waivers of governmental immunity. In the Tort Claims Act, the Legislature has provided a limited waiver of immunity from suit for certain tort actions. *See* TEX. CIV. PRAC. & REM. CODE ANN. § § 101.021, 101.0215 (Vernon 1997 & Supp. 2004). The Whistleblower Act also contains a partial waiver of immunity from suit to the extent claims are allowed under that Act. And the Local Government Code provides general law municipalities may "sue and be sued"-- language that some courts have found to be a waiver of immunity from suit. *See* TEX. LOC. GOV'T CODE ANN. § § 51.013, 51.033, 51.051 (Vernon 1999).

In issue one, the City contends the trial court erred in denying its plea to the jurisdiction on Stockman's Whistleblower Act claim. Under the Act, a "state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel [*5] action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." TEX. GOV'T CODE ANN. § 554.002(a) (Vernon Supp. 2004). The statute defines "public employee" as "an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity." TEX. GOV'T CODE ANN. § 554.001(4) (Vernon Supp. 2004). Immunity is waived to the extent of liability allowed by the Whistleblower Act. *See* TEX. GOV'T CODE ANN. § 554.0035 (Vernon Supp. 2004). Therefore, unless the party asserting the claim under the Whistleblower Act is a public employee within the meaning of the Act, immunity from suit is not waived by the Act.

Stockman argues he falls under the "appointed officer other than an independent contractor" part of the "public employee" definition. He was appointed; and because members of the City's governing body attempted to control the details of his work as municipal judge, Stockman says he was not an independent contractor. [*6]

The common law test for determining whether someone is an employee rather than an independent contractor is whether the alleged employer has the right to control the progress, details, and methods of operation of the work. *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312, 45 Tex. Sup. Ct. J. 382 (Tex. 2002). Stockman relies on the City's control of the hours he worked and the provision of his supplies, his office, and support personnel to establish he was not an independent contractor. But that arrangement does not show any right to control the details of his work as a municipal judge, nor does any individual's alleged effort to control him demonstrate the City's right to control his judicial work. The evidence before the trial court does not indicate he was an employee rather than an independent contractor. *See generally Miranda,* 133 S.W.3d at 228 (If the evidence is undisputed or does not create a fact question regarding the jurisdictional issue, then the trial court rules on the plea to the jurisdiction as a matter of law.). Stockman argues that the City's right to terminate him or not reappoint him makes him dependent. n3 But the Act's definition of "public [*7] employee" excludes appointed officials who are independent contractors. *See* TEX. GOV'T CODE ANN. § 554.001(3) (Vernon Supp. 2004). The general power to appoint or not reappoint Stockman does not in itself show control of the details of the judge's work sufficient to make him a "public employee" within the meaning of the Act.

> n3 The parties dispute whether Stockman completed his two year term and was not reappointed or whether he was terminated.

The Texas Constitution provides, as follows, for a separation of powers among the three branches of state government:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of [*8] the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1. The Texas Constitution also provides that the "judicial power of this State shall be

vested in one Supreme Court, in one Court of Criminal Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law." TEX. CONST. art. V, § 1. The municipal court derives its power and jurisdiction from the Texas Government Code; pursuant to constitutional authority, the Legislature has created a municipal court in each municipality and defined the court's jurisdiction. *See* TEX. GOV'T CODE ANN. § § 29.002, 29.003 (Vernon 2004). A municipal court judge is part of the judicial branch of government. *See generally Thompson v. City of Austin*, 979 S.W.2d 676, 680-83 (Tex. App.--Austin 1998, no pet.).

In *Thompson*, the court noted that a municipal judge was entrusted with independent and sovereign powers, and his office had all the indicia of a public office, including judicial oath, membership in the judiciary, authority to pronounce judgment and to adjudicate parties' [*9] rights, and a fixed term subject to removal. *Thompson,* 979 S.W.2d at 682-83. In view of these facts, the court held a municipal judge was not an "employee" within the meaning of that term in the Texas Commission on Human Rights Act. As the *Thompson* court stated, "Historically, the judiciary has been privileged with a sacred independence necessary to maintain the impartiality required to determine the law. A judge must be independent from the outside influence of the other branches of government. Thus, the very nature of the office demands that a municipal judge be independent of the Council in exercising this sovereign power." *Id.* at 682.

We hold a municipal judge is not within the definition of "public employee" in the Whistleblower Act. Issue one is sustained.

In issue two, the City argues that Stockman's breach of contract claim is barred by the doctrine of governmental immunity. n4 Stockman alleged in his pleadings that the City breached its agreement to pay him wages for services he had rendered to the City in an audit of the City's warrant and complaint system. This assignment was separate from his work as a municipal judge. In its plea [*10] to the jurisdiction, the City denied the existence of a contract, and, alternatively, that any contract would be unenforceable under the Statute of Frauds. The City does not make this argument on appeal, and we do not consider it. Instead, the City argues on appeal that governmental immunity bars the contract claim. n5

n4 The terms "governmental immunity" and "sovereign immunity" are often used synonymously and interchangeably without distinction. However, the Supreme Court has noted that sovereign immunity refers to the State's immunity from suit and liability and protects the State and its divisions, while governmental immunity protects political subdivisions of the State, including counties, cities, and school districts. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n. 3, 46 Tex. Sup. Ct. J. 494 (Tex. 2003). Because the governmental entity involved here is a municipality, we use the term governmental immunity in this opinion. But, if the authority cited in this opinion uses "sovereign immunity," we shall also employ that terminology.

n5 Although the City did not raise governmental immunity as to Stockman's contract claim at the trial court level, waiver of immunity from suit is jurisdictional in nature and may be raised for the first time on appeal. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928, 41 Tex. Sup. Ct. J. 517 (Tex. 1998); *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 444-45, 36 Tex. Sup. Ct. J. 607 (Tex. 1993) (subject matter jurisdiction cannot be waived and may be raised for the first time on appeal by the parties or by the court).

[*11]

Governmental immunity inures to the benefit of a municipality when it engages in the exercise of governmental functions. *City of Tyler v. Likes*, 962 S.W.2d 489, 501, 41 Tex. Sup. Ct. J. 174 (Tex. 1997); *City of Mexia v. Tooke*, 115 S.W.3d 618, 624 (Tex. App.--Waco 2003, pet. granted) (applying the "governmental-proprietary dichotomy" to contract claims). A municipality's exercise of proprietary functions, however, does not fall under the protection of governmental immunity. *Herschbach*, 883 S.W.2d at 730. Stockman contends the City's immunity from suit is waived because the City was exercising a proprietary function. We reject this argument. The auditing of City records, as it relates to a determination of the validity of warrants issued by the City police, is inherently integral to the City's functioning as an arm of the State and is therefore a governmental function. *See generally Tooke*, 115 S.W.3d at 620-21; 624-25.

Stockman further argues that, even if a governmental function is involved, the Local Government Code gives him permission to sue the City on the contract through the "sue and be sued" language applicable to general law municipalities. [*12] *See* TEX. LOC. GOV'T CODE ANN. § § 51.013, 51.033, 51.075 (Vernon 1999). A governmental entity does not waive immunity from suit simply by contracting with a

private party. *Pelzel*, 77 S.W.3d at 248; *see also Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401, 408, 40 Tex. Sup. Ct. J. 676 (Tex. 1997). Express consent is required to show that immunity from suit has been waived. *Id.* Thus, in the instant case, Stockman must establish consent to sue the City. Absent consent, the trial court lacks jurisdiction. *Id.*

A party may establish consent by statute or legislative resolution. *Pelzel*, 77 S.W.3d at 248. The consent must be expressed by "clear and unambiguous language." TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2004); *Pelzel*, 77 S.W.3d at 248; *City of LaPorte v. Barfield*, 898 S.W.2d 288, 291, 38 Tex. Sup. Ct. J. 533 (Tex. 1995). Accordingly, we must determine whether the Legislature has by clear and unambiguous language in the Local Government Code's "sue and be sued" provisions waived immunity to suits against municipalities. *See Barfield*, 898 S.W.2d at 291 [*13] (stating that clear-and-unambiguous requirement for waiving immunity applies to governmental entities other than the state). Waiver will be found only if the statute in question would be meaningless unless immunity were waived. *See Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 8, 43 Tex. Sup. Ct. J. 1036 (Tex. 2000) (holding an anti-retaliation statute meaningless absent waiver of sovereign immunity).

In the instant case, to construe the "sue and be sued" provisions in the Local Government Code as Stockman does overlooks the fact that this language has meaning other than in the context of permitting private party lawsuits that seek to impose liability and recover money damages against a governmental entity. Governmental entities may "be sued" by private parties seeking declaratory relief when alleging a governmental entity or official has acted without legal authority or statutory authority as such suits are not suits against the state. *See e.g., Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446, 37 Tex. Sup. Ct. J. 968 (Tex. 1994); *W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838, 840, 1 Tex. Sup. Ct. J. 191 (Tex. 1958) (citing the rule announced in *Cobb v. Harrington*, 144 Tex. 360, 190 S.W.2d 709, 712 (1945)). [*14] As for the "sue" portion of "sue and be sued," it is merely recognition of the rule that when a governmental entity files suit for damages, or intervenes in an action in which the governmental entity could have brought the same action, it waives immunity from suit for any claim that is incident to, connected with, arises out of, or is germane to the suit or controversy brought by the government entity. *See Reata Const. Corp. v. City of Dallas*, 2004 Tex. LEXIS 303, 47 Tex. Sup. Ct. J. 408, 2004 WL 726906, at *3 (Apr. 2, 2004).

Finding waiver of governmental immunity in the "sue and be sued" language, the dissent relies on the continued viability of *Missouri Pacific Railroad Co. v. Brownsville Navigation District*, 453 S.W.2d 812, 813, 13 Tex. Sup. Ct. J. 308 (Tex. 1970). *Missouri Pacific* held that the "sue and be sued" language in a 1925 statute (now section 62.078 of the Texas Water Code) creating a navigation district waived the district's immunity from suit and authorized the railroad's suit against the district. *Missouri Pacific*, 453 S.W.2d at 813. While it is true that *Missouri Pacific* has not been expressly overruled [*15] or expressly limited by subsequent Supreme Court decisions, more recent decisions by the Supreme Court, n6 as well as the Legislature's enactment of § 311.034 of the Government Code, appear to indicate waiver of governmental immunity should no longer be so easily found.

n6 *See Pelzel,* 77 S.W.3d at 251; *Texas Natural Resource Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 857, 45 Tex. Sup. Ct. J. 558 (Tex. 2002).

For example, in *Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692, 697-98, 46 Tex. Sup. Ct. J. 494 (Tex. 2003), the Court set out four factors for determining whether there is a clear and unambiguous waiver of immunity from suit: (1) waiver of immunity must be beyond doubt; (2) if there is ambiguity, it must be resolved in favor of retaining immunity; (3) if the Legislature requires that the State be joined in a lawsuit for which immunity would otherwise attach, immunity is waived; and (4) if a monetary cap or scheme is provided in the statute, the Legislature probably [*16] intended to waive immunity. Because the Local Government Code provisions in question do not require the joining of the governmental entity in any lawsuit (the provisions use the permissive term "may") factor 3 does not apply. *See* TEX. LOC. GOV'T CODE ANN. § § 51.013, 51.033, 51.075 (Vernon 1999). Factor four is also not implicated in the named sections. Analyzing these sections under factors one and two leads us to conclude that waiver of governmental immunity was not intended as none of the provisions waive immunity "beyond doubt," and the ambiguity present when examining the three provisions together require resolution in favor of retaining immunity.

Finally, we note that there currently exists a split in authority among the courts of appeals as to whether similar "sue and be sued" language waives governmental immunity from suit; with the Dallas and Corpus Christi Courts of Appeals holding such

language does not waive governmental immunity from suit while several sister Courts hold to the contrary. n7 As the Supreme Court's "frustration" continues unabated in its attempt to clearly distinguish between "use" and "non-use" of tangible property so as [*17] to determine whether sovereign immunity has been waived under the Tort Claims Act, *see Texas Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 588-89, 44 Tex. Sup. Ct. J. 963 (Tex. 2001), the Courts of Appeals of this State continue to struggle with proper application of "sue and be sued," awaiting clear and definitive guidance from the Supreme Court as to the current precedential value of *Missouri Pacific*. In light of the recent emphasis by the Texas Supreme Court and the Texas Legislature on the necessity of "clear and unambiguous" waiver, we find the "sue and be sued" language in the Local Government Code provisions does not contain clear waiver of immunity language that is present in certain provisions of the Texas Tort Claims Act and of the Whistleblower Act. Applying the firmly-held and consistent principles set out by the Texas Supreme Court and the Texas Legislature since *Missouri Pacific*, we hold that the "sue and be sued" language in sections 51.013, 51.033, 51.075 of the Texas Local Government Code, does not provide a clear and unambiguous waiver of the City's immunity from suit.

n7 *See Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist.*, 123 S.W.3d 63, 66-68 (Tex. App.--Dallas 2003, pet. filed); *City of Dallas v. Reata Constr. Corp.*, 83 S.W.3d 392, 398 (Tex. App.--Dallas 2002), *rev. on other grounds*, 2004 Tex. LEXIS 303, 47 Tex. Sup. Ct. J. 408, 2004 WL 726906 (Apr. 2, 2004); *Townsend v. Memorial Med. Ctr.*, 529 S.W.2d 264, 267 (Tex. App.--Corpus Christi 1975, writ ref'd n.r.e.). By contrast, *see United Water Servs. v. City of Houston*, 2004 Tex. App. LEXIS 3988, No. 01-02-01057-CV, 2004 WL 909178 (Tex. App.--Houston [1st Dist.] Apr. 29, 2004, pet. filed); *Alamo Community College Dist. v. Browning Constr. Co.*, 131 S.W.3d 146 (Tex. App.--San Antonio 2004, pet. filed); *City of Houston v. Clear Channel Outdoor, Inc.*, 2004 Tex. App. LEXIS 367, No. 14-03-00022-CV, 2004 WL 63561 (Tex. App.--Houston [14th Dist.] Jan. 15, 2004, pet. filed); *City of Mexia*, 115 S.W.3d at 621-22 (pet. granted); *Goerlitz v. City of Midland*, 101 S.W.3d 573, 577 (Tex. App.--El Paso 2003, pet. filed); *Tarrant County Hosp. Dist. v. Henry*, 52 S.W.3d 434, 449 (Tex. App.--Fort Worth 2001, no pet.); *Welch v. Coca-Cola Enter., Inc.*, 36 S.W.3d 532 (Tex. App.--Tyler 2000, no pet.); *Loyd v. ECO Resources, Inc.*, 956 S.W.2d 110, 122 (Tex. App.--Houston [14th Dist.] 1997, no pet.).

[*18]

Stockman lastly contends that by accepting and implementing his audit recommendations, and thereby ratifying the "contract," the City waived immunity from suit as it accepted the benefits of the contract. The Supreme Court has rejected that position. Immunity from suit is not waived merely by accepting some of the benefits of a contract. *See Texas A & M Univ. - Kingsville v. Lawson*, 87 S.W.3d 518, 520-21 (Tex. 2002); *IT-Davy*, 74 S.W.3d at 857. The exception to that rule, not present here, is that a governmental entity cannot agree to settle a lawsuit from which it is not immune and then later claim immunity from suit for breach of the settlement agreement. *Lawson*, 87 S.W.3d at 521-23. Issue two is sustained.

In issue three, the City argues governmental immunity bars Stockman's intentional infliction of emotional distress claim. The intentional infliction cause of action arises out of allegations involving governmental functions. The Tort Claims Act waives immunity from suit to the extent liability is "created" by the Act. TEX. CIV. PRAC. & REM. CODE ANN. § 101.025 (Vernon 1997). Section 101.057(2) [*19] states that the Act does not apply to a claim arising out of an intentional tort. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.057 (Vernon 1997); *Tarrant County Hospital Dist. v. Henry*, 52 S.W.3d 434, 440 (Tex. App.--Fort Worth 2001, no pet.); *Nueces County v. Ferguson*, 97 S.W.3d 205, 223 (Tex. App.--Corpus Christi 2002, no pet.). The "sue and be sued" provision in the Local Government Code does not waive immunity to suit for tort claims. The trial court does not have jurisdiction to consider the alleged intentional tort claim against the City. Issue three is sustained.

Finally, Stockman argues three council members may be sued because their actions were not lawfully authorized by the City. An official may be sued in an individual capacity for wrongful, unofficial conduct, but that matter is not before us in this interlocutory appeal. *See Bagg v. University of Texas Med. Branch at Galveston*, 726 S.W.2d 582, 586 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.).

We have sustained each of the City's appellate issues. This essentially means that the trial court lacked subject matter [*20] jurisdiction over the entirety of Stockman's lawsuit against the City as immunity from suit was not waived under any theory. Therefore, we reverse the trial court's order denying the City's plea to

the jurisdiction, and we dismiss Stockman's claims against the City for want of jurisdiction. *See* TEX. R. APP. P. 43.2(c).

REVERSED AND DISMISSED.

STEVE MCKEITHEN

Chief Justice

CONCURBY: DAVID B. GAULTNEY (In Part)

DISSENTBY: DAVID B. GAULTNEY (In Part)

DISSENT:

DISSENTING AND CONCURRING OPINION

In issue two, appellee argues the Local Government Code gives him permission to sue the City on a contract through the "sue and be sued" language applicable to general law municipalities. *See generally* TEX. LOC. GOV'T CODE ANN. § § 51.013, 51.033 (Vernon 1999). In 1970, the Supreme Court held "sue and be sued" language in a 1925 statute creating a navigation district waived the District's immunity from suit. *See Missouri Pac. R.R. Co. v. Brownsville Navigation Dist.,* 453 S.W.2d 812, 813-14, 13 Tex. Sup. Ct. J. 308 (Tex. 1970). The statute provided that "all navigation districts established under this Act may, by and through the navigation and canal commissioners, sue [*21] and be sued in all courts of this State in the name of such navigation district. . . ." n8 The Supreme Court found the statute was "quite plain and gives general consent for District to be sued in the courts of Texas in the same manner as other defendants." *Missouri Pacific*, 453 S.W.2d at 813. The Supreme Court has continued to reference the operation of "sue and be sued" language as waiving sovereign immunity. *See generally Texas A & M Univ.-Kingsville v. Lawson,* 87 S.W.3d 518, 520-21 n.21 (Tex. 2002); *see also Travis Co. v. Pelzel & Assocs., Inc.,* 77 S.W.3d 246, 249-50, 45 Tex. Sup. Ct. J. 623 (Tex. 2002) ("sue and be sued" language in earlier statute "arguably showed intent to waive sovereign immunity . . . .") (citing *Missouri Pacific* with the parenthetical explanation that *Missouri Pacific* held a "statute containing 'sue and be sued' language provided consent to suit."); *Federal Sign v. Texas Southern Univ.,* 951 S.W.2d 401, 408, 40 Tex. Sup. Ct. J. 676 (Tex. 1997) (citing *Missouri Pacific* as an example of the Court's recognition of consent to suit in a statute providing the navigation district could "sue and be sued"). Although not citing *Missouri* [*22] *Pacific,* and not finding waiver in the statute at issue, the Court in *Wichita Falls State Hospital* stated, "We have little difficulty recognizing the Legislature's intent to waive immunity from suit when a statute provides that a state entity may be sued or that 'sovereign immunity to suit is waived.'" *Wichita Falls State Hosp. v. Taylor,* 106 S.W.3d 692, 696-97, 46 Tex. Sup. Ct. J. 494 (Tex. 2003).

n8 *See* Act effective Feb. 19, 1925, 39th Leg., R.S., ch. 5, § 46, 1925 Tex. Gen. Laws 7, 21 (current version at TEX. WATER CODE ANN. § 62.078 (Vernon 2004)).

The Supreme Court's holding in *Missouri Pacific* remains controlling authority. We must apply the holding to the specific statute at issue. As I read the "sue and be sued" language in the applicable provisions of the Local Government Code, a general law municipality is subject to suit on a contract. *See* TEX. LOC. GOV'T CODE ANN. § § 51.013, 51.033 (Vernon 1999). In section 51.014, the Local Government Code [*23] grants the City the authority to contract, and I view any waiver of immunity to suit intended by the "sue and be sued" language as related to the City's ability to enter into enforceable contracts. *See* TEX. LOC. GOV'T CODE ANN. § 51.014 (Vernon 1999).

Of course, *Missouri Pacific* did not expressly limit itself to contract claims. Nor does the Local Government Code's "sue and be sued" provision distinguish between a suit grounded in contract and one grounded in tort or statute. *See* TEX. LOC. GOV'T CODE ANN. § § 51.013, 51.033 (Vernon 1999). Because the statute does not make that distinction, following *Missouri Pacific* arguably would lead to a waiver of immunity to suit here on the tort claim and the Whistleblower claim, as well as the contract claim. But a municipality's immunity on tort claims relating to governmental functions has existed alongside the statutory "sue and be sued" language. n9 In 1987, the Legislature added section 101.0215 to the Tort Claims Act, defined many functions of a municipality as governmental, and waived the municipality's immunity from suit and liability to the limited extent allowed [*24] under the Act. n10 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(Vernon 1997), § 101.0215 (Vernon Supp. 2004); *see also* TEX. CIV. PRAC. & REM. CODE ANN. 101.025(a) (Vernon 1997) ("Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter."). Therefore, when a party sues a municipality for tort claims involving governmental functions, a court does not have jurisdiction unless those claims fit within the terms of the Tort Claims Act.

n9 *See City of Galveston v. Posnainsky,* 62 Tex. 118, 125 (1884); *see also* Act approved Jan. 27, 1858, 7th Leg., R.S., ch. 61, § 9, 1858 Tex. Gen. Laws 69, 70, *reprinted in* 4 H.P.N. GAMMEL, THE LAWS OF TEXAS, 1822-1897, at 941, 942 (Austin, Gammel Book Co. 1898).

n10 *See* Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 3.02, sec. 101.0215, 1987 Tex. Gen. Laws 37, 47-48 (amended 1997, 1999, 2001) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon Supp. 2004)).

[*25]

Just as we must follow the Supreme Court precedent of *Missouri Pacific*, we are not at liberty to ignore the Tort Claims Act. The Tort Claims Act's limited waiver of immunity to suit must be harmonized with the "sue and be sued" waiver in the Local Government Code and the holding in *Missouri Pacific.* The statutes may be harmonized by restricting the "sue and be sued" waiver to claims based on contracts. In this case, the Tort Claims Act governs the extent of the waiver of immunity to suit in Stockman's tort claim, and the Whistleblower Act governs waiver of immunity to suit in his Whistleblower claim.

Missouri Pacific must be narrowly read in this manner if the Local Government Code provision is to be consistent with the Tort Claims Act. Although arising out of a wrongful death claim, *Missouri Pacific* involved the railroad's indemnity claim against the governmental entity. *Missouri Pacific,* 453 S.W.2d at 812-13. The basis of the indemnity claim was a written agreement. *Id.* Reading *Missouri Pacific* narrowly, the District's authority to enter into that written agreement carried with it the possibility of being sued for a violation of the agreement. [*26]

The waiver of immunity to suit intended by the "sue and be sued" language appears to be coextensive with the power given to the City to enter into an enforceable contract. I would hold the "sue and be sued" provision in the Local Government Code waives immunity from suit only on the contract claim. n11 I therefore respectfully dissent from the majority's resolution of issue two, but I concur on issues one and three.

n11 Two law review articles read the "sue and be sued" provisions as referring to an entity's legal capacity to sue and be sued -- as giving a particular entity a legal existence in the courts. *See* George C. Kraehe, *"There's Something About Cities: Understanding Proprietary Functions of Texas Municipalities and Governmental Immunity."* 32 TEX. TECH. L. REV. 1, 35-36 (2000); A. Craig Carter, *"Is Sue and Be Sued Language a Clear and Unambiguous Waiver of Immunity?"* 35 ST. MARY'S L.J. 275, 289-300 (2004).

DAVID B. GAULTNEY,

Justice

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Driver's License Offenders

OBJECTIVES

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

1. List the most common driver's license offenses in Texas.
2. Describe the elements, defenses and penalties for common driver's license offenses in Texas.
3. Create routine court procedures for the common driver's license offenses in Texas.

UNDERSTANDING COMMON TEXAS DRIVER'S LICENSE OFFENSES

By

Scott E. Kurth

PREAMBLE

Unless otherwise specified, all references in this article are the Texas Transportation Code.

INTRODUCTION

The purpose of this article is to provide Texas municipal court judges with specific information on the statutory design behind the most common driver's license violations appearing in the various municipal courts in Texas and how to properly dispose of them, to-wit: driving without a license aka "I never had one"; driving with an expired driver's license aka "I had one but let it go;" and failure to present driver's license aka "I have it I just can't show it to you right now."

No Driver's License

§ 521.021. License Required

A person, other than a person expressly exempted under this chapter, may not operate a motor vehicle on a highway in this state unless the person holds a driver's license issued under this chapter.

The offense of "**no driver's license**" 'aka' "**driving without a license**" is derived from § 521.021. The State of Texas requires driver's licenses because a license or permit to drive an automobile on public highways is not a property right; it is a privilege. Schwantz vs. Texas Department of Public Safety, 415 S.W.2d 12, (Tex. App. – Waco, 1967) Hicks v. State, 18 S.W.3d 743, 744 (Tex. App.--San Antonio 2000, no pet.). Given that no specific penalty is provided in §521.021 for driving

without a license, § 521.021 is punishable pursuant to §521.461 that provides a fine not to exceed $200.00.[1]

Driver's License Classification Scheme

The term "driver's license" is the overall generic description ascribed to series of license classifications that permit Texans to operate motor vehicles on the roadways of this State. § 521.001(a)(3) of the Transportation Code defines a driver's license as *". . . an authorization issued by the department for the operation of a motor vehicle."* In Texas, driver's licenses are divided into four (4) classifications, to-wit: A (e.g. heaviest vehicles like 18-wheelers), B (e.g. chauffeur's, smaller vehicles, C (e.g. normal passenger vehicles---this is the **lowest classification**), and M (i.e. motorcycles and mopeds) as set forth in § 521.081[2], §521.082[3],

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[1] *§ 521.461 General Criminal Penalty*
(a) A person who violates a provision of this chapter for which a specific penalty is not provided commits an offense.
(b) An offense under this section is a misdemeanor punishable by a fine not to exceed $200.

[2] *§ 521.081. Class A License*

A Class A driver's license authorizes the holder of the license to operate:

(1) a vehicle with a gross vehicle weight rating of 26,001 pounds or more; or

(2) a combination of vehicles that has a gross combination weight rating of 26,001 pounds or more, if the gross vehicle weight rating of any vehicle or vehicles in tow is more than 10,000 pounds.

[3] *§ 521.082. Class B License*

(a) A Class B driver's license authorizes the holder of the license to operate:

§ 521.083[4], and § 521.084[5], respectively.

While each class of license (i.e. A, B, C, and M) defines the types of motor vehicles that may be operated under each license, (see footnotes), §521.085 permits the license holder to drive *". . . any lesser type of vehicle other than a motorcycle."*[6] For example, a holder of a class A license working as a long-haul, 18-wheeler truck driver, is permitted to

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(1) a vehicle with a gross vehicle weight rating that is more than 26,000 pounds;

(2) a vehicle with a gross vehicle weight rating of 26,000 pounds or more towing:

(A) a vehicle, other than a farm trailer, with a gross vehicle weight rating that is not more than 10,000 pounds; or

(B) a farm trailer with a gross vehicle weight rating that is not more than 20,000 pounds; and

(3) a bus with a seating capacity of 24 passengers or more.

(b) For the purposes of Subsection (a)(3), seating capacity is computed in accordance with Section 502.162, except that the operator's seat is included in the computation.

[4] *§ 521.083. Class C License*

A Class C driver's license authorizes the holder of the license to operate:

(1) a vehicle or combination of vehicles not described by Section 521.081 or 521.082; and

(2) a vehicle with a gross vehicle weight rating of less than 26,001 pounds towing a farm trailer with a gross vehicle weight rating that is not more than 20,000 pounds.

[5] *§ 521.084. Class M License*

A Class M driver's license authorizes the holder of the license to operate a motorcycle or moped.

[6] *§ 521.085. Type of Vehicle Authorized*

Unless prohibited by Chapter 522, the license holder may operate any vehicle of the type for which that class of license is issued and any lesser type of vehicle other than a motorcycle or moped.

drive his personal Ford F-150 under his Class A driver's license because the Ford F-150 is a *"lesser type of vehicle"* and generally falls under a Class C license (i.e. the lowest classification).

Motorcyles and Mopeds

§521.085 place motorcycles and mopeds in a separate category from commercial, farm and passenger motor vehicles. More specifically, a person with a motorcycle license is not permitted to drive a passenger car nor vice versa, but must separately qualify and obtain a separate license for each. Therefore, a person with both a motorcycle license and a Class C license will be listed on the **same driver's license** as "CM." Having a double notation on one license card as opposed to two (2) separate licenses is in keeping with §521.182 that prohibits an individual from holding more than one driver's license (i.e. the actual driver's license card itself).[7]

It is important to note that motorcycles and mopeds are defined separately under the Transportation Code. A "moped" is generally

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[7] *§ 521.182. Surrender of License Issued by Other Jurisdiction*

(a) A person is not entitled to receive a driver's license until the person surrenders to the department each driver's license in the person's possession that was ***issued by this state [Emphasis Added]*** *or another state or Canadian province.*

(b) The department shall send to the state or province that issued the license:

(1) the surrendered license or a notification that the license has been surrendered; and

(2) a statement that the person holds a driver's license issued by this state.

defined under §541.201(8) as a *"motor-driven cycle that cannot attain a speed in one mile of more than 30 miles per hour . . ."* nor can the engine size generally be larger than 50 cubic centimeters (e.g. a mini-bike or "Honda 50" of yester-year).[8] Per §521.225, a moped may not be operated unless the person, who must be at least 15 years of age or older, holds a Class M driver's license.[9] Similar to §521.025 (discussed below) that authorizes a police officer to require any driver to produce their driver's license, §521.227 permits any police officer to stop and detain a

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[8] *§ 541.201. Vehicles*

In this subtitle:

(8) "Moped" means a motor-driven cycle that cannot attain a speed in one mile of more than 30 miles per hour and the engine of which:

(A) cannot produce more than two-brake horsepower; and

(B) if an internal combustion engine, has a piston displacement of 50 cubic centimeters or less and connects to a power drive system that does not require the operator to shift gears.

[9] *§ 521.225. Moped License*

(a) A person may not operate a moped unless the person holds a driver's license. An applicant for a moped license must be 15 years of age or older.

(b) The department shall administer to an applicant for a moped license a written examination relating to the traffic laws applicable to the operation of mopeds. A test involving the operation of the vehicle is not required.

(c) An applicable provision of this chapter relating to a restricted Class M license applies also to a moped license, including a provision relating to the application, issuance, duration, suspension, cancellation, or revocation of that license.

(d) The department shall certify whether a vehicle alleged to be a moped is a moped. The department shall:

(1) by rule establish the procedure for determining whether a vehicle is a moped;

(2) compile a list of mopeds certified by the department; and

(3) make the list available to the public on request.

motorcycle or moped to determine if the vehicle is within the make and model requirements of the Department of Public Safety.[10]

Arrest Permitted for Driver's License Offenses

The arrest (i.e. handcuff or go to jail) or release with a promise to appear on a driver's license charge is generally within the discretion of the police officer. Article 14.06(b) of the Code of Criminal Procedure authorizes the on-view arrest by police for driver's license violations (e.g. no driver's license, failure to present driver's license and expired driver's license). In the event that the officer decides not to take the defendant to jail (i.e. technically before a 'magistrate' as required by Article 14.06(a) of the Code of Criminal Procedure) at the time of the traffic stop, the officer may, pursuant to Article 14.06(b)[11], issue a citation to the defendant that contains a written notice to appear in court that shows the time and place the defendant is to appear, the name and address of the person charged, and the offense charged." It is worth noting that Article 14.06(b) does not contain the added requirement that the person charged must sign a promise to appear in court at the time and place

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[10] *§ 521.227. Inspection by Peace Officer*

Any peace officer may stop and detain a motorcycle, motor driven cycle, or moped to determine if the vehicle is of a model and make certified by the department.

[11] *Art 14.06. Must take offender before magistrate*

(b) A peace officer who is charging a person, including a child, with committing an offense that is a Class C misdemeanor, other than an offense under Section 49.02, Penal Code, may, instead of taking the person before a magistrate, issue a citation to the person that contains written notice of the time and place the person must appear before a magistrate, the name and address of the person charged, and the offense charged.

noted on the citation in order to be released. It is true that Transportation Code §543.005[12] does require that the person charged Subtitle C Rules, Rules of the Road violation must sign a promise to appear in order to secure his release. However, §543.005 is not applicable to driver's license cases because driver's licenses are governed by Subtitle B (i.e. a completely different section). Therefore, a person charged with no driver's license, failure to present driver's license, and/or expired driver's license is not required to sign a promise to appear in court. Furthermore, the Code of Criminal Procedure is silent as to whether a citation in and of itself is sufficient to require the defendant to appear in court or be charged with another offense of failure to appear per Penal Code §38.10(a)(e)[13] without a written promise to appear. Berrett v. State, 2004 Tex. App. LEXIS 4393 (Tex. App. Houston 1st Dist. May 13 2004)[14]. *[Editorial comment: As a practical matter, it*

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[12] *§ 543.005. Promise to Appear; Release*

To secure release, the person arrested must make a written promise to appear in court by signing the written notice prepared by the arresting officer. The signature may be obtained on a duplicate form or on an electronic device capable of creating a copy of the signed notice. The arresting officer shall retain the paper or electronic original of the notice and deliver the copy of the notice to the person arrested. The officer shall then promptly release the person from custody.

[13] *§ 38.10. Bail Jumping and Failure to Appear*

(a) A person lawfully released from custody, with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly fails to appear in accordance with the terms of his release.

(e) An offense under this section is a Class C misdemeanor if the offense for which the actor's appearance was required is punishable by fine only.

does not matter whether or not 14.06(b) permits the officer to require a written promise to appear because if the defendant does not sign the ticket that will undoubtedly contain a written promise to appear then the defendant is likely to be arrested and taken to jail. Thereafter, if a defendant, having signed the written promise to appear on an expired driver's license citation, for example, and fails to appear in court, then he will likely be charged under Penal Code § 38.10(a)(e) with failure to appear, a Class C misdemeanor, with a possible fine of up to $500.00 under Penal Code § 12.23.[15] *[Note: Do not confuse the $200.00 fine authorized by § 542.401*[16] *for violating a written promise to appear under § 543.005 for Rules of the Road violations.] The State will no doubt argue that although the defendant was not required to sign the written promise to appear, he/she waived any complaint by voluntarily signing the promise to appear (no doubt to avoid going to jail) thereby bringing themselves within the parameters of § 38.10(a)(e) (i.e. failure to appear, a Class C misdemeanor).*

The Court can accept the defendant's plea without preparing a formal complaint. (See the discussion in Complaints below). In the defendant simply pays the fine, the payment itself automatically results in a finding of 'guilty' as if the defendant had entered a plea of 'no

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[15] *§ 12.23. Class C Misdemeanor*

An individual adjudged guilty of a Class C misdemeanor shall be punished by a fine not to exceed $ 500.

[16] *§ 542.401. General Penalty*

A person convicted of an offense that is a misdemeanor under this subtitle for which another penalty is not provided shall be punished by a fine of not less than $ 1 or more than $ 200

contest' and waived a jury trial in writing. Texas Code of Criminal Procedure 27.14(d).[17]

DRIVER RESPONSIBILITY PROGRAM

On September 1, 2003, the new Driver Responsibility Program added by the 78th Texas Legislature became effective under Chapter 708 of the Transportation Code. Essentially, the provisions of Chapter 708 are prospective in nature only (i.e. Chapter 708 does not apply to offenses occurring or becoming final judgment before September 1, 2003 (See §708.101[18]). §708.104 requires the Department of Public Safety ("DPS") to assess the surcharge of $100.00 per year for a maximum of three (3) years on the license of a person, who has been convicted of no driver's license (§521.021) within the preceding 36-month period. In

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[17] *Article 27.14*

(d) If written notice of an offense for which maximum possible punishment is by fine only or of a violation relating to the manner, time, and place of parking has been prepared, delivered, and filed with the court and a legible duplicate copy has been given to the defendant, the written notice serves as a complaint to which the defendant may plead "guilty," "not guilty," or "nolo contendere." If the defendant pleads "not guilty" to the offense, a complaint shall be filed that conforms to the requirements of Chapter 45 of this code, and that complaint serves as an original complaint. A defendant may waive the filing of a sworn complaint and elect that the prosecution proceed on the written notice of the charged offense if the defendant agrees in writing with the prosecution, signs the agreement, and files it with the court.

[18] *§ 708.101. Nonapplicability*

This subchapter does not apply to a conviction that became final before September 1, 2003.

NOTICE: SECOND OF TWO VERSIONS OF THIS SECTION
Effective January 11, 2004

§ 708.101. Nonapplicability

This subchapter does not apply to an offense committed before September 1, 2003.

other words, if a person is convicted for driving with no license, then that person will be required to pay to the DPS a surcharge of $100.00 each year for three (3) years on each no driver's license conviction.[19] The $100.00 surcharge is assessed for three years on each no driver's license conviction. DPS procedure: John Doe is convicted on January 1, 2004 under §521.021 of no driver's license by the Judge of the DeSoto Municipal Court. The clerk of the DeSoto Municipal notifies the DPS of the conviction, and the DPS notes the conviction on its computer system not with the date of the conviction but with the date the conviction is filed with DPS. The DPS computer system is programmed to send a letter to John Doe that the $100.00 surcharge is due within 30 days or the person's driver's license will be suspended. Each year thereafter (i.e. until a total of three notice letters are sent) on the date that the conviction was registered with DPS on its computer system a new notice letter will be generated and mailed to John Doe demanding payment of the $100.00 surcharge within 30 days. If John Doe receives another no driver's license conviction, it will be treated separately by DPS, that is, John Doe will be required to pay another surcharge of $100.00 for the

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[19] *§ 708.104. Surcharge for Conviction of Driving Without Valid License*
(a) Each year the department shall assess a surcharge on the license of a person who during the preceding 36-month period has been convicted of an offense under Section 521.021.

(b) The amount of a surcharge under this section is $ 100 per year.

(c) A surcharge under this section for the same conviction may not be assessed in more than three years.

next three (3) years from the date that the conviction was registered with the DPS.[20]

DEFERRED DISPOSITION

A final conviction is required for the imposition of the surcharge §708.104. Therefore, many defendants have sought to escape the surcharge through a deferred adjudication under Article 45.051 of the Code of Criminal Procedure. *[Editorial Comment: Article 45.051(b)(10) permits the judge to impose "any other reasonable condition" as a part of the deferred probation, such as requiring the defendant to get a driver's license.[21]]* No deferred disposition is permitted for a traffic offense by a person holding a commercial driver's license (i.e. Class B driver's license) per Article 45.051(f)(2). Therefore, a holder of a commercial driver's license charged with no driver's license, whose commercial license has expired and was not renewed within ten (10) working days (See discussion below on Dismissal of Expired Driver's License Charge) who is convicted will be assessed the surcharge under §708.104.

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[20] *All information regarding the policy of the DPS is taken from an interview on September 30, 2004, with Rebecca Blewitt, Senior Staff Attorney, Driver's License Division, and Project Manager for the Driver's License Responsibility Program.*

[21] *§45.051(b)(10)*
(b) During the deferral period, the judge may, at the judge's discretion, require the defendant to:
(10) comply with any other reasonable condition

FAILURE TO PRESENT DRIVER'S LICENSE

§ 521.025. License to be Carried and Exhibited on Demand; Criminal Penalty

(a) A person required to hold a license under Section 521.021 shall:

(1) have in the person's possession while operating a motor vehicle the class of driver's license appropriate for the type of vehicle operated; and

(2) display the license on the demand of a magistrate, court officer, or peace officer.

(b) A peace officer may stop and detain a person operating a motor vehicle to determine if the person has a driver's license as required by this section.

A license or permit to drive an automobile on public highways is privilege and not a property right. Schwantz vs. Texas Department of Public Safety, (supra). Thus, the legislature was justified in enacting §521.025 (quoted above in part), which is commonly known as "failure to present driver's license." Without more, §521.025 simply requires a person operating a motor vehicle to produce upon the request of a police officer or magistrate, his/her driver's license for inspection and a determination of whether the person has a valid driver's license. It is §521.025 that provides a legal foundation for the police officer's request to motorists, to-wit: "May I see your driver's license, please."[22] Texas courts have upheld the right of a peace officer to stop and detain a person operating a

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[22] *"When an officer stops a motorist for a traffic violation, he has the right and the duty to demand identification, a valid license, and proof of insurance from the driver."* Sendejo vs. State, *841 S.W.2d 856,* (Tex. App. – Corpus Christi, 1992).

motor vehicle to determine if the person has a driver's license. Once an officer has confirmed that the driver is driving without a valid license for the type of vehicle being driven, he has probable cause to arrest him. Munoz vs. State, 2002 Tex. App. LEXIS 2317, (Tex. App. – Houston, 2002) (Unpublished). Williams vs. State, 2003 Tex. App. LEXIS 5999, (Tex. App. – San Antonio, 2003) (Unpublished).

§521.025 and Search and Seizure

§521.025 has been fertile field for Texas appellate opinions in the area of search and seizure based upon subsection (b) of §521.025 that permits a police officer to stop and detain a driver *". . . to determine if the person has a valid driver's license. . . ."* has been as the heart of the controversy surrounding most of the case law in this area. More specifically, police departments have been repeatedly accused of using §521.025(b) (i.e. their authority to check for driver's licenses) as a cover or subterfuge for generalized DWI checkpoints, for example, that have been held unconstitutional essentially because many police departments were using the driver's license checkpoints as a subterfuge for DWI checkpoints.

In Webb Vs. State, 739 S.W.2d 802, 1987 Tex. Crim. App. Lexis 740 (Tex. Crim. App. 1987), the Texas Court of Criminal appeals overturned a DWI conviction where the police roadblock ostensibly set up for checking driver's licenses from 7:00 p.m. to 10:00 p.m. on Greenville Avenue in Dallas, was in reality placed there because of its proximity to

nearby establishments that sold alcoholic beverages. The police officer in this case admitted that the "purpose was not a driver's license check but it was, in fact, for a D.W.I. check." Here, the Court of Criminal Appeals in discussing its ruling in Meeks v. State, 692 S.W.2d 504 (Tex.Cr.App. 1985) where a variety of different law enforcement agencies supplied officers to man a roadblock set up on U.S. Highway No. 90 to "enforce all the laws," the different police agencies working together on "anything that would be a violation of some type," stated in pertinent part:

". . . the statute in question does not provide carte blanche authority for "fishing expeditions"; while a license checkpoint is allowed under the statute, such an operation cannot be used as a subterfuge to cover up unlawful activity. Under our prior case law, it is clear that the mere request for a motorist's license will not validate the stopping of an automobile under the authority of Art. 6687b, § 13, supra, if it is not clear the driver's license check was the reason for the detention."

The Court of Criminal Appeals in Meeks (supra) found that a "general purpose" checkpoint designed to enforce all laws amounts to an unlawful arrest. Later, this same Court of Criminal Appeals said that a "combination" checkpoint (e.g. DWI and driver's license) seemingly justified under the now §521.025(b) could not be used to ferret out persons driving while intoxicated from nearby bars and dance halls. It is important to note that the Court did not deem true driver's license checkpoints illegal.

Affirmative Defense

§521.025(d) provides as follows:

"(d) It is a defense to prosecution under this section if the person charged produces ***in court [Emphasis Added]*** *a driver's license:*

(1) issued to that person;

(2) appropriate for the type of vehicle operated; and

(3) valid at the time of the arrest for the offense."

§521.025(d) provides the defendant charged with failure to present a valid Texas driver's license with a defense to prosecution if the defendant can establish that the driver's license was issued to him/her and was not canceled, expired or suspended at the time of the issuance of the citation. §521.025(d) is in the nature of an affirmative defense that must be proved by the defendant by a preponderance of the evidence to prevail in a case brought by the prosecution. Texas Penal Code §2.04.[23] Hence, the requirement of §521.025(d) that the defendant produce the driver's license in court for a factual determination in a trial with the prosecutor present to determine whether the defendant has met its burden of proof by a preponderance of the evidence. Therefore, the judge

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[23] *§ 2.04. Affirmative Defense*

(a) An affirmative defense in this code is so labeled by the phrase: "It is an affirmative defense to prosecution . . . ."

(b) The prosecuting attorney is not required to negate the existence of an affirmative defense in the accusation charging commission of the offense.

(c) The issue of the existence of an affirmative defense is not submitted to the jury unless evidence is admitted supporting the defense.

(d) If the issue of the existence of an affirmative defense is submitted to the jury, the court shall charge that the defendant must prove the affirmative defense by a preponderance of evidence.

is not empowered, without the consent of the State, to dismiss or enter a finding of 'not guilty' for failing to display a driver's license or for driving without a driver's license without a formal proceeding in open court with the prosecutor present. *[Editorial Comment: While it is not advisable to proceed to dismiss any case except in open court without the prosecutor present, a judge dismissing a charge pursuant to §521.025(d) is well-advised to have the prosecutor sign off on each dismissal or at the least have the prosecutor sign off on a written policy of dismissal to avoid later claims of violating the Code of Judicial Conduct.]*

It is important to note that a municipal court has no jurisdiction to render judgment assessing jail time as punishment. It may order a defendant committed to jail only upon default of the payment of fines assessed against him. Ex part Minjares, 582 S.W.2d 105, Tex. Crim. App. 1978). Thus, the municipal court is without jurisdiction to try a charge against a defendant brought under §521.025(c)(2) that requires not less than three (3) days in jail and not more than six (6) months in jail. Those cases must of necessity be heard in the County Courts.[24]

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[24] *§521.025(c)(2):*

"(c) A person who violates this section commits an offense. An offense under this subsection is a misdemeanor punishable by a fine not to exceed $ 200, except that:

(1) for a second conviction within one year after the date of the first conviction, the offense is a misdemeanor punishable by a fine of not less than $ 25 or more than $ 200; and

(2) for a third or subsequent conviction within one year after the date of the second conviction the offense is a misdemeanor punishable by:

Dismissal of Expired License Charge

§ 521.026. Dismissal of Expired License Charge

(a) A judge may dismiss a charge of driving with an expired license if the defendant remedies this defect within 10 working days.

(b) The judge may assess the defendant an administrative fee not to exceed $10 when the charge of driving with an expired driver's license is dismissed under Subsection (a).

By the use of the words "may dismiss," it is understood that the legislative intent in passing §521.026 was to permit the court within its discretion to dismiss on **its own motion** (i.e. sua sponte) a charge of driving with an expired driver's license; however, confusion arises when trying to determine the period of time within which this judicial discretion may be exercised. For instance, the statute permits a dismissal *"if the defendant remedies the defect within 10 working days."* Although not defined, presumably the word "defect" references the failure to timely renew the license. However, the all-important words "10 working days" describing the period during which a defendant may cure the "defect" by getting his/her license are not defined in §521.026 nor are there any cases concerning §521.026 on this issue. Since the words

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(A) a fine of not less than $ 25 or more than $ 500;

(B) confinement in the county jail for not less than 72 hours or more than six months; or

(C) both the fine and confinement."

or phrase "10 working days" is not defined in Chapter 521, §521.001(b)[25] directs a judge to definitions found in Subtitle C, Rules of the Road that runs from Chapter 541 through Chapter 600. The same words (i.e. "10 working days") are defined in §548.605 (i.e. expired inspection certificates) and §520.031 (transferring registration and title on the sale of a vehicle) of the Transportation Code dealing with expired motor vehicle inspection certificates. Both §548.605 and §520.031 employ the same language, to-wit:

(a) In this section, "working day" means any day other than a Saturday, a Sunday, or a holiday on which ***county offices*** *are closed [Emphasis Added].*

Employment of the foregoing definition in the sister statutes (i.e.) is not water-tight because in some areas the Department of Public Safety ("DPS") has its own driver's license facilities apart from county offices. There is presumably some variances in holiday schedules between the county and State government (e.g. some counties close on December 24th and/or December 27th and others do not). Therefore, presumably the "working days" refers to days on which the Department's licensing facility was open to the public. This reasoning is buttressed by the opinion of the Court of Appeals in City of Lubbock Vs. Civil Service Commission of the

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[25] *§ 521.001. Definitions*

(b) A word or phrase that is not defined by this chapter but is defined by Subtitle C has the meaning in this chapter that is assigned by that subtitle.

City of Lubbock, 896 S.W.2d 346 (Tex. App. – Amarillo, 1995) that stated:

"The underlying rationale used by the courts in determining what construction should be placed upon the term is to look to the purpose intended to be accomplished by the provision within which the term is used and the effect that various interpretations of the term will have when applied to the subject matter."

Therefore, the §526.026 is properly read to mean that the trial judge has the discretion to dismiss the charge of driving with an expired license if within 10 days (i.e. counting 10 days from the date that the citation was issued that are not Saturdays, Sundays, or a holiday on which the DPS' driver's license facilities are closed) the person's driver's license was renewed.

§526.026 permits the judge to collect an administrative fee of $10.00 when dismissing cases under §521.026(a), which administrative fee is not required to be reported and submitted to the state. Therefore, it is understandable that the State Comptroller and the Judicial Conduct Commission have the incentive to ensure that the narrow discretionary authority granted to judges by §521.026(a) to dismiss is properly exercised.

A careful examination of §521.025 and §521.026 and reveals an overall legislative preference to permit Texas residents to cure their driver's license defects (i.e. expired driver's license and failure to present driver's license) within a reasonable time (i.e. within 10 DPS working days) without paying a fine of up to $200 and applicable surcharges (See

discuss above on Driver's Responsibility Program). Sections §521.025 and §521.026 provide a mechanism for dismissal of the citation that overall involves obtaining a valid Texas driver's license; having actual physical possession of the Texas driver's license; and presenting that valid Texas driver's license to the court. *[Editorial comment only: Such legislative scheme makes sense given the enormous numbers of people killed in automobile related deaths each year and the recognition that in Texas, people need to drive and are going to drive motor vehicles every day whether or not they have a driver's license. Giving citizens charged with a driver's license violation the impetus to get a driver's license to avoid paying a fine and perhaps a surcharge is a win-win for everyone involved. More specifically, obtaining/having physical possession of a driver's license, of necessity, provides important identification information for the police (i.e. address, social security, date of birth), screening for unqualified drivers, and testing of the rules of the road for which citizens will presumably study, to at least a limited degree. All of this hopefully means that more knowledgeable drivers will be driving on Texas roadways and less injuries and deaths will occur. (See §521.161)[26]]*

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[26] *§ 521.161. Examination of License Applicants*

(a) Except as otherwise provided by this subchapter, the department shall examine each applicant for a driver's license. The examination shall be held in the county in which the applicant resides or applies not later than the 10th day after the date on which the application is made.

(b) The examination must include:

(1) a test of the applicant's:

In short, having a valid driver's license is encouraged in the Transportation Code. §521.026 (i.e. dismissal of expired driver's license) is a logical extension of §521.025 (i.e. failure to present driver's license) in that in both instances the law's remedial effort is geared toward the citizen maintaining actual physical possession of the driver's license with its accompanying identifying information making infinitely easier the business of law enforcement from traffic stops to homeland security.[27]

The offense of driving without a license includes within its penumbra those persons driving with an expired license. More specifically, it is clear that upon the expiration of a Texas driver's license, the individual has no driver's license. In other words, it is not just

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(A) vision;

(B) ability to identify and understand highway signs in English that regulate, warn, or direct traffic; and

(C) knowledge of the traffic laws of this state;

(2) a demonstration of the applicant's ability to exercise ordinary and reasonable control in the operation of a motor vehicle of the type that the applicant will be licensed to operate; and

(3) any additional examination the department finds necessary to determine the applicant's fitness to operate a motor vehicle safely.

[27] *"It is an affirmative defense to prosecution for driving without a license if the person charged produces in court a driver's license issued to that person, appropriate for the type of vehicle operated and valid at the time of the arrest for the offense. Tex. Transp. Code Ann. § 521.025(d) (Vernon 1999). Moreover, a judge may dismiss a charge of driving with an expired license if the defendant remedies this defect within 10 working days." Tex. Transp. Code Ann. § 521.026a) (Vernon 1999).* Walker Vs. State of Texas, 2002 Tex. App. Lexis 1376, (Tex. App. Tyler – February 20, 2002) (Unpublished opinion)

expired---it no longer exists. Hence, a person driving with an expired license is properly charged with driving without a driver's license. This was poignantly illustrated by the Court of Criminal Appeals in Bryant v. State, 163 Tex. Crim. 544, 294 S.W.2d 819, 1956 Tex. Crim. Lexis 1168: There the appellant was convicted of driving an automobile while his operator's license was suspended, and his punishment assessed at a fine of $ 25. The offense occurred on or about the 23rd day of November, 1955. The evidence showed that the operator's license, which had been issued to appellant, expired on February 13, 1954, and had not been suspended prior to its expiration. **No renewal of the license occurred after its expiration.** The Court of Criminal Appeals held: *"Of necessity, therefore, at the time of the commission of the alleged offense* ***appellant had no operator's license*** *[Emphasis Added] which might be or was suspended."*

Although a person driving without a license is in violation of §521.021 (i.e. driver's license required) that imposes a fine of up to $200 under §521.461[28], he/she may seek refuge under §521.026 if they can show that **at sometime in the past** they once held a valid Texas driver's

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[28] *§521.461. General Criminal Penalty*

(a) A person who violates a provision of this chapter for which a specific penalty is not provided commits an offense
(b) An offense under this section is a misdemeanor punishable by a fine not to exceed $200.

license and they renewed it within ten (10) working days of receiving the citation. This may prove problematic for some defendants who have allowed the passage of significant time from the date that their driver's license expired and who have lost actual possession of their driver's license. This is because under §521.043 the Department of Public Safety may eliminate records it deems no longer necessary,[29] like an expired license whose number is assigned to one driver, who does not otherwise have any convictions on his driving record, and simply retire the driver's license number.[30] Walker vs. State of Texas, 2002 Tex. App. Lexis 1376, (Tex. App. Tyler – February 20, 2002).

COMPLAINTS (I.E. CHARGING INSTRUMENTS)

No formal complaint is necessary unless there is a plea of not guilty.

No formal complaint (i.e. charging instrument) is required to be filed with the court in connection with any offense in the municipal courts, including driver's license offenses, because the *"maximum*

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[29] *Per Rebecca Blewitt, Senior Staff Attorney for the Driver's License Division, DPS*

[30] *§ 521.043. Elimination of Certain Unnecessary Records*

The department is not required to maintain records relating to a person if the director decides that the records are no longer necessary, except that the department shall maintain a record of a conviction as long as the record may be used:

(1) as grounds for a license cancellation, suspension, revocation, or denial; or

(2) in conjunction with other records of convictions, to establish that a person is a frequent violator of traffic laws.

[Note: Per Rebecca Blewitt, Senior Staff Attorney for the Driver's License Division, DPS, the DPS retires expired driver's licenses 2 years and 60 days following the expiration date of the license.]

possible punishment is by fine only" until after the defendant appears and enters a plea of "not guilty" to the offense charged. The written notice to appear on the citation serves as a complaint to which the defendant may plead "guilty," "not guilty," or "nolo contendere." If the defendant pleads "not guilty" to the offense, a complaint shall be filed that conforms to the requirements of Chapter 45 of the Code of Criminal Procedure. A defendant may waive the filing of a sworn complaint and elect that the prosecution proceed on the written notice of the charged offense if the defendant agrees in writing with the prosecution, signs the agreement, and files it with the court. Code of Criminal Procedure, Article 27.14(d).[31]

In Palma vs. State, 2004 Tex. App. Lexis 5872 (Tex. App. – Houston 2004), the defendant complained that he was not afforded notice of the charges against him because a formal complaint was not filed prior to but rather after he entered his plea of not guilty to the offense of failure to display driver's license. Here the Houston Court of Appeals relying on Article 27.14 of the Code of Criminal Procedure noted that the purposes of a formal charging instrument was to provide the accused with notice

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[31] *Texas Code of Criminal Procedure, Article 27.14 (d):*

(d) If written notice of an offense for which maximum possible punishment is by fine only or of a violation relating to the manner, time, and place of parking has been prepared, delivered, and filed with the court and a legible duplicate copy has been given to the defendant, the written notice serves as a complaint to which the defendant may plead "guilty," "not guilty," or "nolo contendere." If the defendant pleads "not guilty" to the offense, a complaint shall be filed that conforms to the requirements of Chapter 45 of this code, and that complaint serves as an original complaint. A defendant may waive the filing of a sworn complaint and elect that the prosecution proceed on the written notice of the charged offense if the defendant agrees in writing with the prosecution, signs the agreement, and files it with the court

of the precise offense with which he is charged and to act as a bar to subsequent prosecutions for the same offense involved in the specific case. A citation issued by the police officer accomplishes the same thing if it provides the date, time, and general location of the offense, the license number and description of the vehicle and the name, driver's license number and current address of the defendant. In fact, in nearly every instance the citation provides more specificity (See §542.003). regarding the charge than the complaint which is not required to state the time of the offense, for example. Texas Code of Criminal Procedure, Article 45.019.

No culpable mental state required in driver's license cases.

It has long been the law in Texas that if the statute expressly dispenses with a culpable mental state, the offense is said to be a strict liability offense[32] and the complaint is not required to contain language alleging that the defendant "did knowingly or intentionally" commit the prohibited act. Zulauf v. State, 591 S.W.2d 869 (Tex.Cr.App. 1979) (Note: a case dealing with speeding). None of the driver's license offenses (i.e. no driver's license, failure to present driver's license or expired driver's license) prescribe a culpable mental state as required by Penal Code §6.02 as element of the offense. More specifically, none of the

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[32] *"The concept of strict liability is founded on the premise that the mere doing of the act constitutes the offense and the lack of intent "will not exonerate the party nor does this make the prohibited act any less harmful to society." **State v. Houdaille Industries, Inc., 632 S.W.2d 723 , (Tex. 1982)***

driver's license offenses require that the prosecution prove that the defendant "intentionally" drove without a valid license, for example. In fact, the language 521.021 (No driver's license) and 521.025 (failure to present driver's license) plainly dispense with any mental element, but rather make the status of driving without a license or not having physical possession of the driver's license gist of the offense.[33] Therefore, the complaints are not required to allege that the defendant possessed a culpable mental state (i.e. "did knowingly or intentionally"). Clayton v. State, 652 S.W. 2d 810, (Tex. App. – Amarillo, 1983).

Quite often, municipal court judges are confronted with motions to quash the complaint for failing to negate the applicability to the defendant of an exception to the law being enforced. In White v. State, 2004 Tex. App. Lexis 5371 (Tex. App. – Houston, 1st Dist., 2004), in a case dealing with a failure to present driver's license, the defendant complained on appeal that the State failed to negate an exception to the offense, namely, that the State did not specify that defendant was not exempted from the requirement to hold a driver's license under §527.027. In this case, the complaint charged the defendant with failing to display a valid driver's license on demand of a peace officer under

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[33] *§ 6.02. Requirement of Culpability*

(a) Except as provided in Subsection (b), a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires.

(b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.

§521.025 (See above). Here, the court held that it was not necessary for a complaint charging such offense to include allegations negating the exceptions to the general requirement that a driver carry a valid driver's license because no exceptions are contained within §525.025. In Bragg v. State, 740 S.W.2d 574, 576 (Tex. App.--Houston [1st Dist.] 1987, pet. ref'd), the court held that, when exceptions to statute are placed in separate section from one defining offense, it is not necessary to negate exceptions in charging instrument.

Therefore, no listing of the statutory exceptions set forth in §521.027[34] are required to be plead in the complaint in connection with failure to present driver's license (§521.025) nor driving without a license (§521.121) because no exceptions are set forth in either section.

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[34] *§ 521.027. Persons Exempt From License Requirement*

The following persons are exempt from the license requirement imposed under this chapter:

(1) a person in the service of the state military forces or the United States while the person is operating an official motor vehicle in the scope of that service;

(2) a person while the person is operating a road machine, farm tractor, or implement of husbandry on a highway, unless the vehicle is a commercial motor vehicle under Section 522.003;

(3) a nonresident on active duty in the armed forces of the United States who holds a license issued by the person's state or Canadian province of residence; and

(4) a person who is the spouse or dependent child of a nonresident exempt under Subdivision (3) and who holds a license issued by the person's state or Canadian province of residence

CONCLUSION

While certainly not exhaustive in scope or depth, the foregoing provides fundamental information for an understanding of the authority and discretion of the municipal court judge in disposing of the most common driver's license violations: driving without a license, driving with an expired license and failure to present driver's license.

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Sovereign Defendants

OBJECTIVES

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

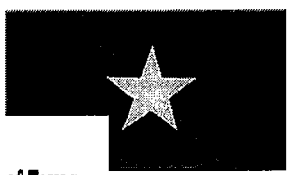
1. Recognize common sovereign citizen arguments and be prepared to respond to such legal arguments.
2. Identify defendants who are likely to raise sovereign citizen legal arguments.
3. Design an action plan to preserve courtroom decorum, protect defendant's rights and limit a sovereign citizens ability to disrupt court proceedings.

Beware Blind Pigs and Patriots: Sovereign Citizens in Municipal Court

Ilse D. Bailey, Asst. City Attorney
Kerrville, Texas
and
Peter Haskel, Asst. City Attorney
Dallas, Texas

TMCEC Annual Training Program
2004-2005

Who Are "Sovereign Defendants"?

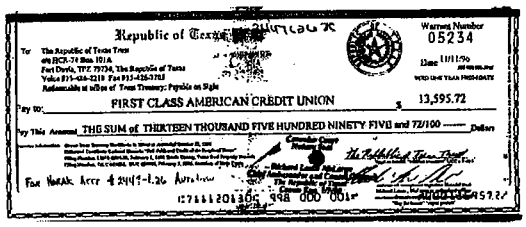


Republic of Texas

Catch the VISION !

Paper Terrorism

- Bogus Financial Instruments


Republic of Texas

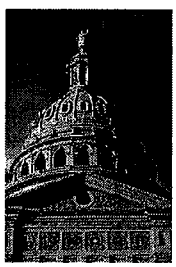
Warrant Number 05234

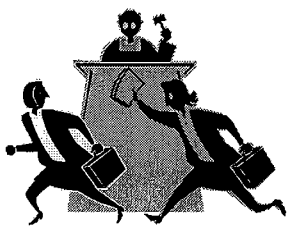
Date 10/11/96

Pay to: FIRST CLASS AMERICAN CREDIT UNION $ 13,595.72

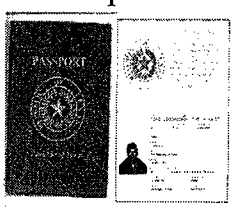
Pay This Amount THE SUM of THIRTEEN THOUSAND FIVE HUNDRED NINETY FIVE and 72/100 ——— Dollars

Bogus Liens





Passports

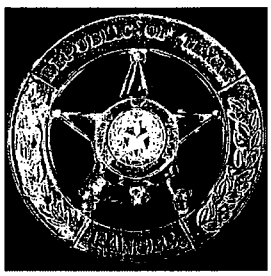


The Republic of Texas now offers standardized passport booklets similar to those issued by other countries. The passports are in the Republic of Texas colors, blue and gold. They are permanent, and are valid for life. Now you can proudly proclaim your nationality with a Republic of Texas passport!

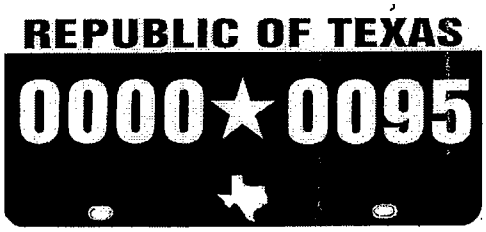
Passports are available through the office of the Secretary of State at the address below. Each passport is priced at 5 ounces of .999 fine silver or $25 US. All profits from the sale of passports go directly to support the operations of the Republic of Texas

To obtain a passport, print this form, complete it, and mail it to the Secretary of State. Be sure to include two standard passport-sized photographs.

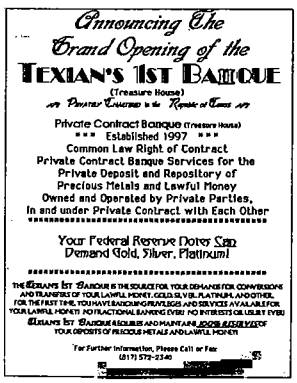
Law Enforcement Insignia



License Plates



Banks



Why Should I Care?!

Like a blind pig,
even a patriot will
find an acorn every
once in a while

Ex Parte Evans,
939 S.W.2d 142 (Tex. 1997)

Ex Parte Evans, 939 S.W.2d 142 (Tex. 1997)

- 1993 City of Dallas sues "Ralph Kenneth: Evans" in District Court for building code violation – dock versus really long deck. City prevails.
- Evans sues 44th Judicial Dist. Court Judge Candace Tyson in federal court for violation of his civil rights (42 USC § 1983) for refusing him a jury trial in the first case in violation of his religious convictions. Case dismissed.
- Evans appeals to 5th Circuit. Case dismissed for want of prosecution
- Evans sues in friendly forum – "Republic of Texas, Milam District Court of Common Law Pleas." Evans wins!
- another fictitious suit in the "Superior Court of Dallas County." Evans wins again!

Ex Parte Evans, 939 S.W.2d 142 (Tex. 1997) (cont.)

- Judge Tyson gets an injunction against Tyson – no more lawsuits against her anywhere without permission of the court issuing injunction.
- Evans sues Judge Tyson again in federal court.
- Tyson moves for contempt – Evans convicted and sentenced to 180 days in jail. Evans 2: Judge Tyson 3.
- Evans files habeas corpus petition in Court of Appeals – dismissed (Evans 2: Judge 4).

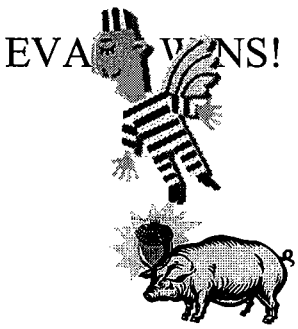
- Evans files habeas corpus petition in Texas Supreme Court

Ex Parte Evans, 939 S.W.2d 142 (Tex. 1997)

Held:

- state courts may enjoin litigation in other state courts
- state courts are completely without power to restrain federal court proceedings in *in personam* actions.
- "Because the trial court had no authority to enjoin **Evans** from filing a federal court lawsuit, the court's judgment of contempt against **Evans** for filing that lawsuit is void."
- Evans is discharged.

- Evans is discharged.



Why Should I Care?!

Texas Canons of Judicial Conduct

- Canon 3(B)(3):
  - Order and Decorum
- Canon 3(B)(4):
  - Patience, Dignity & Courtesy to Litigants
- Canon 3(B)(6):
  - Do Not Manifest Bias or Prejudice
- Canon 3(B)(8):
  - A Right for Every Litigant to be Heard

Why Should I Care?!

H.E.L.P. (1995-96)

H.E.L.P. (1995-96)

- Request for courtroom and personnel
- Political attack on Judge Carolyn Garcia

WANTED

CAROLYN CLAUDE GARCIA

JUDGE, 81ST CIVIL DISTRICT COURT

REMOVED FROM THE COURT

FOR THE FOLLOWING REASONS:

- Criminal Acts Against Citizens of Bexar County
- Illegal Disregard For The U.S. and Texas Constitutions
- Ordering Personal Briefings Of Civil Litigants In Her Courtroom By Her Bailiffs
- Violation Of Separation Of Church And State Statutes
- Having Arrogant Monuments Erected To Her Honor And Vanity

H.E.L.P. – TEXAS requests your NO VOTE against Carolyn Claude Garcia on Election Day, Nov. 5, 1996. This Judge does not deserve re-election.

Montana Municipal Judge Martha Bethel

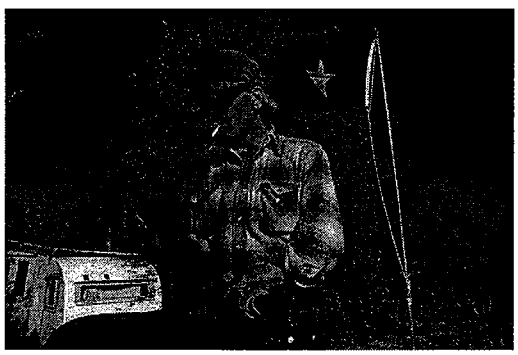
- Kidnap and death threats
- Break-ins
- Stalking

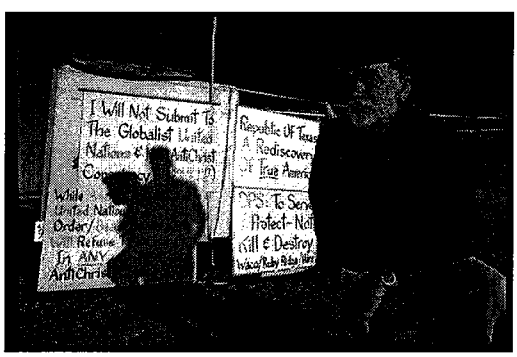
Idiot Legal Arguments –

- http://www.militia-watchdog.org/sussman.doc - Updated as of 1999
- Coleman v. Commissioner of Internal Revenue (7th Cir 1986) 791 F2d 68 at 69: "Some people believe with great fervor preposterous things that just happen to coincide with their self-interest."

Procedural Considerations

- Standing orders/local rules
- AG Letter Opinion
- House Bill 1185
- Vexatious litigants
- McLaren opinion -- Texas is a state!




I Will Not Submit To
The Globalist United
Republic Of Texas
A Rediscovery
Of True America


APRIL 19, 1995 Oklahoma City, OK

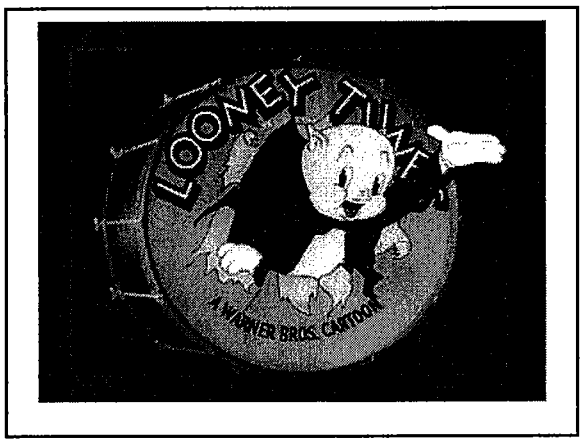

LOONEY TUNES
A WARNER BROS. CARTOON

Table of Contents

HB1185- Effective 5/13/97
75th Texas Legislature R.S., ch. 189, §17 Tex. Gen. Laws 1058

SUMMARY

1. Forgery definition amended to include bogus land patents;

2. Securing Execution of Documents by Deception -Makes it illegal to cause a public servant to file any document from a fraudulent court (*See* Penal Code §32.46; state jail felony);

3. Simulating Legal Process- makes it a crime to use a bogus court document to try to cause anyone to take action or refrain from taking action thereon (*See* Penal Code §32.48; Class A misdemeanor);

4. Refusal to Execute Release of Fraudulent Lien or Claim (*See* Penal Code §32.49 – Class A misdemeanor);

5. Penal Code definitions amended to make it clear that a bogus court document is not a "court document" for legitimate purpose (*See* Penal Code §37.01);

6. Tampering with Governmental Record offense is amended to include letters of patent as governmental records that may not be tampered with (*See* Penal Code §37.10);

7. Impersonating a Public Servant amended to make it an offense to purport to be some officer or official that does not exist in law (makes it a crime to pretend to be a judge of the common law court for the Republic of Texas, etc.) (*See* Penal Code §37.11; 3rd degree felony);

8. Record of a Fraudulent Court -makes it illegal to make, use or present a document that purports to be from a fraudulent court and try to get someone to take action or refrain from taking action based on the document (*See* Penal Code §37.13 – Class A misdemeanor for 1st offense);

9. Adds impersonating a public servant to the list of offenses that can be enhanced under the organized crime statute (*See* Penal Code Section 71.02);

10. Fraudulent filing of Financing Statement- makes it an offense to file a fraudulent financing statement (*See* Penal Code §37.101 – penalty varies from Class A misdemeanor to 2nd degree felony);

11. Signed Pleadings of Defendant- makes it a violation of the law for a person to file a document in a criminal case that is groundless or in bad faith. Mirrors what was already the case in civil rules (*See* Code of Criminal Procedure §1.052);

12. Venue for Simulating the Legal Process charges -can be filed in either the county where the document was mailed or the county where it was delivered (*See* Code of Criminal Procedure §13.26);

13. Clerks are required to have at least one hour of education annually on fraudulent filings (*See* Government Code §51.605[c]);

14. Amendments to the Government Code (*See* Chapter 51):

    a. Establishes duty on clerks when they receive documents that appear fraudulent to them. Clerks must provide written notice to the victim not later than the second business day after filing or after the clerk discovers the document is or may be fraudulent. Statue defines what is presumed to be fraudulent;

    b. Gives form for filing to get a fraudulent judgment lien declared void by a real court. Also provides form for suggested judgment with findings and conclusions holding lien invalid. Clerk may not collect filing fees for this pleading or for the judge's findings and conclusions in relation thereto;

    c. Gives form for filing to get a fraudulent lien on real property declared void by a real court. Also provides form for suggested judgment with findings and conclusions holding lien invalid. Clerk may not collect filing fees for this pleading or for the judge's findings and conclusions in relation thereto;

    d. Requires all clerks offices to post a sign stating that it is a crime to file a fraudulent court record;

    e. Provides that if a fraudulent lien is declared invalid by the process set out above, this document can be filed with the secretary of state along with the bogus lien that may also be filed in the secretary of state's office. The secretary of state is permitted to charge a $15.00 filing fee for this filing;

15. Amends Property Code to clarify that the definition of a judgment does not include a bogus judgment (*See* Property Code §12.013);

16. Amends Civil Practice & Remedies Code (*See* Chapter 11):

a. Provides that if anyone does file a bogus lien or other fraudulent document under these rules, he shall be liable for either actual damages plus attorney fees plus exemplary damages or $10,000.00, whichever is greater;

b. Sets out who may bring an action to enjoin violation of this chapter;

c. Provides the venue for such actions (district court where the document is filed);

d. Establishes filing fees for such action --$15.00, plus $20.00 for personal service, cost of mail if certified mail used. If affidavit of indigency filed, costs may be waived;

e. If Plaintiff wins, Defendant can be ordered to pay the difference between the filing and service fee actually paid and the filing and service fee usually charged for similar cases by the court;

17. Repeals Business & Commerce Code Section 9.412(c), which made it an offense to file a fraudulent financing statement -this is already covered under the penal code amendments in this bill;

18. Allowing for lawsuits to be filed to remove a lien regardless of whether the false lien was filed before or after the effective date of this statute (Chapter 51, Subchapter J, Government Code);

19. Clerks are required to have at least one hour of education annually on fraudulent filings (Note that this is repetitious of #13, above);

20. Establishes date of accrual of cause of action (important for statutes of limitations);

21. Establishes that acts made criminal are only criminal if performed after the effective date of statute;

22. Declaring an emergency, immediate effectiveness of law- May rather than September or January.

Letter Opinion 98-016 (3/13/98)

Office of the Attorney General
State of Texas

March 13, 1998
The Honorable John Vance
Dallas County District Attorney
Administration Building, 411 Elm Street
Dallas, Texas 75202
Letter Opinion No. 98-016

Re: Instruments that the county clerk must accept for filing and recording (RQ-950)

Dear Mr. Vance:

You ask what instruments the Dallas County Clerk must accept for filing and recording. You state that the Dallas County Clerk has recently noticed a great increase in the number of unusual documents presented for filing and recording in his office. Many of these do not belong in the traditional categories of documents filed with the clerk, such as land records, lien instruments, financing statements, probate records, or court pleadings. You identify some of the unusual instruments as follows:

1. Refusal to Pay Property Taxes,

2. Common Law Liens,

3. Affidavit Revoking Signature,

4. Affidavit of Refusal to Accept Post,

5. Affidavit of Direct Attack Upon Lawsuit,

6. Constructive Notice,

7. Notice of Non-Statutory Waiver of Tort Presented by Affidavit.

These examples of unusual documents presented for filing are often in affidavit form, while the following are not in affidavit form:

1. Surrender of Social Security Card,

2. Declaration of Person Being a Sovereign,

3. Notice of Asseveration,(1)

4. Notice of Waiver of Tort,

5. Notice Regarding Lack of Jurisdiction.

You do not submit copies of any of the unusual documents you inquire about, nor do you attempt to explain what the proponents of these documents hope to accomplish by filing them and having them recorded as public records. Since we can only speculate from the names of the documents what they relate to, we cannot determine as a matter of law whether or not the county clerk may accept them for filing. We can, however, review the law establishing the county clerk's duties, to assist you in advising the clerk how to deal with these documents.

Article V, section 20 of the Texas Constitution provides for the election of a county clerk, who will be clerk of the county and commissioners courts and recorder of the county, and "whose duties, perquisites and fees of office shall be prescribed by the Legislature." Thus, the county clerk's duties, including filing and recording duties, will be found in the statutes.(2) Section 192.001 of the Local Government Code provides that the county clerk "shall record each deed, mortgage, or other instrument that is required or permitted by law to be recorded."(3) Unless a .statute provides that a document is authorized, required, or permitted to be recorded in the clerk's office, he may not accept it for filing(4) .

In *City of Abilene v. Fryar*, 143 S.W.2d 654 (Tex. Civ. App.--Eastland 1940, no writ), the court addressed the county clerk's refusal to file trust deeds securing city bonds unless stamps demonstrating payment of a tax were affixed to them, as required by statute.(5) The city provided the clerk with warrants covering the cost of stamps claimed to be necessary and then sued to enjoin the clerk from cashing the warrants. The court, explaining why the city had no right to litigate the question of its tax liability in an injunction suit, described the clerk's duty as follows:

> [I]f the law imposed the tax in question it vested no authority in the Clerk to file or record the deeds of trust without being stamped; but to the contrary, expressly prohibited the Clerk from doing so. If the law did not impose said tax, under the circumstances, it was the ministerial duty of the Clerk to file and record the instruments without being stamped. The Clerk's duty was not affected by any mistaken understanding or construction of the law. The Clerk charged with a ministerial duty is presumed to know the law, and if she makes a mistake as to such question there is a plain and adequate legal remedy for requiring performance of the duty. . . . Such remedy is an action of mandamus.(6)

The court further stated that the clerk's "sole duty, other than to supply the stamps if requested, was

> to obey the statutory prohibition not to file or record the instruments unless they were stamped."(7)

The *Fryar* case makes it clear that the clerk may file and record a document only if authorized, required, or permitted to do so by a statute. In addition, numerous attorney general opinions on the county clerk's authority to file particular documents address this issue by construing the relevant statutes.(8) If a document covered by a filing statute is regular on its face, the clerk may not refuse to file it based on extraneous facts.(9) However, the clerk must be able to determine from the face of the document that it complies with the applicable statute. For example, this office held that the county clerk may not file an assumed business name certificate if the acknowledgment is written in a language other than English, because the clerk would then be unable to determine whether or not the instrument was regular on its face.(10) If the clerk, through a mistaken understanding of the statute, refuses to file a document that is statutorily required to be filed, the remedy is an action of mandamus, which enables the court to construe the recording statute and determine as a matter of law whether it applies to the document in question.

There are numerous provisions scattered throughout the Texas statutes and codes that authorize, require, or permit the county clerk to record documents.(11) We cannot discuss or even enumerate all such provisions, but we will mention some of the more important.(12) As already pointed out, section 192.001 of the Local Government Code provides that the county clerk "shall record each deed, mortgage, or other instrument that is required or permitted by law to be recorded," and other sections of chapter 192 refer to other kinds of documents that may be filed and recorded.(13) The Property Code includes provisions on filing liens and other instruments relating to real property.(14) Many provisions on the filing of litigation-related documents with the office of the clerk are found in the Texas Rules of Civil Procedure.(15)

Newly enacted legislation may assist the clerk in dealing with some of the unusual documents you inquire about House Bill No. 1185,(16) adopted by the 75th Legislature, addresses fraudulent judgment liens issued by so-called "common law courts" and fraudulent documents purporting to create liens or claims on personal and real property that have been filed with court clerks and the secretary of state.(17) Among other provisions, it establishes criminal offenses for filing a fraudulent court document or a fraudulent financing statement and provides a means of clearing public records of such documents.(18) We will focus on the provisions relating to the county clerk's duties.

House Bill No. 1185 amended the continuing education requirement applicable to county clerks, district clerks, and county and district clerks to require at least one hour regarding fraudulent court documents and fraudulent document filings.(19) It also added subchapter J to Government Code chapter 51,(20) which permits a person against whom a fraudulent judgment or lien against real or personal property has been filed to have it removed. A document is presumed to be fraudulent if it is "a purported judgment or other document purporting to memorialize an act, an order, a directive, or process of . . . a purported court or a purported judicial entity not expressly created or established under the constitution or the laws of this state or of the United States."(21) A document is also presumed to be fraudulent if it "purports to create a lien or assert a claim against real or

personal property or an interest in real or personal property" and the lien is not provided for by law, created by consent of the obligor, debtor, or owner of the property or a representative of that person, or an equitable, constructive, or other lien imposed by a court.(22)

When the clerk of a court reasonably believes that a previously filed judgment, court order, or lien is fraudulent, he or she shall notify the person against whom the purported judgment or order is rendered, or who is affected by the purported lien.(23) The written notice is to be provided not later than the second business day after the date that the document or instrument is offered or submitted for filing, or, if it has already been filed or recorded, not later than the second business day after the date that the clerk becomes aware that the document or instrument may be fraudulent.(24) Persons who have reason to believe that their interests are affected by a fraudulent document may file a motion with the district clerk requesting the court to determine the status of the document.(25) Subchapter J describes in detail the kind of fraudulent documents it applies to and sets out the text of a suggested motion for judicial review of a document. It also provides that a clerk of a court, including a county court, "shall post a sign in letters at least one inch in height, that is clearly visible to the general public in or near the clerk's office stating that it is a crime to intentionally or knowingly file a fraudulent court record or a fraudulent instrument with the clerk."(26)

Some of the unusual documents you describe may be subject to the procedures set out in subchapter J. In particular, the documents described as "common law liens" should be examined to determine if they are fraudulent documents within the legislation.

If the county clerk is presented with fraudulent documents for filing, despite the criminal penalties for filing such documents and the sign in the clerk's office stating that it is a crime to intentionally or knowingly file a fraudulent court record or a fraudulent instrument with the clerk, he should give the written notice required by House Bill 1185.(27) When the clerk is presented with any other document, he has a ministerial duty to accept it for filing if a statute authorizes, requires or permits it to be recorded in the clerk's office, and if it is regular on its face. If no statute authorizes, requires, or permits a document to be recorded in the clerk's office, he may not accept it for filing. If the Dallas County Clerk is unable to determine whether a particular document or type of document is within a filing statute, he may seek advice from the criminal district attorney pursuant to section 41.007 of the Government Code.(28)

SUMMARY

The county clerk has a ministerial duty to accept a document for filing and recording if a statute authorizes, requires or permits it to be filed in the clerk's office, and if it is regular on its face. If no statute authorizes, requires, or permits a document to be filed in the clerk's office, he may not accept it for filing. When the county clerk believes that a previously filed document or a document presented for filing is fraudulent within Government Code chapter 51, subchapter J, he is to provide the notice required by that provision.

Yours very truly,

Susan Garrison
Assistant Attorney General
Opinion Committee

Footnotes

1. "Asseveration" refers to an affirmation of fact, usually with no implication that an oath has been taken. Bryan. A. Garner, A Dictionary of Modern Legal Usage 77 (1987); see Black's Law Dictionary 152 (4th ed. 1968).

2. See Comm'rs Court of Titus County v. Agan, 940 S.W.2d 77 (Tex. 1997) (construing similar language in Tex. Const. art. XVI, section 44(a), pertaining to county treasurer).

3. See also Local Gov't Code § 191.001 (duty of clerk to record contents of each instrument filed for recording that clerk is authorized to record).

4. Turrentine v. Lasane, 389 S.W.2d 336, 337 (Tex. Civ. App.--Waco 1965, no writ) (citing statutes that establish duty of county clerk to record all deposited written instruments authorized, required or permitted to be recorded in his office).

5. Former article 7047e, V.T.C.S. (1925), imposed a stamp tax on certain promissory notes. See ..Act of Oct. 26, 1936, 44th Leg., 3d C.S., ch. 495, art. IV, § 9, 1936 Tex. Gen. Laws.. 2040, 2080, repealed by ..Act of May 21, 1941, 47th Leg., R.S., ch. 449, § 1, 1941 Tex. Gen. Laws.. 723, 723.

6. City of Abilene v. Fryar, 143 S.W.2d 654, 657 (Tex. Civ. App.--Eastland 1940, no writ) (citation omitted).

7. *Id.* at 659.

8. Attorney General Opinions JM-1277 (1990) (county clerk may not accept cash bond in satisfaction of bond requirement in statute regulating charitable raffles); JM-825 (1987) (county clerk may not file assumed business name certificate if acknowledgment is written in a foreign language); H-1155 (1978) (county clerk may not refuse to file pleadings that appear inadequately certified but may flag them or otherwise bring them to

the attention of the court); M-511 (1969) at 4 (unprobated will may not be recorded by county clerk except when attached as an exhibit to an otherwise recordable affidavit of heirship); C-695 (1966) at 3 (field notes of a subdivision cannot be recorded in plat records unless accompanied by map or plat of subdivision); V-1529 (1952) at 13 (county clerk must accept a certificate of nomination that is regular on its face, and may not determine questions of illegality in the nomination that depend upon an investigation of extraneous facts); V-1450 (1952) at 3-4 (clerk has authority and duty to file birth and death certificates only as provided by statute).

9. Attorney General Opinions WW-908 (1960) at 9; V-1529 (1952) at 13 (county clerk must accept certificate of nomination that is regular on its face, and may not determine questions of illegality in nomination that depend upon an investigation of extraneous facts).

10. Attorney General Opinion JM-825 (1987) at 2; see also Attorney General Opinion H-1155 (1978) at 2 (clerk may exercise discretion with respect to documents offered for filing only when expressly authorized by applicable statute).

11. See, e.g., V.T.C.S. art. 5192 (stevedore's bond); Agric. Code § 144.041 (livestock brands); Bus. &. Com. Code §§ 9.401 (certain security interests), 35.07 (utility security interests), 36.10 (certificate assumed name under which business is conducted or professional services rendered).

12. The statutes and rules of procedure that authorize, permit, or require the county clerk to accept documents for filing are included in the General Index to Vernon's Texas Statutes and Codes, Annotated, if the district attorney's office or the county clerk wishes to compile a list of them. See also Texas Dep't of Housing and Community Affairs, Guide to Texas Laws for County Officials 82-94 (1995-96 ed.) (list of statutes stating duties and authority of county clerk).

13. See Local Gov't Code §§ 192.002 (military discharge records), .004 (judgment lien and "every other instrument that is intended to create a lien"), .005 (certain probate records).

14. Prop. Code §§ 11.001(a) (instruments relating to real property), 12.013 (judgment or abstract of judgment); chs. 14 (federal tax liens and other liens), 52 (judgment liens), 53 (mechanic's, contractor's, or materialman's lien).

15. See Tex. R. Civ. P. 21 (filing of pleadings, pleas, and motions).

16. ..Act of May 10, 1997, 75th Leg., R.S., ch. 189, 1997 Tex. Sess. Law Serv... 1045, 1045 (adopting and amending provisions to be codified in Penal Code, Government Code, and other codes).

17. ..Senate Research Center, Bill Analysis, H.B. 1185, 75th Leg., R.S. (1997),.. see Attorney General Opinion DM-389 (1996) (background on fraudulent judgment liens).

18. ..Act of May 10, 1997, supra, §§ 8, 10, 14, 1997 Tex. Sess. Law Serv... 1045, 1048-50 (to be codified at Penal Code §§ 37.13, .101; Gov't Code § 51.901).

19. *Id.* § 13, 1997 Tex. Sess. Law Serv. 1045, 1050 (to be codified at Gov't Code § 51.605(c)).

20. *Id.* § 14, at 1045, 1050-56 (to be codified at Gov't Code §§ 51.901 - .905).

21. *Id.* § 14, at 1045, 1050 (to be codified at Gov't Code §§ 51.901(c)(1)).

22. *Id.* (to be codified at Gov't Code §§ 51.901(c)(2)).

23. *Id.* (to be codified at Gov't Code § 51.901(a)).

24. *Id.* (to be codified at Gov't Code § 51.901(b)).

25. *Id.* § 14, at 1045, 1051-56 (to be codified at Gov't Code § 51.902 - .903).

26. *Id.* § 14, at 1045, 1056 (to be codified at Gov't Code § 51.904).

27. House Bill 1185 amended Property Code section 12.013 to provide that a judgment or an abstract of a judgment of a court may be recorded if the judgment is of a court "expressly created or established under the constitution or laws of this state or of the United States; . . . that is a court of a foreign country and that is recognized by an Act of congress or a treaty or other international convention to which the United States is a party; or . . . of any other jurisdiction, territory, or protectorate entitled to full faith and credit in this state under the Constitution of the United States," and the judgment is attested under the signature and seal of the clerk of the court that rendered it. *See* Attorney General Opinion DM-389 (1996) (district or county clerk need not accept for filing document indicating on its face that it proceeds from a purported state or local court not named in the constitution or statutes of the state of Texas). Even though a fraudulent judgment is not authorized to be recorded, House Bill 1185 contemplates that the clerk will as a practical matter accept such documents on occasion and then implement the notice provisions.

28. A "criminal district attorney" within the Texas Constitution is a class or kind of district attorney. *Hill County v. Sheppard*, 178 S.W.2d 261 (Tex. 1944); see also Attorney General Opinion JM-727 (1987).

H.B. No. 1185

December 15, 2000

The Honorable Senfronia Thompson
Chair, Committee on Judicial Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910 Opinion No. JC-0317

Re: Whether the addition of certain protest words to a traffic citation constitutes a valid promise to appear in court (RQ-0270-JC)

Dear Representative Thompson:

In 1999, this office opined on certain general principles of contract law with respect to the potential effect of certain protest words written under a signature on an Internal Revenue Service form. *See* Tex. Att'y Gen. Op. No. JC-0153 (1999). The constituent for whom you inquired on that occasion now wishes to know the effect of the same or similar formulae of protest on a traffic ticket.(1) Your constituent has, in our view, misunderstood the distinction between contract law, which governs the relations of particular parties who have come to an agreement, and public law, which governs all persons within that law's jurisdiction.

While it matters for the purpose of contract law whether or not two parties have agreed to be bound to certain conditions in a bargain, it is of no consequence whether any individual agrees to be bound by the traffic regulations or penal laws of the State of Texas. So long as such a person is in Texas, he or she is bound by those laws. *See United States v. Masat*, 948 F.2d 923, 934 (5th Cir. 1991) (rejecting argument that court lacks jurisdiction over one who declares himself "non-citizen," "non-resident" and "freeman"). Your constituent's legal obligation to appear in court does not require his agreement. His choices in the matter are simple. When he is stopped, the police officer has the discretion to issue him a ticket or take him into custody. If the police officer issues the ticket, your constituent can sign it or be arrested. On the indicated court date he can appear in court, or he can subject himself to arrest. He cannot, merely by writing "forced to sign under threat, duress and coercion"(2) on his traffic ticket, avoid the consequences of the traffic laws.

The statutes in question here are to be found in subchapter A, chapter 543 of the Transportation Code. Pursuant to section 543.001, a peace officer may arrest without warrant a person found committing any of a variety of traffic violations.(3) *See* Tex. Transp. Code Ann. § 543.001 (Vernon 1999). The police officer then either takes the arrestee "immediately . . . before a magistrate," *id.* § 543.002, or issues "a written notice to appear in court," *id.* § 543.003 (Vernon Supp. 2000). Such a notice is to be issued if "the offense charged is speeding or a violation of the open container law; . . . and the person makes a written promise to appear in court as provided by Section 543.005." *Id.* § 543.004. "To secure release, the person arrested must make a written promise to appear in court by signing the written notice prepared by the arresting officer. . . . The arresting

officer shall retain the paper or electronic original of the notice and deliver the copy of the notice to the person arrested. The officer shall then promptly release the person from custody." *Id.* § 543.005. The appearance date on the notice must be at least ten days later "unless the person arrested demands an earlier hearing." *Id.* § 543.006 (Vernon 1999). A wilful violation of the written promise to appear is a misdemeanor. *See id.* § 543.009.

The import of this statutory scheme is clear. When a policeman stops a driver for a moving violation, he writes a ticket. The driver signs the ticket, thereby promising to appear in court. If the driver does not sign the ticket, he is not released. If the driver signs the ticket and does not appear in court, he is subject to arrest.

Your constituent, however, appears to believe that he may escape the consequences of chapter 543 of the Transportation Code. He has asked you:

By placing these words after one's signature, "forced to sign under threat, duress and coercion," when no "meeting of the minds has occurred," and the ticketed party . . . has no intentions of making a court appearance, is the signatory relieved of his promise to appear in court if no adhesion contract exists?(4).

Your constituent has noted the conclusion of Attorney General Opinion JC-0153 that such a form of words, when appended to a contract, "may indicate that the person signing has not agreed to the terms of the document, and consequently that there has been no 'meeting of the minds' that is necessary to form a binding agreement." Tex. Att'y Gen. Op. No. JC-0153 (1999) at 4. He then makes the assumption that a traffic ticket is a contract. His implicit argument is that the contract is void, because it is adhesive and he has not truly agreed to it.

We note, as a preliminary matter, that even were we to accept the notion that a traffic stop is a bargaining session in which the writing of a ticket is an offer and the signing of the ticket an acceptance, the principles of contract law would not provide your constituent with the relief he seeks. It is hornbook law that "[a] person will not be permitted to accept the beneficial part of a transaction and repudiate the disadvantageous part. In other words, one who retains benefits under a transaction cannot avoid its obligations, and is estopped to take a position inconsistent therewith. Similarly, one cannot accept and reject the same instrument, or, having availed himself of the benefits conveyed by a part of an instrument, reject its other provisions." 34 Tex. Jur. 3d *Estoppel* § 13 (1984). Transparently, a motorist who signs a ticket and drives away rather than spending the night in police custody has availed himself of what a reasonable person would regard as a very substantial benefit. He cannot then be heard to say that he has no intention to appear in court.

The traffic laws of this state are, however, no more a matter of contract than are its penal laws. They govern all those within the jurisdiction of Texas; they cannot be evaded at whim by a verbal formula. Your correspondent's apparent notion that his relation to our laws is purely contractual, and as such may be unilaterally abrogated by him, has no basis in law. *See Coyle v. State*, 775 S.W.2d 843, 847 (Tex. App.-Dallas 1989, no writ)

(rejecting argument that defendant "has cancelled all contracts that would require her, in her view, to recognize any authority other than God."); *cf. Barcroft v. State*, 881 S.W.2d 838, 840 (Tex. App.-Tyler 1994, no pet.) (Uniform Commercial Code inapplicable in criminal trial for exceeding speed limit).

Having signed a traffic ticket, one is obliged to appear in court. Wilful failure to so appear is a misdemeanor. *See* Tex. Transp. Code Ann. ß 543.009 (Vernon 1999). The law does not contemplate that any mental reservations with which one signs, or any form of words one appends to that signature, will have the remotest effect on one's obligation to appear.

SUMMARY

The addition of protest words to a signature on a traffic ticket has no effect whatsoever on the obligation of the ticketed party to appear in court.

Yours very truly,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

CLARK KENT ERVIN
Deputy Attorney General - General Counsel

SUSAN D. GUSKY
Chair, Opinion Committee

James E. Tourtelott
Assistant Attorney General - Opinion Committee

Footnotes

1. See Letter from Honorable Senfronia Thompson, Chair, Committee on Judicial Affairs, Texas House of Representatives, to Honorable John Cornyn, Texas Attorney General (Aug. 17, 2000) (on file with Opinion Committee).

2. Letter from Charles Louis Bailey III, to Honorable Senfronia Thompson, Chair, Committee on Judicial Affairs, Texas House of Representatives (June 6, 2000) (on file with Opinion Committee) [hereinafter Charles Louis Bailey III Letter].

3. The question of whether an arrest for a misdemeanor punishable only by a fine violates the Fourth Amendment of the Constitution is at present before the United States Supreme Court in *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999), cert. granted, 120 S.Ct. 2715 (2000) (No. 99-1408).[1]

4. Charles Louis Bailey III Letter, supra note 2, at 1.

[1] The Supreme Court held that there was no Fourth Amendment violation. *See Atwater v. City of Lago Vist***a,** 532 U.S. 318, 121 S. Ct. 1536, 149 L.Ed.2d 549 (2001). Pete Haskel.

WORKING DRAFT FOR STANDING ORDER/LOCAL RULES/ CASE-SPECIFIC ORDER RE COMMON LAW TACTICS

Pete Haskel, as of October 4, 2004

The formulations below can be adopted as local rules, as standing orders, or as orders to be issued to parties in particular cases. They are drafted to apply equally to all parties, so as to avoid even the appearance of partiality. They are very much in the draft stage, and I would appreciate any suggestions. All suggestions are those of Pete Haskel only. Nothing herein represents the official position or opinion of any office or agency. Any one of these provisions may be more appropriate for civil or for criminal cases.

1. **Individual parties may appear without counsel but must adhere to applicable rules and orders.**[1] In connection with [this cause/any cause before this Court], all individuals have the absolute right to appear and represent themselves, without attorneys. No entity has that right. Any individual party not represented by counsel shall comply with the Texas Rules of Civil/Criminal Procedure [and local rules and standing orders of this Court]. The Texas Rules of Civil/Criminal Procedure are published in the Texas Government Code as part of Vernon's Annotated Texas Statutes, and also are available from other publishers. Copies of local rules/standing orders are available from the clerk of the court [upon payment of the standard fee] [or may be consulted in the County Law Library].

2. **No reliance on spurious legal process.** In connection with [this cause/any cause before this Court], no party shall without prior express leave of the Court upon written application filed at least ten days in advance with copies of such application served upon all other parties upon the filing thereof, file with the Court or rely in any respect on any purported order, judgment, decree, writ, or other purported judicial process of any court that purportedly sits in or exercises jurisdiction within the territory of the State of Texas that is not a court created or authorized by the constitutions or laws of the State of Texas or of the United States.

3. **No resort to fictitious governmental process.** In connection with [this cause/any cause before this Court], no party shall without prior express leave of the Court upon written application filed at least ten days in advance with copies of such application served upon all other parties upon the filing thereof, directly or indirectly take or threaten any other party, any attorney for any party, any witness, any deponent, any person designated as a witness or deponent, any employee of this Court, any officer or employee of any branch of government or any family member of any of the foregoing, with any action by or under the purported authority of any purported government or branch or agency thereof, other than the government of the United States, of the State of Texas, or of a political subdivision of either such government.

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[1] Intended for civil case. In order to modify for criminal case or contempt case, one must take into account Code Crim. P. Art. 1.051. *See In re Alloju,* 907 S.W.2d 486 (Tex. 1995) (forbidding *in absentia* contempt trials absent knowing waiver by accused, and suggesting that criminal procedures regarding waiver of counsel might also apply in all contempt proceedings, even in civil cases). In criminal cases, there are well-established procedures for waiver of counsel and progressive sanctions for deterring contumacious pro se defendants' antics.

4. **No unauthorized liens or properly transfers.** In connection with [this cause/any cause before this Court], no party shall without prior express leave of the Court upon written application filed at least ten days in advance with copies of such application served upon all other parties upon the filing thereof, or otherwise as may expressly be permitted by the statutes of the State of Texas, directly or indirectly threaten to or purport to transfer any interest in property of any other party, any attorney for any party, any witness, any deponent, any person designated as a witness or deponent, any employee of this Court, any officer or employee of any branch of government, or any family member of any of the foregoing, or of any governmental entity. This prohibition includes, but is not limited to, threatening to file, causing to be filed, offering for filing, filing, or assigning or otherwise transferring any purported lien, financing statement, or other cloud upon title against or upon, any interest in any property of such persons or governments.

5. **No threat or use of force.** In connection with [this cause/any cause before this Court], no party shall directly or indirectly threaten, counsel, importune the use of, aid or abet the use of, or use physical force against, or directly or indirectly threaten to cause, counsel, importune, aid or abet in the causing, or cause physical injury to, any other party, any attorney for any party, any witness, any deponent, any person designated as a witness or deponent, any employee of this Court, any juror or prospective juror, any officer or employee of any branch of government, or any family member of any of the foregoing, or directly or indirectly threaten, cause, or engage in damage to or trespass upon property of such persons. This prohibition does not include any use of force justified under the provisions of the Texas Penal Code.

6. **No reliance on so-called "sovereign citizenship" or "strawman".** In connection with any cause before this Court, no party shall without prior express leave of the Court upon written application filed at least ten days in advance with copies of such application served upon all other parties upon the filing thereof, assert as the basis for any defense, objection, claim, motion or other relief, or as the basis for refusing to comply with any discovery request, subpoena, or order or process of the Court, any argument grounded on the propositions that the proponent of such argument is a so-called "sovereign citizen" or term of like import not based on the laws of the State of Texas or of the United States, or that any constitutional provision, statute or rule of the State of Texas or any rule, order, or process of this Court is addressed to or binds only such party's so-called "strawman," and therefore upon either ground ("sovereign citizen" or "strawman"), that such party is purportedly excused from compliance with any constitutional provision, statute or rule of the State of Texas or any rule, order, or process of this Court, is not amendable or subject to the jurisdiction of this Court, or is entitled to any right, remedy, or other relief.

7. **No subpoena without prior written permission of court.**[2] In connection with [this cause/ any cause before this court], no party shall request, cause to be issued, issue or serve any subpoena for witnesses, documents, or things, for trial or otherwise, without prior permission of this court upon

[2] Intended primarily for criminal cases. In a civil case, the defense could argue that the proposed provision is contrary to Tex. R. Civ. P. 176.4, making subpoenas available from the clerk on "request" of any party or upon filing of a notice of deposition (and *see* TEX. R. CIV. P. 201(l) as to foreign depositions). However, the Rules expressly authorize a court to issue orders governing the scope of discovery. Tex. R. Civ. P. 190.4 (level 3 discovery control plan – by order). I would assert that courts also have inherent authority to prevent abuse of their process respecting trial subpoenas in civil cases.

written sworn application to the Clerk of the Court pursuant to Texas Code of Criminal Procedure Articles 24.03 and 24.16]. The Clerk of the Court will forward all such applications to the Court for review.

8. **No Use of Discovery Devices Except As Permitted By Law or Rules.** Except as expressly permitted by laws and rules of the State of Texas or by order of this court sought upon written application filed at least ten days in advance of issuing any request for discovery, with copies of such application served upon all other parties upon the filing thereof, no party in [this cause/ any cause before this court], shall use or attempt to use any means of discovery in litigation. In particular, without limitation, no party shall use or attempt to use any demand or request, or otherwise attempt to obtain documents, things, or information, relying or purporting to rely upon any request, demand, bill, or interrogatory not authorized by laws and rules of this state or order of this court, or that relies for authority under the Texas Public Information Act (formerly the Texas Public Records Act), the Federal Freedom of Information Act, or the Federal Privacy Act in or in respect of such litigation except when such request is directed at a governmental entity that is not this Court and that is not a party to such litigation.

9. **No Attempt to Coerce, Intimidate, or Influence Hearing or Trial Participants.** Except as expressly permitted by laws and rules of the State of Texas or by order of this court sought upon written application filed, and served upon all parties to be received, at least ten days in advance of any such proposed conduct, no person shall attempt to, and no person shall, coerce, intimidate, or influence any participant in any hearing or trial [in any cause before this court/in this cause], including any judge, court personnel, clerk's office personnel, attorneys, parties, witnesses, prospective witnesses, jurors, and prospective jurors, by violent or tumultuous behavior, interfering with the execution of any process or orders issued by this court or by the clerk thereof, impersonating a public servant, simulating legal process, offering or promising anything of value, or addressing to any such person any communication with intent to influence the outcome of such proceeding on the basis of considerations other than those authorized by law.

10. **No altered quotations.** In connection with [this cause/ any cause before this court], no party shall offer for filing or file any written document that purports to quote the exact words from any other source but that has altered the words by adding to or subtracting from the content thereof unless such additions or subtractions are clearly indicated within the quoted material by clearly delineating the added material by underlining all such additions and by clearly delineating the omitted material by inserting empty brackets "[ ]", three asterisks ("***") or an ellipsis. (three periods) ("...") at each place in the purported quotation where material is omitted; and by stating immediately before or after the purported quotation, preferably immediately after the citation associated with such citation, that material was added or omitted from within the quoted material as indicated.

2001 U.S. Dist. LEXIS 9577,

UNITED STATES OF AMERICA v. **RICHARD** LANCE **MCLAREN** ET AL.

P-00-CR-400

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, PECOS DIVISION

2001 U.S. Dist. LEXIS 9577

June 19, 2001, Decided

DISPOSITION: Defendants' Motion to Dismiss DENIED.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants moved to dismiss an indictment for want of jurisdiction. Defendants' grounds for dismissal were predicated on their contention that the Republic of Texas was a legitimate, sovereign, and separate nation.

OVERVIEW: The court found defendants' argument unpersuasive. Despite defendants' arguments to the contrary, in 1845, Texas became the 28th state of the United States of America. A consequence of attaining statehood and admission in to the Union was that the Republic of Texas ceased being. The legitimacy of Texas's statehood and the enduring power of its admission into the Union was confirmed by the United States Supreme Court. Defendants' argument that the Republic of Texas remained an independent, sovereign nation was also entirely unsupported within the international community. The Republic of Texas failed to receive any diplomatic recognition or recognition as a sovereign nation.

OUTCOME: Defendants' motion to dismiss was denied.

COUNSEL: For **RICHARD** LANCE **MCLAREN,** defendant: Robert A. Leahey, Leahey Law Offices, Odessa, TX.

U. S. Attorneys: Gerald Conley Carruth, Assistant United States Attorney, Austin, TX.

JUDGES: ROYAL FURGESON, UNITED STATES DISTRICT JUDGE.

OPINIONBY: ROYAL FURGESON

OPINION: ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Before the Court is Defendants' Verified Motion in Abatement for Demand to Dismiss Action for Want of Jurisdiction ("Motion to Dismiss"), filed May 18, 2001, in the above-styled case. After careful consideration of the law and facts, the Court is of the opinion that Defendants' Motion to Dismiss should be DENIED.

In this Motion, Defendants assert the following grounds for dismissal: (1) that Defendants enjoy diplomatic immunity from prosecution under 28 U.S.C. §254(d); (2) that 28 U.S.C. §1251 reserves original jurisdiction of this case to the U.S. Supreme Court; and (3) that the United States may not prosecute Defendants except under international law or the laws and customs of war. These grounds for dismissal are predicated on Defendants' contention that the Republic of Texas is a legitimate, sovereign, and separate nation. The Court finds this argument unpersuasive.

On December 29, 1845, President James K. Polk signed the joint resolution that "'admitted [the State of Texas] into the Union on an equal footing with the original States in all respects whatever.'" Ralph H. Brock, *"The Republic of Texas is No More": An Answer to the Claim that Texas was Unconstitutionally Annexed to the United States*, 28 Tex. Tech L. Rev. 679, 692 (1997) (quoting Joint Resolution for the Admission of the States of Texas into the Union, H.R.J. Res. 1, 29th Cong., 9 Stat. 108, 108 (1845)). On February 19, 1846, the end of independence and the beginning of statehood for Texas was proclaimed by Dr. Anson Jones, the last president of the Republic of Texas: "The final act in this great drama is now performed. . . . The republic of Texas is no more." *Id.*, at 681 (citation omitted). The legitimacy of Texas's statehood and the enduring power of its admission into the Union was confirmed by the Supreme Court in Texas v. White, 74 U.S. 700, 726, 19 L. Ed. 227(1868), *overruled on other grounds by Morgan v. United States,* 113 U.S. 476, 496, 28 L. Ed. 1044, 5 S.Ct. 558 (1885):

> When, therefore, Texas became one of the United States, she entered into a indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was complete, as perpetual, and as indissoluble as the union between the original States.

Defendants' argument that the Republic of Texas remains an independent, sovereign nation is also entirely unsupported within the international community. Despite their many letters to the United Nations and to other countries, the Republic of Texas has failed to receive any diplomatic recognition or recognition as a sovereign nation. Brock, 28 Tex. Tech L. Rev. at 709-10. Despite Defendants' arguments to the contrary, in 1845, Texas became the 28th states of the United States of America. A consequence of attaining statehood and admission in to the Union is that the Republic of Texas ceased being. Accordingly, Defendants' grounds for dismissal of the Indictment based on the existence and recognition of the Republic of Texas as a sovereign nation are without merit. *See McLaren v. United States, Inc. 2 F.Supp. 2d 48,51 (D.C.D.C. 1998)* (performing similar analysis to determine that the Republic of Texas no longer exists).

It is therefore ORDERED that Defendants' Motion to Dismiss be DENIED.

Signed this 19 day of June, 2001.

ROYAL FURGESON

UNITED STATES DISTRICT JUDGE

TOP 15 WAYS TO IDENTIFY "COMMON LAW" LITIGANTS AND FILERS

As of October 4, 2004

Peter B. Haskel

This list is derived from a "Top 10 Ways" list by former Texas Assistant Attorney General Ilse D. Bailey (now Assistant Kerr County Attorney).

1. Signature accompanied by one or more of the following:
   a. "Without Prejudice, UCC 1-201"
   b. Comma, Colon, or Semi-Colon after middle name (e.g., John D., Smith)
   c. Thumb print (often in red ink, simulating blood) instead of or beside signature
   d. "TDC" (meaning "Threat, Duress, & Coercion") written beside signature, often hidden in fancy loops under signed name

2. Style of case names court/and or governmental unit using inappropriate capitalization, or the terms "de facto" or "inc." (*e.g.*, "uNITED sTATES DISTRICT COURT" or "DISTRICT COURT OF THE UNITED STATES, INC." or "PANOLA COUNTY CLERK," de facto)

3. First page of document (usually toward the top) includes so-called "flag of peace" (U.S. Flag without gold fringe around border) either printed on document or affixed as a sticker (similar to U.S. postage stamp)

4. Litigant/filer declares self to be "sovereign," "freeman," "natural freeman," "common law citizen," "Citizen of the Republic of Texas," or similar term

5. Inappropriate or odd use of archaic legal terms, or of terms that sound legalistic but have no meaning, such as "in propria persona," "pro per," "plea of non-assumpsit," or "Claim: Writ of Error"

6. Out of context citation of short passages from old court cases (often from low level courts or fictitious courts) or superceded statutes, often from other states, from Great Britain, from Medieval Europe, or from imagination. Lately, using "Redemption" scam, most popular citation is to House Joint Resolution ["HJR"] 192 (June 5, 1933), later codifed by former 31 U.S.C. sec. 463. However, Section 463 was repealed by Act of October 28, 1977, P.L. 95-147, sec. 4(c), 91 Stat. 1229 [now codified as 31 U.S.C. § 5118(d)(2)].

7. Urging the nullification of constitutional, treaty, or statutory law on the basis that such provision contravenes religious or natural law

8. Pleadings purport to be filed in or to remove case to a "common law" court (removal often accomplished by use of inappropriate capitalization, for example, notice of "removal" to "uNITED sTATES DISTRICT COURT" may later be asserted to have removed case to a U.S. District Court created not by federal statute, but by "common law" as somehow embodied in the U.S. Constitution

9. Defendant demands proof of court's or prosecutor's jurisdiction or authority

10. Defendant moves to remove judge, prosecutor, or attorney for "treason against oath" or failure to file oaths required by constitution or statute

11. Defendant rejects authority of the state to regulate his "rights", such as claimed rights to travel, to operate motor vehicle, or to possess weapon, without defendant's express prior consent to such regulation.

12. Objection to court's jurisdiction if U.S. Flag in courtroom has gold fringe around border

13. Defendant/filer uses spurious social security number (including number not appearing to be a social security number where SSN called for)

14. Defendant/filer's address given as "TPZ" (Texas Postal Zone) or variant thereof, before zip code in address

15. Defendant has no driver's license, liability insurance or financial responsibility card, or vehicle plates, or one or more of them are home made or issued by non-governmental or fictional governmental entity (*e.g.*, Embassy of Heaven, Republic of Texas, Wachita Nation)

CIVIL PRACTICE & REMEDIES CODE
VEXATIOUS LITIGANTS

SUBCHAPTER A. GENERAL PROVISIONS

§ 11.001. DEFINITIONS. In this chapter:

(1) 'Defendant' means a person or governmental entity against whom a plaintiff commences or maintains or seeks to commence or maintain a litigation.

(2) 'Litigation' means a civil action commenced, maintained, or pending in any state or federal court.

(3) 'Local administrative judge' means a local administrative district judge or a local administrative statutory county court judge.

(4) 'Moving defendant' means a defendant who moves for an order under Section 11.051 determining that a plaintiff is a vexatious litigant and requesting security.

(5) 'Plaintiff' means an individual who commences or maintains a litigation.

Added by Acts 1997, 75th Leg., ch. 806, § 1, eff. Sept. 1, 1997.

SUBCHAPTER B. VEXATIOUS LITIGANTS

§ 11.051. MOTION FOR ORDER DETERMINING PLAINTIFF A VEXATIOUS LITIGANT AND REQUESTING SECURITY.

In a litigation in this state, the defendant may, on or before the 90th day after the date the defendant files the original answer or makes a special appearance, move the court for an order:

(1) determining that the plaintiff is a vexatious litigant; and

(2) requiring the plaintiff to furnish security.

Added by Acts 1997, 75th Leg., ch. 806, § 1, eff. Sept. 1, 1997.

§ 11.052. STAY OF PROCEEDINGS ON FILING OF MOTION.

(a) On the filing of a motion under Section 11.051, the litigation is stayed and the moving defendant is not required to plead:

(1) if the motion is denied, before the 10th day after the date it is denied; or

(2) if the motion is granted, before the 10th day after the date the moving defendant receives written notice that the plaintiff has furnished the required security.

(b) On the filing of a motion under Section 11.051 on or after the date the trial starts, the litigation is stayed for a period the court determines.

Added by Acts 1997, 75th Leg., ch. 806, § 1, eff. Sept. 1, 1997.

§ 11.053. HEARING.

(a) On receipt of a motion under Section 11.051, the court shall, after notice to all parties, conduct a hearing to determine whether to grant the motion.

(b) The court may consider any evidence material to the ground of the motion, including:

(1) written or oral evidence; and

(2) evidence presented by witnesses or by affidavit.

Added by Acts 1997, 75th Leg., ch. 806, § 1, eff. Sept. 1, 1997.

§ 11.054. CRITERIA FOR FINDING PLAINTIFF A VEXATIOUS LITIGANT.

A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that:

(1) the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been:

(A) finally determined adversely to the plaintiff;

(B) permitted to remain pending at least two years without having been brought to trial or hearing; or

(C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure;

(2) after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, in propria persona, either:

(A) the validity of the determination against the same defendant as to whom the litigation was finally determined; or

(B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant as to whom the litigation was finally determined; or

(3) the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence.

Added by Acts 1997, 75th Leg., ch. 806, § 1, eff. Sept. 1, 1997.

§ 11.055. SECURITY.

(a) A court shall order the plaintiff to furnish security for the benefit of the moving defendant if the court, after hearing the evidence on the motion, determines that the plaintiff is a vexatious litigant.

(b) The court in its discretion shall determine the date by which the security must be furnished.

(c) The court shall provide that the security is an undertaking by the plaintiff to assure payment to the moving defendant of the moving defendant's reasonable expenses incurred in or in connection with a litigation commenced, caused to be commenced, maintained, or caused to be maintained by the plaintiff, including costs and attorney's fees.

Added by Acts 1997, 75th Leg., ch. 806, § 1, eff. Sept. 1, 1997.

§ 11.056. DISMISSAL FOR FAILURE TO FURNISH SECURITY.

The court shall dismiss a litigation as to a moving defendant if a plaintiff ordered to furnish security does not furnish the security within the time set by the order.

Added by Acts 1997, 75th Leg., ch. 806, § 1, eff. Sept. 1, 1997.

§ 11.057. DISMISSAL ON THE MERITS.

If the litigation is dismissed on its merits, the moving defendant has recourse to the security furnished by the plaintiff in an amount determined by the court.

Added by Acts 1997, 75th Leg., ch. 806, § 1, eff. Sept. 1, 1997.

SUBCHAPTER C. PROHIBITING FILING OF NEW LITIGATION

§ 11.101. PREFILING ORDER; CONTEMPT.

(a) A court may, on its own motion or the motion of any party, enter an order prohibiting a person from filing, in propria persona, a new litigation in a court in this state if the court finds, after notice and hearing as provided by Subchapter B, that:

(1) the person is a vexatious litigant; and

(2) the local administrative judge of the court in which the person intends to file the litigation has not granted permission to the person under Section 11.102 to file the litigation.

(b) A person who disobeys an order under Subsection (a) is subject to contempt of court.

Added by Acts 1997, 75th Leg., ch. 806, § 1, eff. Sept. 1, 1997.

§ 11.102. PERMISSION BY LOCAL ADMINISTRATIVE JUDGE.

(a) A local administrative judge may grant permission to a person found to be a vexatious litigant under Section 11.101 to file a litigation only if it appears to the judge that the litigation:

(1) has merit; and

(2) has not been filed for the purposes of harassment or delay.

(b) The local administrative judge may condition permission on the furnishing of security for the benefit of the defendant as provided in Subchapter B.

Added by Acts 1997, 75th Leg., ch. 806, § 1, eff. Sept. 1, 1997.

§ 11.103. DUTIES OF CLERK; MISTAKEN FILING.

(a) A clerk of a court may not file a litigation presented by a vexatious litigant subject to a prefiling order under Section 11.101 unless the litigant obtains an order from the local administrative judge permitting the filing.

(b) If the clerk mistakenly files a litigation without an order from the local administrative judge, any party may file with the clerk and serve on the plaintiff and the other parties to the suit a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order under Section 11.101. On the filing of the notice, the court shall immediately stay the litigation and shall dismiss the litigation unless the plaintiff, not later than the 10th day after the date the notice is filed, obtains an order from the local administrative judge under Section 11.102 permitting the filing of the litigation.

(c) If the local administrative judge issues an order permitting the filing of the litigation under Subsection (b), the litigation remains stayed and the defendant need not plead until the 10th day after the date the defendant is served with a copy of the order.

Added by Acts 1997, 75th Leg., ch. 806, § 1, eff. Sept. 1, 1997.

§ 11.104. NOTICE TO OFFICE OF COURT ADMINISTRATION; DISSEMINATION OF LIST.

(a) A clerk of a court shall provide the Office of Court Administration of the Texas Judicial System a copy of any prefiling order issued under Section 11.101.

(b) The Office of Court Administration of the Texas Judicial System shall maintain a list of vexatious litigants subject to prefiling orders under Section 11.101 and shall annually send the list to the clerks of the courts of this state.

Added by Acts 1997, 75th Leg., ch. 806, § 1, eff. Sept. 1, 1997.

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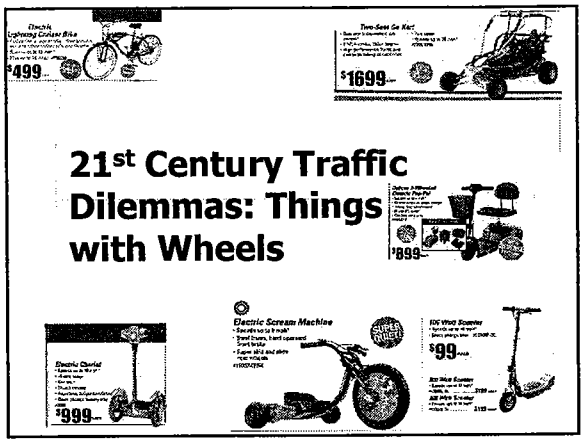
21st Century Traffic Dilemmas: Things with Wheels

OBJECTIVES

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

1. Define key terms from the Transportation Code including traffic, vehicle, motor vehicle, motorcycle, passenger vehicle, and highway.
2. Apply those definitions to the elements of the moving violations, driver's license violations, registration violations, and insurance violations.
3. Categorize differing mechanical devices to the appropriate Transportation Code grouping.



Definitions:Traffic

- If if travels, it's traffic.
- Must yield to traffic.
- Passing applies to traffic.

Definitions: Vehicle

- Device that carries
  - Persons
  - Property
- Not Trains
- Not Animals, but
- Traffic rules apply to riders, unless the application is stupid. 542.003

Definitions: Motor Vehicle

- Self Propelled
- Not:
  - Electric bicycle
  - Segway (EPAMD)
- Important to Insurance, DL, and Registration.

Definitions: Passenger Car and Light Truck

- Yes that Ford 5100,000XL is still a Light Truck.
- Used to matter with seat belts.
- Two definitions
- Not bus
- Used to transport persons.

Definitions: Truck and Truck Tractor

- Both designed to move property.
- Truck-not divided.
- Truck Tractor-Cab and trailer

Definitions: Bicycle

- Two Definitions
- Human Powered

Definitions: Electric Bicycle and Moped

- Electric Power with or without human power
- 20 MPH on its own
- 100 lbs
- Motor Driven Cycle
- Limits on:
- Speed
- Horse Power
- CCs
- Gears

Definitions: Motorcycle and Motor-driven Cycle

- Is a Motor Vehicle
- No more than 3 wheels on the ground
- Less than 250 cc
- Not an Electric Bicycle

Definitions: Electronic Personal Assistive Mobility Device

- Segways
- Self Balancing
  - Excludes most look alikes

Definitions:Motor Assisted Scooter and Neighborhood Electric Vehicle

- Deck not a Saddle
- Under 40 ccs
- Can be propelled with out motor
- Transportation Code does not Apply
- AARP Machines
- Only on Roads w/ Speed Limits under 35.
- Can be Restricted by Ordinance

Definitions: Golf Cart

- Pretty Much What it Says
- Designed to be Used on Golf Course

Definitions: All Terrain Vehicle

- 3 or 4 Wheels
- A Saddle
- Designed for Off-Road
- Not a Lawn Mower or Tractor

Definitions: Motorized Mobility Device

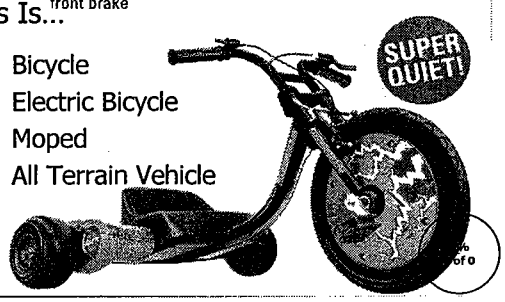
- Motorized Wheelchairs
- Limited to 8 mph
- Battery Only
- 1 gear
- Pedestrian, Not Motor Vehicle

Electric Scream Machine

- Speeds up to 9 mph*
- Steel frame, hand operated front brake
- Super skid and slide rear wheels

This Is...

1. Bicycle
2. Electric Bicycle
3. Moped
4. All Terrain Vehicle



Electric Punk Scooter

- Speeds up to 9 mph*
- Tough freestyle stunt saddle
- Steel frame and fork

This Is...

1. Motor Vehicle
2. Electric Bicycle
3. Motorcycle
4. Motor Driven Cycle

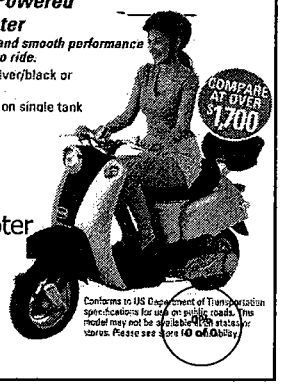
STREET LEGAL!

SPEEDS UP TO 29 mph*

49cc Gas-Powered Road Scooter

Vintage design and smooth performance make this cool to ride.

- Choose from silver/black or blue/white
- 140-mile range on single tank



This Is...

1. Moped
2. Motorcycle
3. Motor Assisted Scooter
4. Motor-driven Cycle

Deluxe 3-Wheeled Electric Pep-Pal

- Speeds up to 4 mph*
- 10-mile range on single charge
- Heavy-duty construction
- 24 volt DC motor
- Flat-free solid tires

This Is...

1. Passenger Vehicle
2. Motor Assisted Scooter
3. Motorized Mobility Device
4. ATV

Two-Seat Go-Kart

- Dual arm independent suspension
- 9 HP, 4-stroke, 150cc engine
- High performance frame and oversized tubing construction
- Two seats
- Speeds up to 35 mph*

This Is...

1. A Motor Vehicle
2. ATV
3. Golf Cart

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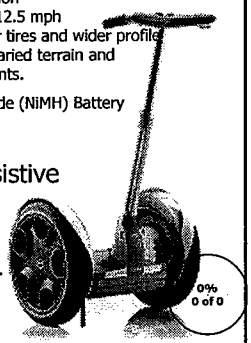
Segway® Human Transporter

This Is...

Dynamic Stabilization
Maximum speed: 12.5 mph
The i Series' larger tires and wider profile make it ideal for varied terrain and rugged environments.

Nickel Metal Hydride (NiMH) Battery Packs

1. Electronic Personal Assistive Mobility Device
2. Electric Bicycle
3. Motor Assisted Scooter



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Insurance

- 601.051
- Operate
- Motor Vehicle
  - Excludes Electronic Personal Assistive Mobility Device

Moving Violations

- Vehicles
- On Highways
- Animal Drawn too, Unless the Result is Silly

Ordinances

- Vehicles
- Restrictions allowed for Many Types
  - Bicycles
  - Electric Bicycles
  - Motor Assisted Scooter
- Limits on
  - EPAMD (Segway)
  - Mopeds
  - Moteorized Mobility Devices (They are Pedestrians)

Parking

- Vehicles Controlled
- Disabled Parking for Motor Vehicles

Seatbelts

- Passenger Vehicle

Equipment

- Vehicles, except:
  - Bicycles
  - Electric Bicycles
  - Golf Carts not Registered
  - 547.002

Inspection Stickers

- Motor Vehicles Required to be Registered

Drivers License

- Motor Vehicle
- Right Endorsements
- Moped, Motor Cycle required Class M

Registration

- Motor Vehicles
- Includes Mopeds 502.007
- Special Rule on Golf Cart 502.0071
- Not ATV 502.006
- Not Electric Bicycles 502.0075
- Not Motorized Mobility Devices 502.0074

Term	Definition(s)	Statute(s)
All Terrain Vehicle	"All-terrain vehicle" means a motor vehicle that is: (A) equipped with a saddle for the use of the rider; (B) designed to propel itself with three or four tires in contact with the ground; (C) designed by the manufacturer for off-highway use by the operator only; and (D) not designed by the manufacturer for farming or lawn care.	502.001 (1)
Bicycle	"Bicycle" means a device that a person may ride and that is propelled by human power and has two tandem wheels at least one of which is more than 14 inches in diameter. "bicycle" means a nonmotorized vehicle propelled by human power.	541.201 (2) 551.105 (a)
Electric Bicycle	"Electric bicycle" means a bicycle that: (A) is designed to be propelled by an electric motor, exclusively or in combination with the application of human power; (B) cannot attain a speed of more than 20 miles per hour without the application of human power; and (C) does not exceed a weight of 100 pounds.	541.201 (24)
Electronic Personal Assistive Mobility Device	In this subchapter, "electric personal assistive mobility device" means a two non-tandem wheeled device designed for transporting one person that is: (1) self-balancing; and (2) propelled by an electric propulsion system with an average power of 750 watts or one horsepower.	551.201
Golf Cart	"Golf cart" means a motor vehicle designed by the manufacturer primarily for transporting persons on a golf course.	502.001 (7)
Light Truck	"Light truck" means a truck, including a pickup truck, panel delivery truck, or carryall truck, that has a manufacturer's rated carrying capacity of 2,000 pounds or less. "Light truck" means a commercial motor vehicle	541.201 (7) 502.001 (9)

	that has a manufacturer's rated carrying capacity of one ton or less.	
Moped	"Moped" means a motor-driven cycle that cannot attain a speed in one mile of more than 30 miles per hour and the engine of which: (A) cannot produce more than two-brake horsepower; and (B) if an internal combustion engine, has a piston displacement of 50 cubic centimeters or less and connects to a power drive system that does not require the operator to shift gears.	541.201 (8)
Motor Assisted Scooter	"Motor assisted scooter" means a self-propelled device with: (A) at least two wheels in contact with the ground during operation; (B) a braking system capable of stopping the device under typical operating conditions; (C) a gas or electric motor not exceeding 40 cubic centimeters; (D) a deck designed to allow a person to stand or sit while operating the device; and (E) the ability to be propelled by human power alone.	551.301 (2)
Motor Vehicle	"Motor vehicle" means a self-propelled vehicle or a vehicle that is propelled by electric power from overhead trolley wires. The term does not include an electric bicycle or an electric personal assistive mobility device, as defined by Section 551.201. "Motor vehicle" means a vehicle that is self-propelled.	541.201 (11) 502.001 (13)
Motorcycle	"Motorcycle" means a motor vehicle, other than a tractor, that is equipped with a rider's saddle and designed to have when propelled not more than three wheels on the ground. "Motorcycle" means a motor vehicle designed to propel itself with not more than three wheels in contact with the ground. The term does not include a tractor.	541.201 (9) 502.001 (12)
Motor-driven Cycle	"Motor-driven cycle" means a motorcycle equipped with a motor that has an engine piston displacement of 250 cubic centimeters or less. The term does not include an electric bicycle.	541.201(10)
Motorized	In this section, "motorized mobility device"	542.009

Mobility Device	means a device designed for transportation of persons with physical disabilities that: (1) has three or more wheels; (2) is propelled by a battery-powered motor; (3) has not more than one forward gear; and (4) is not capable of speeds exceeding eight miles per hour. (b) For the purposes of this subtitle, a person operating a nonmotorized wheelchair or motorized mobility device is considered to be a pedestrian.	
Neighborhood Electric Vehicle	"Neighborhood electric vehicle" means a vehicle subject to Federal Motor Vehicle Safety Standard 500 (49 C.F.R. Section 571.500).	551.301 (1)
Operator	"Operator" means, as used in reference to a vehicle, a person who drives or has physical control of a vehicle.	541.001 (1)
Passenger Car	"Passenger car" means a motor vehicle, other than a motorcycle, used to transport persons and designed to accommodate 10 or fewer passengers, including the operator. "Passenger car" means a motor vehicle, other than a motorcycle, golf cart, light truck, or bus, designed or used primarily for the transportation of persons.	541.201 (12) 502.001 (17)
Passenger Vehicle	"Passenger vehicle" means a passenger car, light truck, sport utility vehicle, truck, or truck tractor.	545.412 (f)(2)
Public Highway	"Public highway" includes a road, street, way, thoroughfare, or bridge: (A) that is in this state; (B) that is for the use of vehicles; (C) that is not privately owned or controlled; and (D) over which the state has legislative jurisdiction under its police power.	502.001 (18)
Traffic	In this subtitle "traffic" means pedestrians, ridden or herded animals, and conveyances, including vehicles and streetcars, singly or together while using a highway for the purposes of travel.	541.301

Truck	"Truck" means a motor vehicle designed, used, or maintained primarily to transport property.	541.201 (21)
Truck Tractor	"Truck tractor" means a motor vehicle designed and used primarily to draw another vehicle but not constructed to carry a load other than a part of the weight of the other vehicle and its load.	541.201 (22)
Vehicle	"Vehicle" means a device that can be used to transport or draw persons or property on a highway. The term does not include: a device exclusively used on stationary rails or tracks; or manufactured housing as that term is defined by Chapter 1201, Occupations Code.	541.201 (23)
	"Vehicle" means a device in or by which a person or property is or may be transported or drawn on a public highway, other than a device used exclusively on stationary rails or tracks.	502.001 (24)

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Access to Justice

OBJECTIVES

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

1. Recognize the major barriers to justice confronted by persons suffering from physical disabilities or mental health problems.
2. Understand via a review of current case law the major issues currently being litigated re access to justice by courts, judges, and court administrator that may impact the operations.
3. Develop court practices and procedures that are sympathetic to the needs of the physically or mentally impaired and promotion of the change of justice generally.

ACCESS TO JUSTICE- An Americans With Disability Law Update

I. Overview Of The Americans With Disabilities Act
see National Center For State Courts webpage
see List Of Frequently Asked Questions

II. Caselaw- The United States Supreme Court
- Tennessee v. Lane, 124 S.Ct. 1978, 158 L.Ed. 2d 280 (2004)
- Barnes v. Gorman, 536 U.S. 181, 122 S.Ct. 2097, 152 L.Ed. 2d 330 (2002)
- Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001).

III. Caselaw- The United States Courts Of Appeals
- Miller v. Texas Tech University Health Sciences Center, 330 F.3d 691(5th Cir. 2003)
- Delano-Pyle v. Victoria County, Texas, 302 F.3d 567 (5th Cir. 2002)
- Hainze v. Richards, Allison, Williamson County, Hallmark & Zion, 216 F.3d 1081 (5th Cir. 2000)
- Popovich v. Cuyahoga County Court of Common Pleas, 276 F.2d 808 (6th Cir. 2002)
- Layton v. Elder, County Judge of Montgomery County, Arkansas, 143 F.3d 469 (8th Cir. 1998)
- Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001)

IV. Texas Courts
- Little v. Texas Department of Criminal Justice, 2004 Tex. LEXIS 323 (The Texas Supreme Court granted this petition for review on April 9, 2004. Oral argument was held in September of 2004); on appeal from the First District, Houston (*see* Little v. Texas Department of Criminal Justice, 2003 Tex. App. LEXIS 2734)

V. Settlement Agreement Between The United States Of America and The City Of Houston

VI. Miscellaneous
- George Lane – hero or hellion?
- Frequently Asked Questions On The Americans With Disabilities Act
- National Center For State Courts, *Memorandum*
- *Disability Etiquette Handbook*, San Antonio, Texas
- NCSC, *Implementation Of The ADA In Court, Self-Evaluation*
- Disability Issues Committee Of The State Bar Of Texas
- Building Accessible Web Sites
- Texas Governor's Committee On People With Disabilities, Key Laws
- A Guide To Making Professional Development Programs Accessible
- Navigating The Juvenile Justice System: A Handbook For Juveniles & Their Families
- Mental Illness, Your Client & The Criminal Law: A Handbook For Attorneys
- DOJ- OVC, *First Response To Victims Of Crime Who Have A Disability*

VII. Ethical Issues

ACCESS TO JUSTICE- An Americans With Disability Law Update

I. Overview of the Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") was first proposed in 1988 under President Reagan's National Council on the Handicapped, but was not passed until the summer of 1990 by President George Bush, Sr. The ADA, unlike some other anti-discrimination legislation, only provides standing to persons that are disabled.

Title I of the ADA prohibits a covered entity from discriminating against a qualified individual with a disability because of the disability of such individual in regard to most aspects of the employment relationship. Title I defines a "qualified person with a disability" as an individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the position. The defense to a charge of discrimination is that an alleged application of qualification standards, tests or selection criteria are job related and consistent to business necessity.

Title II of the ADA applies to "public entities" including: any state or local government; any department, agency, or instrumentality of a state or local government, and any commuter authority. Title II overlaps with §504 of the Rehabilitation Act because 504 applies to any entity receiving federal financial assistance. Title II says that remedies, procedures and rights in §504 shall be the remedies, procedures and rights provided by Title II. Title II defines three types of reasonable accommodations: (1) Reasonable modifications to rules, policies or practice; (2) Removal of architectural, communication or transportation barriers; and (3) Provision of auxiliary aids.

Title III of the ADA governs all private institutions, except ones that are religious. Title III applies to any: (1) Public accommodation, (2) Commercial facility, (3) Entity that offers exams or courses related to licensing. An entity can't be both public and private. If it is public, it is excluded from coverage under Title III. Public accommodations are subject to the general nondiscrimination requirements of Title III and lists 5 specific discriminatory actions:

1. Application of discriminatory eligibility criteria
2. Failure to make reasonable modification
3. Failure to provide necessary auxiliary aids and services
4. Failure to remove architectural barriers and
5. Failure to provide alternative methods of providing a service

See www.ncsconline.com for more complete information concerning the Americans with Disabilities Act.

For a list of Frequently Asked Questions concerning the Americans with Disabilities Act, *see attached.*

II. The United States Supreme Court

***Tennessee v. Lane,* 124 S.Ct. 1978, 158 L.Ed. 2d 280 (2004)**

Facts: Respondents George Lane and Beverly Jones, both of whom are paraplegics who use wheelchairs for mobility, claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process. Respondents filed this action against the State of Tennessee and a number of Tennessee counties, alleging past and ongoing violations of Title II. Respondents sought damages and equitable relief.

The State moved to dismiss the suit on the ground that it was barred by the Eleventh Amendment. The District Court denied the State's motion to dismiss on Eleventh Amendment immunity grounds, the Sixth Circuit held the appeal in abeyance pending *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955. This Court ruled in *Garrett* that the Eleventh Amendment bars private money damages actions for state violations of ADA Title I, which prohibits employment discrimination against the disabled. The Sixth Circuit *en banc* then issued its *Popovich (see below)* decision, in which it interpreted *Garrett* to bar private ADA suits against States based on equal protection principles, but not those relying on due process, and therefore permitted a Title II damages action to proceed despite the State's immunity claim. Thereafter, a Sixth Circuit panel affirmed the dismissal denial in this case, explaining that respondents' claims were not barred because they were based on due process principles. In response to a rehearing petition arguing that *Popovich* did not control because respondents' complaint did not allege due process violations, the panel filed an amended opinion, explaining that due process protects the right of access to the courts, and that the evidence before Congress when it enacted Title II established, *inter alia*, that physical barriers in courthouses and courtrooms have had the effect of denying disabled people the opportunity for such access.

Held: As it applies to the class of cases implicating the fundamental right of access to the courts, Title II constitutes a valid exercise of Congress' authority under § 5 of the Fourteenth Amendment to enforce that Amendment's substantive guarantees. Judgment of Court of Appeals is affirmed.

***Barnes v. Gorman,* 536 U.S. 181, 122 S.Ct. 2097, 152 L.Ed. 2d 330 (2002)**

Facts: Respondent, a paraplegic, is confined to a wheelchair and lacks voluntary control over his lower torso, including his bladder, forcing him to wear a catheter attached to a urine bad around his waist. In 1992, he was arrested for trespass after fighting with a bouncer at a Kansas City, Missouri, nightclub. While waiting for a police van to transport him to the station, he was denied permission to empty his urine bag. When the van arrived, it was not wheelchair-accessible. Officers chose to remove respondent from his wheelchair and used a seatbelt and his own belt to strap him into the bench in the rear of the van. During the ride, respondent released himself from the seatbelt, as it put excessive pressure on his urine bag. The other belt became loose as well, and he fell to the floor, rupturing his urine bag and injuring his shoulder and back. The driver of the van, unable to lift the respondent, secured him to a support for the remainder of the trip. Upon arriving to the station,

respondent was booked, processed and released, and was later convicted of misdemeanor trespass. After these events, respondent suffered serious medical problems including a bladder infection, serious lower back pain and uncontrollable spasms in his paralyzed areas that left him unable to work full time.

Respondent sued petitioner police officials and officers for discriminating against him on the basis of his disability, in violation of Sec. 202 of the ADA by failing to maintain appropriate policies for the arrest and transportation of persons with spinal cord injuries. A jury found petitioners liable and awarded him over $1 million in compensatory and $1.2 Million in punitive damages. The District court vacated the punitive damages, holding they are unavailable in private suits brought under Sec. 202. The Eighth Circuit reversed and found that punitive damages are available.

Held: The Supreme Court found that because punitive damages could not be awarded in private suits brought under Title VI, it followed that they could not be awarded in suits brought under Sec. 202 of the ADA. Judgement reversed.

***Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001).**

Facts: Respondent Patricia Garrett, a registered nurse, was employed as the Director of Nursing, OB/Gyn/Neonatal Services, for the University of Alabama in Birmingham Hospital. In 1994, Garrett was diagnosed with breast cancer and subsequently underwent a lumpectomy, radiation treatment, and chemotherapy. Garrett's treatments required her to take substantial leave from work. Upon returning to work in July 1995, Garrett's supervisor informed her that she would have to give up her Director position. Garrett then applied for and received a transfer to another, lower paying position as a nurse manager.

Respondent Milton Ash worked as a security officer for the Alabama Department of Youth Services Upon commencing this employment, Ash informed the Department that he suffered from chronic asthma and that his doctor recommended he avoid carbon monoxide and cigarette smoke, and Ash requested that the Department modify his duties to minimize his exposure to these substances. He was later diagnosed with sleep apnea and requested, again pursuant to his doctor's recommendation, that he be reassigned to daytime shifts to accommodate his condition. Ultimately, the Department granted none of the requested relief. Shortly after Ash filed a discrimination claim with the Equal Employment Opportunity Commission, he noticed that his performance evaluations were lower than those he had received on previous occasions.

Garrett and Ash filed separate lawsuits in the District Court, both seeking money damages under the ADA. Petitioners moved for summary judgment, claiming that the ADA exceeds Congress' authority to abrogate the State's Eleventh Amendment immunity. In a single opinion disposing of both cases, the District Court agreed with petitioners' position and granted their motions for summary judgment. The cases were consolidated on appeal to the Eleventh Circuit. The Court of Appeals reversed, holding that the ADA validly abrogates the States' Eleventh Amendment immunity.

Held: The Supreme Court found that suits in federal court by state employees to recover money damages by reason of the State's failure to comply with Title I of the ADA are barred by the Eleventh Amendment.

III. The United States Court of Appeals

A. Fifth Circuit

***Miller v. Texas Tech University Health Sciences Center,* 330 F.3d 691(5th Cir. 2003)**

Facts: In April 1999, plaintiff was diagnosed as legally blind and was removed as Associate Dean, but did continue as a professor. It was suggested she use certain adaptive equipment and seek accommodations in order to continue teaching at the Pharmacy School, but the school failed to respond to her request for accommodations. As her vision deteriorated, plaintiff requested a meeting with the Dean to discuss adaptive equipment and accommodations needed to permit program accessibility. Reportedly, the Dean refused to meet with her until medical documentation was provided. She filed her discrimination charge with the Equal Employment Opportunity Commission on April 15, 1999. On July 21, 1999, plaintiff provided a letter from Dr. William D. Townshend, D.O., Texas Commission for the Blind, Regional Consultant. In that letter to TTUHSC the doctor stated that Plaintiff had a visual disability, made accommodation recommendations, and further confirmed the need for adaptive equipment so as to assure accessibility.

On January 14, 2000, plaintiff learned she was demoted from her position as Associate Dean to merely a Professor of Pharmaceutical Sciences and denied her second request for tenure. She filed her second charge of discrimination with the EEOC on March 10, 2000. In April 2001plaintiff was told by TTUHSC she could not take braille classes, a program accommodation, during business hours. During this same period TTUHSC also failed to provide training in the use of certain assistive equipment and to properly install adaptive software on her computer. She was finally terminated in August 2001. Plaintiff employee sued the university, alleging that the university failed to accommodate her disability. Plaintiff had a degenerative eye disease that caused her to become legally blind.

The University moved to dismiss the case on the basis of 11th Amendment immunity.

Held: At the district court level, the court dismissed the plaintiff's Title VII claim and Texas Labor Code claim, but did not dismiss the claim based on the Rehabilitation Act. The 5th Circuit reversed and remanded back to the district court with instructions to dismiss the plaintiff's remaining claim due to the university's 11th Amendment immunity. However, on August 12, 2003, the Court granted a rehearing in this case. No decision has been yet made as to the date or time of oral argument.

***Delano-Pyle v. Victoria County, Texas,* 302 F.3d 567 (5th Cir. 2002)**

Facts: On July 17, 1998, plaintiff, who is severely hearing impaired, was involved in a car accident when he rear ended another vehicle traveling on the shoulder of Highway 77 in Victoria County.

Two Victoria County deputies arrived on the scene of the accident in response to a report of an incoherent subject at the location. Shortly after the officers arrived, the plaintiff informed them of his hearing disability. While investigating the accident, one of the deputies searched plaintiff's vehicle and discovered some legal prescription medication. Despite knowing of plaintiff's disability, the deputies proceeded to administer the sobriety tests without asking Pyle which form of communication would be most effective.

First, the deputy administered the "walk and turn" test. This requires an individual to take nine steps, heel to toe, along a straight line while counting the steps out loud and watching his feet. After taking the nine steps, the subject must turn around and return to the starting point in the same manner. The deputy demonstrated the test to the defendant, however, because plaintiff could not hear the instructions as communicated, he took more than nine steps before turning around. The second test was the "one leg stand". The deputy wanted the plaintiff to stand on one leg and count to ten. The deputy again spoke so quickly that plaintiff did not understand the instructions and counted to fourteen, rather than ten. The last test was the "finger to nose" test where the deputy wanted plaintiff to lean his head back and touch his finger to his nose six times. But, since plaintiff did not understand, he touched his finger to his nose about twenty five times. The deputy concluded that the plaintiff could not complete these tests because he was intoxicated. The plaintiff asserts that he was unable to understand the directions due to his hearing impairment, and that was why he could not complete the tests. The deputy Mirandized plaintiff prior to his arrest, but when plaintiff was asked if he understood his rights, he did not answer.

At the police station, the deputy again read plaintiff his Miranda warning, but this time also wrote it on a blackboard. Then, knowing that the plaintiff is hearing impaired, deputy interrogated plaintiff without any accommodations. Deputy asked plaintiff to take a blood test and after successfully passing the test, plaintiff was released.

Plaintiff filed a lawsuit against Victoria County, alleging violations of Title II of the ADA. The jury found that plaintiff was intentionally discriminated against by the county and awarded damages in the amount of $230,000.

Held: The appellate court affirmed the decision of the district court. Subsequently, the county appealed, but the 5th Circuit denied the petition for rehearing and the Supreme Court denied certiorari as well.

***Hainze v. Richards, Allison, Williamson County, Hallmark & Zion,* 216 F.3d 1081 (5th Cir. 2000)**

Facts: In the early morning hours of November 16, 1997, Alicia Cluck made a 911 call requesting that the police transport her suicidal nephew, plaintiff, to a hospital for mental health treatment. Cluck advised that plaintiff had a history of depression and currently was under the influence of alcohol and anti-depressants, carrying a knife, and threatening to commit suicide or "suicide by cop." Uniformed Williamson County Sheriff's deputies, defendants-appellees Allison, Hallmark, and Zion, were given this information and dispatched in marked police cars to a convenience store where plaintiff was located.

Upon arriving at the store the officers observed a man, believed to be plaintiff, standing by the passenger door of a pickup truck occupied by two unidentified individuals. Plaintiff appeared to be holding the door's handle and talking to the individuals. He had a knife in his hand and was not wearing shoes, despite the cold temperature. Deputy Allison exited his vehicle, drew his weapon, and ordered plaintiff away from the truck. Plaintiff responded with profanities and began to walk towards Allison. At this point, Zion, who was riding with Allison, and Hallmark had also exited their vehicles with their weapons drawn. Allison twice ordered plaintiff to stop but plaintiff ignored him. When plaintiff was within four to six feet Allison fired two shots in rapid succession into plaintiff's chest. Allison immediately called EMS. plaintiff survived. Approximately twenty seconds elapsed from the time the officers pulled into the store parking lot until plaintiff was shot.

On August 21, 1998, plaintiff was convicted by a Williamson County jury of aggravated assault with a deadly weapon for his conduct at the convenience store on November 16, 1997. The instant action was filed on November 20, 1997, before plaintiff was charged with the criminal offense of which he was convicted. Plaintiff asserted claims against Williamson County Sheriff Richards, the county, and Deputies Allison, Zion, and Hallmark in their individual capacities under *42 U.S.C. § 1983,* alleging that they acted with deliberate indifference to his fourth and fourteenth amendment rights by using "excessive, unreasonable, and deadly force against him." He also asserted the same claim against Williamson County and Sheriff Richards in his official capacity for failing to adopt or enforce policies to adequately handle individuals who are mentally ill and in crisis situations, and to protect against the use of excessive and deadly force in such situations.

Plaintiff sought a declaratory judgment, injunctive relief, and damages. In addition, he brought assault and battery claims against the three deputies under Texas law. He also sought declaratory, injunctive, and compensatory relief under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act against Williamson County and Sheriff Richards in his official capacity. These claims were based on the defendants' alleged failure to establish a policy or train deputies to protect the well-being of mentally ill individuals, for having actually discriminated against plaintiff on the basis of his disability, and for failing to conduct a self-evaluation, all of which plaintiff contends were the direct and proximate causes of the near-fatal shooting. Summary judgment was ultimately granted in favor of all defendants on all claims. plaintiff timely appealed.

Plaintiff claimed he was denied the benefits and protections of Williamson County's mental health training provided to its deputies when Allison used excessive and deadly force to restrain him. Specifically, Plaintiff alleges that Allison never engaged him in conversation to calm him, never tried to give him space by backing away, never attempted to defuse the situation, never tried to use less than deadly force, and never attempted to create any opportunities for the foregoing to occur. We must conclude that this argument fails. A necessary prerequisite to a successful claim under Title II is that a disabled person be denied the benefits of a service, program or activity by the public entity that provides such service, program or activity. Plaintiff was not denied the benefits and protections of Williamson County's mental health training by the County, Sheriff Richards, or the officers. Rather, Plaintiff's assault of Allison with a deadly weapon denied him the benefits of that program.

Second, plaintiff claims that the county failed to reasonably accommodate his disability by "failing and refusing to adopt a policy protecting the well-being of [plaintiff] as a person with a mental

illness in a mental health crisis situation, thus resulting in discriminatory treatment from [the] sheriff's deputies." He stresses that the county's policy of treating mental health calls identical to criminal response calls and those not involving people with mental disabilities resulted in his discriminatory treatment. Despite plaintiff's claims, court held that Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.

Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the discrimination of disabled individuals, Congress did not intend that the fulfillment of that objective be attained at the expense of the safety of the general public.

Held: Plaintiff's claims lack merit. Plaintiff's injuries were caused by his own criminal actions, not Williamson County's failure to perform a self-evaluation. Consequently, plaintiff lacks standing to seek declaratory or injunctive relief. A precondition to asserting a claim for a declaratory judgment is that a viable case or controversy exist. Because plaintiff cannot state a claim under either Title II or Section 504 the district court did not abuse its discretion in summarily denying the requested relief. Judgment dismissing all defendants is affirmed. Petition for rehearing en banc denied.

B. Sixth Circuit

***Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.2d 808 (2002)**

Facts: Plaintiff, a hearing-impaired person, claims that the Domestic Violence Division of the court violated Title II of the ADA when it refused to provide him with real-time captioning services during custody hearings concerning his daughter. Plaintiff brought an action in federal court under Title II and obtained a jury verdict in the district court against the state court for $400,000 in compensatory damages based on an equal protection-type claim of discrimination, a due process-type claim of unreasonable exclusion from participation in the custody proceeding, and a claim of retaliation for filing an administrative complaint for failing to accommodate his disability.

The State claimed immunity under the 11th Amendment. The Court concluded that the plaintiff's action is barred by the Eleventh Amendment in so far as the action relies on congressional enforcement of the Equal Protection Clause, but it is not barred in so far as it relies on congressional enforcement of the Due Process Clause. As applied to the plaintiff's cause of action, Title II is "appropriate legislation" under section 5 and the Due Process Clause of section 1 of the Fourteenth Amendment.

The plaintiff's due process interest is significant in that the judicial proceeding will determine the amount of time, if any, he can spend with his daughter. Failure to accommodate his hearing disability may render him unable to participate meaningfully in that determination. If he cannot

understand what is happening during the custody hearing, it will be impossible for him to refute claims made against him, or to offer evidence on his own behalf. Consequently, a state's failure to accommodate plaintiff's deafness may greatly increase the risk of error in the proceeding, precluding one side from responding to charges made by the opposing party, an essential element of our adversary system. From Ohio's perspective, the paramount governmental interest is to insure that the State's most vulnerable citizens are placed with the parent best suited for providing for their welfare. This interest is achieved through a proceeding that permits both parents to understand and to respond to the arguments made by their adversaries, thereby giving the judge a complete picture of each parent's abilities to care for the child in question. At the same time, Ohio has an obvious need to administer its decisions in a cost-conscious and time-effective manner, and at some point the requested accommodations may become so expensive or onerous as to outweigh their usefulness in reaching a decision.

Held: The Court reversed and remanded the case for a new trial because the charge to the jury appears to permit the jury to find in favor of the plaintiff if it finds discrimination against him or exclusion from public proceedings based on equal protection principles. The plaintiff's claims based on equal protection principles are denied, the jury verdict of $400,000 is set aside and the case is remanded on the retaliation and unreasonable exclusion from participation claims.

C. Eighth Circuit

***Layton v. Elder, County Judge of Montgomery County, Arkansas,* 143 F.3d 469 (8th Cir. 1998)**

Facts: Appellants are disabled veterans. Richard Ray Layton is a quadriplegic and confined to a wheelchair. Billy R. Penny suffers from the conditions of ankylosing spondylitis, psoriatic arthritis, and psoriasis; due to his conditions, Penny frequently uses crutches and occasionally uses a wheelchair. They alleged that they could not reach the second floor of the county courthouse because it was not wheelchair accessible. They specifically found that: non-authorized vehicles are frequently found in the handicapped parking spaces, the flights of stairs within the courthouse are too narrow, the wheelchair ramps are too steep and the bathrooms are not handicap-accessible. Also, there is no wheelchair access to the first floor, causing all proceedings for the wheelchair bound to take place on the first floor.

Held: Though the lower court found the veterans to be disabled, the court denied his claim because the courthouse had been taking steps to remedy the ADA violations. The 8th Circuit agreed that the county had taken measures, but was not yet remedying the problem and reversed the decision, remanding the case back to the district court, and ordering an injunction to make all municipal facilities accessible to persons with disabilities.

D. Ninth Circuit

***Duvall v. County of Kitsap,* 260 F.3d 1124(9th Cir. 2001)**

Facts: Plaintiff is completely deaf in his left ear and has a severe hearing impairment in his right ear. Because he does not sign well enough to use sign language, he primarily communicates through

writing. He wears custom fitted hearing aids and is able to communicate effectively in one on one conversation in spoken English with the aid of visual cues and lip reading. However, he finds it very difficult to follow conversations that he is not directly involved in. Attempting to overhear or follow a conversation between others requires a great deal of concentration, and after approximately thirty minutes, plaintiff begins to suffer from tinnitus and headaches.

In 1994 and 1995, Duvall was a party to a family law case in the superior court of Kitsap County, Washington involving the dissolution of his marriage. He states that he was initially able to participate in the pre-trial hearings because they were short, there was no oral testimony, and the discussion centered on written materials that he had reviewed previously. However, he experienced great difficulty in following the pre-trial hearing that included extensive oral testimony. Though the courtroom is equipped with assistive listening devices, he was not able to understand the testimony of his ex-wife. Plaintiff contacted the county's ADA coordinator to ask for videotext display of the court proceedings. He was told that it was not possible to get more accommodations, but that he could file a motion with the court to request it.

The trial itself was held in a courtroom equipped with the "Telex Soundmate", an assistive audio system for hearing-impaired individuals. However, this system was not compatible with his personal assistive-listening devices, requiring him to remove his own hearing aid. Plaintiff's attorney made a motion to the court on the first day of trial requesting videotext display to accommodate plaintiff's hearing impairment. Motion was denied, however the judge did allow plaintiff to move around in the courtroom freely and position himself wherever he could best hear the proceedings.

A post trial hearing was scheduled for the next month and ten days before the hearing, plaintiff contacted the ADA coordinator and again requested videotext display. Because he was again denied this service, he filed a motion for mistrial, alleging that he was unable to participate in the proceedings because of the denied accommodation. The County's ADA grievance committee denied the grievance and the Board of County Commissioners denied the appeal. Plaintiff filed sued in federal district court under Title II of the ADA. The district court granted summary judgment to the county and plaintiff appealed.

The defendants argued that the videotext display was not a reasonable accommodation because it was not available in that county at the time of the trial. Plaintiff provided evidence that the ADA coordinator and two other county officials had notice of his need for accommodation and failed despite requests to take the necessary action. However, the Board of Commissioners did not become aware of plaintiff's request for accommodation until after the County had arranged to provide videotext at the future court hearings. The court also found that the judge was acting in a judicial capacity when he refused to accommodate plaintiff.

Held: District Court's grant of summary judgment in favor of the judge and members of the Board of Commissioners was affirmed. The grant of summary judgment in favor of the ADA coordinator and the County was reversed and remanded to district court. 9th Circuit voted unanimously to deny the petition for rehearing en banc.

IV. The Texas Supreme Court

***Little v. Texas Department of Criminal Justice,* 2004 Tex. LEXIS 323**

The Texas Supreme Court granted this petition for review on April 9, 2004. Oral argument was held in September of 2004.

V. Texas Court of Appeals

A. First District, Houston

***Little v. Texas Department of Criminal Justice*, 2003 Tex. App. LEXIS 2734**

Facts: In 1974, the lower half of appellant's left leg was amputated after she suffered an accidental shotgun wound. Appellant wears a prosthesis on her left leg and, while able to walk, moves with a discernable limp. In 1991, appellant tried to find food service work in Jasper, but none was available. Between 1996 and 1999, appellant applied on 14 separate occasions to the Texas Department of Criminal Justice for a food service manager position at various prison units. For each position, appellant filled out written application forms, answered written questions, and was interviewed by a board consisting of a ranking food service department supervisor and a warden, assistant warden, or major.

Appellant was not hired by the Texas Department of Criminal Justice for any of the food service manager positions. She claimed disability discrimination and brought her discrimination claim under state law, via the Texas Commission on Human Rights and pursuant to the Texas Labor Code. The Commission rejected her claim because: 1) she failed to prove that she was "disabled" or that the Texas Department of Criminal Justice treated her as "disabled;" 2) she failed to show that she was the best qualified candidate; and 3) failed to show evidence of intentional discrimination.

Held: In order for a person to succeed under this statute, they must prove that they have a "Substantial impairment", that they are the most qualified candidate for the position and that the discrimination was intentional. Here, as the Texas Department of Criminal Justice did not know the candidate was substantially impaired, they were not thought to have discriminated against her intentionally.

VI. State District Courts

A. District Court - Arkansas

***Matthews v. Jefferson, County Judge of Marion County, Arkansas,* 29 F. Supp. 2d 525(W. Dist. AR 1998)**

Facts: Plaintiff suffers from T-3 paraplegia, necessitating the use of a wheelchair and other mobility aids for ambulation. On March 18, 1996, Matthews was scheduled to appear in the Marion County Chancery Court. The chancery court is located in the Marion County Courthouse on the second floor.

The courthouse is listed on the National Registry of Historic Buildings. The courthouse does not have an elevator, ramp, or other device making the second floor accessible to anyone with disabilities involving mobility. The public entrance doors to the courtroom are not wide enough for a wheelchair to pass through. Additionally, the restrooms on the second floor are not accessible to wheelchair bound individuals.

When plaintiff arrived for the March 18th hearing, he had to be carried up the stairs to the courtroom by men the County Judge had arranged for, or located, to provide the needed assistance. During the course of the hearing which lasted from approximately 9:00 a.m. until 7:00 p.m., plaintiff alleges he was unable to empty an external catheter because of the inaccessible restrooms. As a result, plaintiff states the catheter "backed up" causing a urinary tract infection and other maladies of a related nature. Plaintiff was also unable to leave the second floor to obtain a meal during the noon recess. At the end of the hearing, the only persons left in the courthouse were plaintiff's attorney and the court clerk who were unable to carry him down the stairs. The Judge was no longer in the building and apparently no arrangements were made to carry plaintiff down the stairs. Thus, plaintiff was forced to remove himself from his wheelchair and with great difficulty make his way down the stairs.

Plaintiff had similar difficulties on two other occasions in May and June of 1996 when he was scheduled to appear before the Marion County Chancery Court. As was the case with the March hearing, court was held on the second floor of the courthouse and lasted from approximately 9:00 a.m. to 7:00 p.m. The morning of the second hearing, plaintiff was told that there was not enough room, no place else to have court. After the second hearing, he was helped down the stairs by his brother, his cousin, and another gentleman who was there for the hearing. After the third hearing, Plaintiff started down on his own but his cousin did come and help him down. Plaintiff filed a complaint on Oct. 30, 1997, alleging violation of Title II of the ADA and two violations of Sec. 504 of the Rehabilitation Act.

The court officials argued that if the plaintiff had made his disability known previously, they would have made arrangements to accommodate him, for example by offering to carry plaintiff down the stairs. The court found that "Carrying an individual with a disability is considered ineffective and therefore an unacceptable method for achieving program accessibility."

Held: The court found that the county was in violation of the ADA and ordered injunctive relief to make the courthouse ADA accessible.

B. District Court - Florida

***Leonard v. Wakula County, Florida* (App. Ct. Fl. 1st District 1997)**

Facts: Appellant is a paraplegic and has been bound to a wheelchair since 1990. In September of 1992, appellant tried to use the Wakulla County Courthouse wheelchair ramp, but the front wheels of his chair became airborne and the chair flipped backwards. Appellant had used the ramp approximately two to six times before the accident. The record also showed that in March of 1991, appellant had sent a letter to the county's building inspector, where appellant pointed out that the courthouse ramp was too steep. Appellant sued Wakulla County alleging negligence. Appellant's

claim was based on (1) the fact that the county failed to repair the ramp after being informed that the ramp was too steep and that it did not comply with the requirements of the Americans with Disabilities Act, and (2) the county failed to warn of a known dangerous condition.

The court determined that the lower court correctly granted summary judgment holding that the county was not under a duty to upgrade the ramp, and the record demonstrated that appellant was aware of the dangerous condition posed by the steepness of the ramp. The court considered whether questions of fact existed as to the county's failure to warn of a known dangerous condition. Finding that there were factual matters which created a dispute as to whether the county knew of a dangerous condition and failed to warn, the court said genuine issues of material fact existed. Yet, it held that there were no circumstances which created an issue of material fact as to whether the defect was readily apparent to the general public or whether appellant had knowledge of the known dangerous condition. The ramp was open and visible, appellant had used the ramp several times, and had written to the county about the dangerous condition. Thus, the court held that the lower court properly granted summary judgment.

Held: Because the appellant charged that the ramp was "Dangerous", the court was able to use the analysis of a dangerous condition to find that in order to be liable, the condition would have had to be dangerous and undisclosed. Since the appellant knew the ramp was dangerous and non-compliant, he was forewarned and should have known of the dangerous condition and not used the ramp.

VIII. Settlement Agreements

A. U.S.A. & City of Houston, Texas; Dept. Of Justice Complaint # 204-74-102

Facts: Complainant, an individual with a hearing impairment, alleges that the City police officers, jail officials and court personnel do not effectively communicate with people with hearing impairments.

Department is also looking at Edwards v. City of Houston, No. H-98-1369(S.D. Tex.). Mr. Edwards claims that he was questioned by a City of Houston police officer and was not provided with a sign language interpreter. The officer arrested him and incarcerated him in the city jail. Mr. Edwards was not provided with TTY technology in order to call his family. At his first appearance in court, he was again denied access to a sign language interpreter. He was also not provided a sign language interpreter when he tried to report criminal action against him. The ADA applies to the City because it is a "public entity" as defined by Title II.

Agreed: City agrees to provide appropriate aids and services to allow the hearing impaired to participate effectively in their proceedings; within 30 days of agreement, City will designate one or more employees as City Police Department ADA Coordinator; within 14 months, the police department will undergo training and learn about ADA and Law Enforcement; and Police Department agrees to purchase TTY and train at least one supervisor on how to operate and maintain the TTY.

City of Houston Detention Facilities agreed to: inform all detainees of their options to use TTY to contact their families if necessary; provide an interpreter within one hour of a request and at court proceedings when needed; equip all televisions in the detention centers with closed captioning technology; install visual fire alarms; distribute these new procedures to all employees and incorporate these new procedures in training for new officers.

City of Houston Court System agreed to: designate an employee as the City Court System's ADA Coordinator; within 90 days, notices of the new procedures will be conspicuously posted throughout the courthouse; purchase a TTY phone system for the Court; install visual fire alarms and within 90 days, City will have a training for judges and court administrators.

B. U.S.A. & Perry County, Kentucky; Dept. Of Justice Complaint # 2204-30-17

F*acts*: Complaint alleges that the County facilities and courthouse are not accessible. The ADA applies to the County because it is a "public entity" as defined by Title II.

Agreed: County agreed to continue to ensure that all 911-Emergency TDD calls are answered promptly, accurately and that TDD operators are trained. Within three months, the County will survey its facilities for the purpose of identifying those that have multiple entrances and identifying which ones are accessible. Within 30 days, the County will designate an ADA coordinator and create a grievance procedure to handle ADA claims. Also, County agreed to submit building plans for the Perry County Hall of Justice to the Dept. Of Justice to ensure compliance.

C. U.S.A. & City of Cambridge, Ohio; Dept. Of Justice Complaint # 204-58-63

Facts: Complaint alleges that structural barriers and other deficiencies make the programs, services and activities offered in the City Building, Municipal Court Building and City's Law Office inaccessible to persons with mobility impairments and to persons with hearing and visual impairments.
The ADA applies to the City because it is a "public entity" as defined by Title II.

Agreed: Within 60 days of the agreement, City will develop a written procedure for providing a sign language interpreter at City Council meetings upon request. Within 120 days, Municipal court Building will adopt "Policy on Accessibility of Proceedings held within the Municipal Court Building". Copies of the policy will be posted in conspicuous locations and will also be distributed to the employees. Within 60 days, the City will have found an alternate location for court proceedings that are accessible. City shall make specific alterations to the City building at each of the following time periods: 180 days, 270 days, and one year.

D. U.S.A. & Allendale County, South Carolina; Dept. Of Justice Complaint # 204-67-74, 204-67-93, 204-67-94

Facts: Three complainants allege that the Allendale County Courthouse is inaccessible to individuals in wheelchairs. The complainants, three individuals who use wheelchairs, alleged that

their court hearings were held in the hallways on the first floor of the courthouse, rather than in a courtroom. The Allendale County courthouse was subsequently burned down by arsonists. The county is temporarily using the Municipal Building courtroom facilities and has advised that the new courthouse will be designed and reconstructed in accordance with the ADA standards for Accessibility. The ADA applies to the County because it is a "public entity" as defined by Title II.

Agreed: Within one year from date of agreement, Allendale County will modify to comply with the Standards, the elements of section 25 of this Agreement for the Voter Registration Building. The County will also make the 8 polling locations accessible and provide the option of mail or absentee ballots for persons with disabilities.

The County will evaluate all telecommunication systems to check for accessibility. Will also make TTY technology available on request to persons with disabilities in the county correctional facility. Within one year, the County will purchase assistive listening devices for use in the Magistrate Judge's offices. Within 270 days, the County will purchase assistive listening devices for use in the temporary courtroom

Within one year the County will survey its public facilities for accessibility and make the following modifications: Courthouse Complex - ramp; Leisure Center - Main entrance door; Office on Aging; Recreation department door; water fountain; unisex bathrooms; cafeteria door; women's restroom; men's restroom; Law Enforcement Building - Parking; restroom signs; employee restrooms; employee break room; Emergency 911 Center - restroom; County Hospital - Emergency telephone; women's restroom; men's restroom; unisex restroom; County Administrator's Building - Parking; route; signage; front entrance; rear entrance; conference room door; Public health center - Parking; accessible route; New Life Center; Clinic; Waiting room; men's and women's restroom; Courthouse Complex - Entrance door width; women's and men's restroom; Court clerk; Auditor/Treasurer's office; Tax Assessor's office; Probation/Parole office; Probate Judge/Tax Collector's office; library; City Hall - Parking; route; Doors; Courtroom; Jury Room.

E. U.S.A. & Butte County, South Dakota; Dept. Of Justice Complaint # 204-69-29

Facts: Complainant sues Butte County alleging that the County courthouse is not wheelchair accessible.

The ADA applies to the County because it is a "public entity" as defined by Title II.

Agreed: County agrees to search for polling places that are ADA accessible; provide the option of mail or absentee ballots; and provide notice in the paper and the radio that advertise where the polling places will be. County will provide training for TDD call takers and maintain the TDD equipment and will add the TDD number to the County letterhead within 90 days.

County will appoint a staff person responsible for handling ADA claims. County will implement a procedure to deal with ADA grievances.

Within seven months, the county will survey the facility and implement adequate signage on all accessible entrances. Physical changes will be made to: Butte County Courthouse; Agriculture Extension and State's Attorney Office Building; Sheriff's Office; Butte County Fairgrounds and Butte County Nurses' Office.

F. U.S.A. & City of Mount Vernon, Washington; Dept. Of Justice Complaint # 204-82-210

Facts: The ADA applies to the City because it is a "public entity" as defined by Title II.

Agreed: Within 30 days, the City will formalize its ADA grievance procedure and put it into writing and distribute to all agency heads, post copies, keep copies posted for 6 months and distribute copies to persons upon request.

Within three months, the city will develop procedures for use of its telephone relay system; Within four months, the City will provide public notice of the telecommunications system by which a hearing impaired person can communicate with the City; and Within six months, the City will report to the Department on the telecommunications system it has chosen and submit the written procedures and the employees who have been trained.

City will undergo several structural changes in order to comply with accessibility including: City Hall, City Library, Community and Economic Building, Engineering Department, Wastewater and Treatment Plant, Fire Station, Police/Court Complex, Hillcrest Park, Bakerview Park, Lion's Park, and Sherman-Anderson Park.

124 S. Ct. 1978, *; 158 L. Ed. 2d 820, **;
2004 U.S. LEXIS 3386, ***; 72 U.S.L.W. 4371

TENNESSEE, Petitioner v. GEORGE LANE et al.

No. 02-1667

SUPREME COURT OF THE UNITED STATES

***124 S. Ct. 1978; 158 L. Ed. 2d 820; 2004 U.S. LEXIS 3386; 72 U.S.L.W. 4371; 15 Am. Disabilities Cas. (BNA) 865; 17 Fla. L. Weekly Fed. S 299;*11 Accom. Disabilities Dec. (CCH) 11-108**

January 13, 2004, Argued
May 17, 2004, Decided

NOTICE: [*1]**

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. *Lane v. Tennessee, 315 F.3d 680, 2003 U.S. App. LEXIS 303 (6th Cir. Tenn., 2003)*

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

SYLLABUS:

[827]** Respondent paraplegics filed this action for damages and equitable relief, alleging that Tennessee and a number of its counties had denied them physical access to that State's courts in violation of *Title II of the Americans with Disabilities Act of 1990* (ADA), which provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity," *42 USC § 12132 [42 USCS § 12132]*. After the District Court denied the State's motion to dismiss on *Eleventh Amendment* immunity grounds, the Sixth Circuit held **[***2]** the appeal in abeyance pending *Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955*. This Court later ruled in *Garrett* that the *Eleventh Amendment* bars private money damages actions for state violations of *ADA Title I*, which prohibits employment discrimination against the disabled. The en banc Sixth Circuit then issued its *Popovich* **[**828]** decision, in which it interpreted *Garrett* to bar private ADA suits against States based on equal protection principles, but not those relying on due process, and therefore permitted a Title II damages action to proceed despite the State's immunity claim. Thereafter, a Sixth Circuit panel affirmed the dismissal denial in this case, explaining that respondents' claims were not barred because they were based on due process principles. In response to a rehearing petition arguing that *Popovich* did not control because respondents' complaint did not allege due process violations, the panel filed an amended opinion, explaining that due process protects the right of access to the courts, and that the evidence before Congress when it enacted Title II established, *inter alia*, that physical barriers in courthouses and **[***3]** courtrooms have had the effect of denying disabled people the opportunity for such access.

Held:

As it applies to the class of cases implicating the fundamental right of access to the courts, Title II constitutes a valid exercise of Congress' authority under *§ 5 of the Fourteenth Amendment* to enforce that Amendment's substantive guarantees.

(a) Determining whether Congress has constitutionally abrogated a State's *Eleventh Amendment* immunity requires resolution of two predicate questions: (1) whether Congress unequivocally expressed its intent to abrogate; and (2), if so, whether it acted pursuant to a valid grant of constitutional authority. *Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73, 145 L. Ed. 2d 522, 120 S. Ct. 631*. The first question is easily answered here, since the ADA specifically provides for abrogation. See *§ 12202*. With regard to the second question, Congress can abrogate state sovereign immunity pursuant to a valid exercise of its power under *§ 5 of the Fourteenth Amendment*. *E.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 49 L. Ed. 2d 614, 96 S. Ct. 2666*. That power is not, however, unlimited. While Congress must have a wide berth in devising appropriate remedial **[***4]** and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." *City of Boerne v. Flores, 521 U.S. 507, 519, 138 L. Ed. 2d 624, 117 S. Ct. 2157*. In *Boerne*, the Court set forth the test for distinguishing between permissible remedial legislation and unconstitutional substantive redefinition: *Section 5* legislation is valid if it exhibits "a congruence and proportionality" between an injury and the means adopted to prevent or remedy it. *Id., 521 U.S. at 520, 138 L. Ed. 2d 624, 117 S. Ct. 2157*. Applying the *Boerne* test in *Garrett*, the Court concluded that *ADA Title I* was not a valid exercise of Congress' *§ 5* power because the historical record and the statute's broad sweep suggested that Title I's true aim was not so much enforcement, but an attempt to "rewrite" this Court's *Fourteenth Amendment* jurisprudence. *531 U.S., at 372-374, 148 L. Ed. 866, 121 S Ct. 955*. In view of

significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' *§ 5* power, *531 U.S. at 360, n. 1, 148 L. Ed. 2d 866, 121 S. Ct. 955*.

(b) Title II is a valid exercise of Congress' *§ 5* enforcement power.

(1) The **[***5]** *Boerne* inquiry's first step requires identification of the constitutional rights Congress sought to **[**829]** enforce when it enacted Title II. *Garrett, 531 U.S., at 365, 148 L. Ed. 2d 866, 121 S. Ct. 955*. Like Title I, Title II seeks to enforce the *Fourteenth Amendment's* prohibition on irrational disability discrimination, *Garrett, 531 U.S., at 366, 148 L. Ed. 2d 866, 121 S. Ct. 955*. But it also seeks to enforce a variety of other basic constitutional guarantees, including some, like the right of access to the courts here at issue, infringements of which are subject to heightened judicial scrutiny. See, *e.g., Dunn v. Blumstein, 405 U.S. 330, 336-337, 31 L. Ed. 2d 274, 92 S. Ct. 995*. Whether Title II validly enforces such constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." *E.g., South Carolina v. Katzenbach, 383 U.S. 301, 308, 15 L. Ed. 2d 769, 86 S. Ct. 803*. Congress enacted Title II against a backdrop of pervasive unequal treatment of persons with disabilities in the administration of state services and programs, including systematic deprivations of fundamental rights. The historical experience that Title II reflects is also documented in the decisions of this and other courts, **[***6]** which have identified unconstitutional treatment of disabled persons by state agencies in a variety of public programs and services. With respect to the particular services at issue, Congress learned that many individuals, in many States, were being excluded from courthouses and court proceedings by reason of their disabilities. A Civil Rights Commission report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by such persons. Congress also heard testimony from those persons describing the physical inaccessibility of local courthouses. And its appointed task force heard numerous examples of their exclusion from state judicial services and programs, including failure to make courtrooms accessible to witnesses with physical disabilities. The sheer volume of such evidence far exceeds the record in last Term's *Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728-733, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003)*, in which the Court approved the family-care leave provision of the *Family and Medical Leave Act of 1993* as valid *§ 5* legislation. Congress' finding in the ADA that "discrimination against individuals with disabilities **[***7]** persists in such critical areas as . . . access to public services," *§ 12101(a)(3)*, together with the extensive record of disability discrimination that underlies it, makes clear that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.

(2) Title II is an appropriate response to this history and pattern of unequal treatment. Unquestionably, it is valid *§ 5* legislation as it applies to the class of cases implicating the accessibility of judicial services. Congress' chosen remedy for the pattern of exclusion and discrimination at issue, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The long history of unequal treatment of disabled persons in the administration of judicial services has persisted despite several state and federal legislative efforts to remedy the problem. Faced with considerable evidence of the shortcomings of these previous efforts, Congress was justified in concluding that the difficult **[**830]** and intractable problem of disability discrimination warranted added prophylactic measures. *Hibbs, 538 U.S., at 737, 155 L. Ed. 2d 953, 123 S. Ct. 1972.* **[***8]** The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. *§ 12132*. But Title II does not require States to employ any and all means to make judicial services accessible or to compromise essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. *Ibid.* Title II's implementing regulations make clear that the reasonable modification requirement can be satisfied in various ways, including less costly measures than structural changes. This duty to accommodate is perfectly consistent with the well-established due process principle that, within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard in its courts. *Boddie v. Connecticut, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)*. A number of affirmative obligations flow from **[***9]** this principle. Cases such as *Boddie, Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585*, and *Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792*, make clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate is a reasonable prophylactic measure, reasonably targeted to a legitimate end. *315 F.3d 680*

, affirmed.

COUNSEL:

Michael E. Moore argued the cause for petitioner.

William J. Brown argued the cause for private respondents.

Paul D. Clement argued the cause for federal respondent.

JUDGES: Stevens, J., delivered the opinion of the Court, in which O'Connor, Souter, Ginsburg, and Breyer, JJ., joined. Souter, J., filed a concurring opinion, in which Ginsburg, J., joined. Ginsburg, J., filed a concurring opinion, in which Souter and Breyer, JJ., joined. Rehnquist, C. J., filed a dissenting opinion, in which Kennedy and Thomas, JJ., joined. Scalia, J., and Thomas, J., filed dissenting opinions.

OPINIONBY: STEVENS

OPINION: Justice **Stevens** delivered the opinion of the Court.

[LEdHR1A]** [1A] **[*1982]** Title II of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat 337, *42 U.S.C. § § 12131-12165* [*42 USCS § § 12131*-12165], provides that "no qualified individual with **[***10]** a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." *§ 12132*. The question presented in this case is whether Title II exceeds Congress' power under *§ 5 of the Fourteenth Amendment*.

I

In August 1998, respondents George Lane and Beverly Jones filed this action against the State of Tennessee and a number of Tennessee counties, alleging past and ongoing violations of Title II. Respondents, **[**831]** both of whom are paraplegics who use wheelchairs for mobility, claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. **[*1983]** When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, **[***11]** alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process. Respondents sought damages and equitable relief.

The State moved to dismiss the suit on the ground that it was barred by the *Eleventh Amendment*. The District Court denied the motion without opinion, and the State appealed. n1 The United States intervened to defend Title II's abrogation of the States' *Eleventh Amendment* immunity. On April 28, 2000, after the appeal had been briefed and argued, the Court of Appeals for the Sixth Circuit entered an order holding the case in abeyance pending our decision in *Board of Trustees v. Garrett, 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001)*.

n1 In *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993)*, we held that "States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of *Eleventh Amendment* immunity." *Id., at 147, 121 L. Ed. 2d 605, 113 S. Ct. 684*.

[*12]**

In *Garrett*, we concluded that the *Eleventh Amendment* bars private suits seeking money damages for state violations of *Title I of the ADA*. *We* left open, however, the question whether the *Eleventh Amendment* permits suits for money damages under Title II. *Id., at 360, n 1, 148 L. Ed. 2d 866, 121 S. Ct. 955*. Following the *Garrett* decision, the Court of Appeals, sitting en banc, heard argument in a Title II suit brought by a hearing-impaired litigant who sought money damages for the State's failure to accommodate his disability in a child custody proceeding. *Popovich v. Cuyahoga County Court, 276 F.3d 808 (CA6 2002)*. A divided court permitted the suit to proceed despite the State's assertion of *Eleventh Amendment* immunity. The majority interpreted *Garrett* to bar private ADA suits against States based on equal protection principles, but not those that rely on due process principles. *276 F.3d, at 811-816*. The minority concluded that Congress had not validly abrogated the States' *Eleventh Amendment* immunity for any Title II claims, *id., at 821*, while the concurring opinion concluded that Title II validly abrogated state sovereign immunity with respect **[***13]** to both equal protection and due process claims, *id., at 818*.

Following the en banc decision in *Popovich*, a panel of the Court of Appeals entered an order affirming the District Court's denial of the State's motion to dismiss in this case. Judgt. order reported at *40 Fed. Appx. 911 (CA6 2002)*. The order explained that respondents' claims were not barred because they were based on due process principles. In response to a petition **[**832]** for rehearing arguing that *Popovich* was not controlling because the complaint did not allege due process violations, the panel filed an amended opinion. It

explained that the *Due Process Clause* protects the right of access to the courts, and that the evidence before Congress when it enacted Title II "established that physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the *Due Process Clause*." *315 F.3d 680, 682 (CA6 2003)*. Moreover, that "record demonstrated that public entities' failure to accommodate the needs of qualified persons **[***14]** **[*1984]** with disabilities may result directly from unconstitutional animus and impermissible stereotypes." *Id., at 683*. The panel did not, however, categorically reject the State's submission. It instead noted that the case presented difficult questions that "cannot be clarified absent a factual record," and remanded for further proceedings. *Ibid.* We granted certiorari, *539 U.S. 941, 56 L. Ed. 2d 626, 123 S. Ct. 2622 (2003)*, and now affirm.

II

The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities. In the years immediately preceding the ADA's enactment, Congress held 13 hearings and created a special task force that gathered evidence from every State in the Union. The conclusions Congress drew from this evidence are set forth in the task force and Committee Reports, described in lengthy legislative hearings, and summarized in the preamble to the statute. n2 Central among these conclusions was Congress' finding that

> "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." *42 U.S.C. § 12101(a)(7)* [*42 USCS § 12101*(a)(7)].

n2 See *42 U.S.C. § 12101* [*42 USCS § 12101]*; Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment 16 (Oct. 12, 1990); S. Rep. No. 101-116 (1989); H. R. Rep. No. 101-485 (1990); H. R. Conf. Rep. No. 101-558 (1990); H. R. Conf. Rep. No. 101-596 (1990); cf. *Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 389-390, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001)* (App. A to opinion of Breyer, J., dissenting) (listing congressional hearings).

[*15]**

Invoking "the sweep of congressional authority, including the power to enforce the *fourteenth amendment* and to regulate commerce," the ADA is designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *§ § 12101(b)(1), (b)(4)*. It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by *Title I* of the statute; public services, programs, and activities, which are the subject of Title II; and public **[**833]** accommodations, which are covered by *Title III*.

Title II, § § 12131-12134, prohibits any public entity from discriminating **[***16]** against "qualified" persons with disabilities in the provision or operation of public services, programs, or activities. The Act defines the term "public entity" to include state and local governments, as well as their agencies and instrumentalities. *§ 12131(1)*. Persons with disabilities are "qualified" if they, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § *12131(2)*. Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, 92 Stat 2982, as added, *29 U.S.C. § 794a* [*29 USCS § 794a]*, which **[*1985]** authorizes private citizens to bring suits for money damages. *42 U.S.C. § 12133* [*42 USCS § 12133]*.

III

[LEdHR2]** [2] The *Eleventh Amendment* renders the States immune from "any suit in law or equity, commenced or prosecuted . . . by Citizens of another State, or by Citizens or Subjects of any Foreign State." Even though the Amendment "by its terms . . . applies **[***17]** only to suits against a State by citizens of another State," our cases have repeatedly held that this immunity also applies to unconsented suits brought by a State's own citizens. *Garrett, 531 U.S., at 363, 148 L. Ed. 2d 866, 121 S. Ct. 955*; *Kimel v. Florida Bd. of Regents, 528 U.S. 62, 72-73, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000)*. Our cases have also held that Congress may abrogate the State's *Eleventh Amendment* immunity. To determine whether it has done so in any given case, we "must resolve two predicate questions: first, whether

Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority." *Id., at 73, 145 L. Ed. 2d 522, 120 S. Ct. 631.*

[LEdHR1B]** [1B] **[**LEdHR3]** [3] The first question is easily answered in this case. The Act specifically provides: "A State shall not be immune under the *eleventh amendment to the Constitution of the United States* from an action in Federal or State court of competent jurisdiction for a violation of this chapter." *42 U.S.C. § 12202 [42 USCS § 12202].* As in *Garrett*, see *531 U.S., at 363-364, 148 L. Ed. 2d 866, 121 S. Ct. 955*, no party disputes the adequacy of that expression of Congress' intent to abrogate the States' *Eleventh Amendment* **[***18]** immunity. The question, then, is whether Congress had the power to give effect to its intent.

In *Fitzpatrick v. Bitzer, 427 U.S. 445, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976)*, we held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under *§ 5 of the Fourteenth Amendment* to enforce the substantive guarantees of that Amendment. *Id., at 456, 49 L. Ed. 2d 614, 96 S. Ct. 2666.* This enforcement power, as we have often acknowledged, is a "broad power indeed." *Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982)*, citing *Ex parte Virginia, 100 U.S. 339, 346,* **[**834]** *25 L. Ed. 676 (1880).* n3 It includes "the authority both to remedy and to deter violation of rights guaranteed [by the *Fourteenth Amendment*] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel, 528 U.S., at 81, 145 L. Ed. 2d 522, 120 S. Ct. 631.* We have thus repeatedly affirmed that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727-728, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003).* **[***19]** See also *City of Boerne v. Flores, 521 U.S. 507, 518, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997).* n4 The **[*1986]** most recent affirmation of the breadth of Congress' *§ 5* power came in *Hibbs*, in which we considered whether a male state employee could recover money damages against the State for its failure to comply with the family-care leave provision of the Family and Medical Leave Act of 1993 (FMLA), 107 Stat 6, *29 U.S.C. § 2601 et seq [29 USCS § § 2601 et seq.]*. We upheld the FMLA as a valid exercise of Congress' *§ 5* power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional under the rule of *Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979).* When Congress seeks to remedy or prevent unconstitutional discrimination, *§ 5* authorizes it to enact prophylactic **[**835]** legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the *Equal Protection Clause.*

n3 In *Ex parte Virginia,* we described the breadth of Congress' *§ 5* power as follows:

"Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *100 U.S., at 345-346, 25 L. Ed. 676.* See also *City of Boerne v. Flores, 521 U.S. 507, 517-518, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997).* **[***20]**

n4 In *Boerne*, we observed:

"Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.' *Fitzpatrick v. Bitzer, 427 U.S. 445, 455 [49 L. Ed. 2d 614, 96 S. Ct. 2666] (1976).* For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the *Fifteenth Amendment*, see *U.S. Const., Amdt. 15, § 2*, as a measure to combat racial discrimination in voting, *South Carolina v. Katzenbach, 383 U.S. 301, 308 [15 L. Ed. 2d 769, 86 S. Ct. 803] (1966)*, despite the facial constitutionality of the tests under *Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 [3 L. Ed. 2d 1072, 79 S. Ct. 985] (1959).* We have also concluded that other measures protecting voting rights are within Congress' power to enforce the *Fourteenth* and *Fifteenth Amendments*, despite the burdens those measures placed on the States. *South Carolina v. Katzenbach, supra* (upholding several provisions of the *Voting Rights Act of 1965*); *Katzenbach v. Morgan, [384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966)]* (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); *Oregon v. Mitchell, 400 U.S. 112 [27 L. Ed. 2d 272, 91 S. Ct. 260] (1970)*

(upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *City of Rome v. United States, 446 U.S. 156, 161 [64 L. Ed. 2d 119, 100 S. Ct. 1548] (1980)* (upholding 7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a "'standard, practice, or procedure with respect to voting"'); see also *James Everard's Breweries v. Day, 265 U.S. 545 [68 L. Ed. 1174, 44 S. Ct. 628] (1924)* (upholding ban on medical prescription of intoxicating malt liquors as appropriate to enforce *Eighteenth Amendment* ban on manufacture, sale, or transportation of intoxicating liquors for beverage purposes)." *Id., at 518, 138 L. Ed. 2d 624, 117 S. Ct. 2157.*

[*21]**

[LEdHR4]** [4] Congress' *§ 5* power is not, however, unlimited. While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." *Boerne, 521 U.S., at 519, 138 L. Ed. 2d 624, 117 S. Ct. 2157.* In *Boerne*, we recognized that the line between remedial legislation and substantive redefinition is "not easy to discern," and that "Congress must have wide latitude in determining where it lies." *Id., at 519-520, 138 L. Ed. 2d 624, 117 S. Ct. 2157.* But we also confirmed that "the distinction exists and must be observed," and set forth a test for so observing it: *Section 5* legislation is valid if it exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id., at 520, 138 L. Ed. 2d 624, 117 S. Ct. 2157.*

In *Boerne,* we held that Congress had exceeded its *§ 5* authority when it enacted the *Religious Freedom Restoration Act of 1993* (RFRA). We began by noting that Congress enacted RFRA "in direct response" to our decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990)*, for the stated purpose of "restor[ing]" **[***22]** a constitutional rule that *Smith* had rejected. *521 U.S., at 512, 515, 138 L. Ed. 2d 624, 117 S. Ct. 2157* (internal quotation marks **[*1987]** omitted). Though the respondent attempted to defend the statute as a reasonable means of enforcing the *Free Exercise Clause* as interpreted in *Smith*, we concluded that RFRA was "so out of proportion" to that objective that it could be understood only as an attempt to work a "substantive change in constitutional protections." *Id., at 529, 532, 138 L. Ed. 2d 624, 117 S. Ct. 2157.* Indeed, that was the very purpose of the law.

This Court further defined the contours of *Boerne*'s "congruence and proportionality" test in *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999).* At issue in that case was the validity of the Patent and Plant Variety Protection Remedy Clarification Act (hereinafter Patent Remedy Act), a statutory amendment Congress enacted in the wake of our decision in *Atascadero State Hospital v. Scanlon, 473 U.S. 234, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985)*, to clarify its intent to abrogate state sovereign immunity from patent infringement suits. *Florida Prepaid, 527 U.S., at 631-632, 144 L. Ed. 2d 575, 119 S. Ct. 2199.* Noting the virtually complete **[***23]** absence of a history of unconstitutional patent infringement on the part of the States, as well as the Act's expansive coverage, the Court concluded that the Patent Remedy Act's apparent aim was to serve the *Article I* concerns of "provid[ing] a uniform remedy for patent infringement and . . . plac[ing] States on the same footing as private parties under that regime," and not to enforce the guarantees of the *Fourteenth Amendment. Id., at 647-648, 144 L. Ed. 2d 575, 119 S. Ct. 2199.* See also *Kimel, 528 U.S. 62, 145 L. Ed. 2d 522, 120 S. Ct. 631* (finding that the *Age Discrimination in Employment Act* exceeded Congress' *§ 5* powers under *Boerne*); *United States v. Morrison, 529 U.S. 598, 146 L. Ed. 2d* **[**836]** *658, 120 S. Ct. 1740 (2000)* (Violence Against Women Act).

Applying the *Boerne* test in *Garrett*, we concluded that Title I of the ADA was not a valid exercise of Congress' *§ 5* power to enforce the *Fourteenth Amendment's* prohibition on unconstitutional disability discrimination in public employment. As in *Florida Prepaid*, we concluded Congress' exercise of its prophylactic *§ 5* power was unsupported by a relevant history and pattern of constitutional violations. *531 U.S., at 368, 374, 148 L. Ed. 2d 866, 121 S. Ct. 955.* Although the dissent pointed out **[***24]** that Congress had before it a great deal of evidence of discrimination by the States against persons with disabilities, *id., at 379, 148 L. Ed. 2d 866, 121 S. Ct. 955* (Breyer, J., dissenting), the Court's opinion noted that the "overwhelming majority" of that evidence related to "the provision of public services and public accommodations, which areas are addressed in Titles II and III," rather than Title I, *id., at 371, n. 7, 148 L. Ed. 2d 866, 121 S. Ct. 955.* We also noted that neither the ADA's legislative findings nor its legislative history reflected a concern that the States had been engaging in a pattern of unconstitutional employment discrimination. We emphasized that the House and Senate Committee Reports on the ADA focused on "'discrimination [in] . . . *employment in the private sector*,'" and made no mention of discrimination in public employment. *Id., at 371-372, 148 L. Ed. 2d 866, 121 S. Ct. 955* (quoting S. Rep. No. 101-116, p 6 (1989), and H. R. Rep. No. 101-485, pt. 2, p 28 (1990)) (emphasis in *Garrett*). Finally, we concluded that Title I's broad remedial scheme was insufficiently targeted to

remedy or prevent unconstitutional discrimination in public employment. Taken together, the historical record and the broad **[***25]** sweep of the statute suggested that Title I's true aim was not so much to enforce the *Fourteenth Amendment's* prohibitions against disability discrimination in public employment as it was to "rewrite" this **[*1988]** Court's *Fourteenth Amendment* jurisprudence. *531 U.S., at 372-374, 148 L. Ed. 2d 866, 121 S. Ct. 955.*

In view of the significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' *§ 5* enforcement power. It is to that question that we now turn.

IV

[LEdHR5]** [5] **[**LEdHR6]** [6] The first step of the *Boerne* inquiry requires us to identify the constitutional right or rights that Congress sought to enforce when it enacted Title II. *Garrett, 531 U.S., at 365, 148 L. Ed. 2d 866, 121 S. Ct. 955.* In *Garrett* we identified Title I's purpose as enforcement of the *Fourteenth Amendment's* command that "all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).* As we observed, classifications based on disability violate that constitutional command if they lack a rational relationship to a legitimate governmental purpose. *Garrett, 531 U.S., at 366, 148 L. Ed. 866, 121 S. Ct. 955* (citing *Cleburne, 473 U.S., at 446, 87 L. Ed. 2d 313, 105 S. Ct. 3249*). **[***26]**

[LEdHR7A]** [7A] **[**LEdHR8]** [8] **[**LEdHR9]** [9] Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety **[**837]** of other basic constitutional guarantees, infringements of which are subject to more searching judicial review. See, *e.g., Dunn v. Blumstein, 405 U.S. 330, 336-337, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972); Shapiro v. Thompson, 394 U.S. 618, 634, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942).* These rights include some, like the right of access to the courts at issue in this case, that are protected by the *Due Process Clause of the Fourteenth Amendment. The Due Process Clause and the Confrontation Clause of the Sixth Amendment*, as applied to the States via the *Fourteenth Amendment*, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California, 422 U.S. 806, 819, n. 15, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). The Due Process Clause* also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation **[***27]** in judicial proceedings. *Boddie v. Connecticut, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971); M.L.B. v. S.L.J., 519 U.S. 102, 136 L. Ed. 2d 473, 117 S. Ct. 555 (1996).* We have held that the *Sixth Amendment* guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor v. Louisiana, 419 U.S. 522, 530, 42 L. Ed. 2d 690, 95 S. Ct. 692 (1975).* And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the *First Amendment. Press-Enterprise Co. v. Superior Court of Cal., County of Riverside, 478 U.S. 1, 8-15, 92 L. Ed. 2d 1, 106 S. Ct. 2735 (1986).*

[LEdHR10]** [10] **[**LEdHR11]** [11] Whether Title II validly enforces these constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." *South Carolina v. Katzenbach, 383 U.S. 301, 308, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966).* See also *Florida Prepaid, 527 U.S., at 639-640, 144 L. Ed. 2d 575, 119 S. Ct. 2199; Boerne, 521 U.S., at 530, 138 L. Ed. 2d 624, 117 S. Ct. 2157.* While *§ 5* authorizes Congress to enact reasonably prophylactic remedial **[***28]** legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent. "Difficult and intractable problems often **[*1989]** require powerful remedies," *Kimel, 528 U.S., at 88, 145 L. Ed. 2d 522, 120 S. Ct. 631,* but it is also true that "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one," *Boerne, 521 U.S., at 530, 138 L. Ed. 2d 624, 117 S. Ct. 2157.*

It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, "[a]s of 1979, most States . . . categorically disqualified 'idiots' from voting, without regard to individual **[**838]** capacity." n5 The majority of these laws remain on the books, n6 and have been the subject of legal challenge as recently as 2001. n7 Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying n8 and serving as jurors. n9 The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional **[***29]** treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, *e.g., Jackson v. Indiana, 406 U.S. 715, 32 L. Ed. 2d 435, 92 S. Ct. 1845 (1972);* the abuse and neglect of persons committed to state mental health hospitals, *Youngberg v. Romeo, 457 U.S. 307, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982);* n10 and irrational discrimination in zoning decisions, *Cleburne v. Cleburne*

Living Center, Inc., 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, n11 public education, n12 and voting. n13 Notably, **[*1990]** these decisions also demonstrate a pattern of unconstitutional **[**839]** treatment in the administration of justice. n14

n5 *Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 464, and n 14, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)* (Marshall, J., concurring in judgment in part and dissenting in part) (citing Note, Mental Disability and the Right to Vote, *88 Yale L. J. 1644 (1979)*).

n6 See Schriner, Ochs, & Shields, Democratic Dilemmas: Notes on the ADA and Voting Rights of People with *Cognitive and Emotional Impairments, 21 Berkeley J. Emp. & Lab. L. 437, 456-472* tbl. II (2000) (listing state laws concerning the voting rights of persons with mental disabilities). **[***30]**

n7 See *Doe v. Rowe, 156 F. Supp. 2d 35 (Me. 2001).*

n8 *E.g., D. C. Code § 46-403* (West 2001) (declaring illegal and void the marriage of "an idiot or of a person adjudged to be a lunatic"); *Ky. Rev. Stat. Ann. § 402.990(2)* (West 1992 Cumulative Service) (criminalizing the marriage of persons with mental disabilities); *Tenn. Code Ann. § 36-3-109* (1996) (forbidding the issuance of a marriage license to "imbecile[s]").

n9 *E.g., Mich. Comp. Laws Ann. § 729.204* (West 2002) (persons selected for inclusion on jury list may not be "infirm or decrepit"); *Tenn. Code Ann. § 22-2-304(c)* (1994) (authorizing judges to excuse "mentally and physically disabled" persons from jury service).

n10 The undisputed findings of fact in *Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981)*, provide another example of such mistreatment. See *id., at 7, 67 L. Ed. 2d 694, 101 S. Ct. 1531* ("Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded").

n11 *E.g., La Faut v. Smith, 834 F.2d 389, 394 (CA4 1987)* (paraplegic inmate unable to access toilet facilities); *Schmidt v. Odell, 64 F. Supp. 2d 1014 (Kan. 1999)* (double amputee forced to crawl around the floor of jail). See also, *e.g., Key v. Grayson, 179 F.3d 996 (CA6 1999)* (deaf inmate denied access to sex offender therapy program allegedly required as precondition for parole). **[***31]**

n12 *E.g., New York State Asso. for Retarded Children, Inc. v. Carey, 466 F. Supp. 487, 504 (EDNY 1979)* (segregation of mentally retarded students with hepatitis B); *Mills v. Board of Ed. of District of Columbia, 348 F. Supp. 866 (DC 1972)* (exclusion of mentally retarded students from public school system). See also, *e.g., Robertson v. Granite City Community Unit School District No. 9, 684 F. Supp. 1002 (SD Ill. 1988)* (elementary-school student with AIDS excluded from attending regular education classes or participating in extracurricular activities); *Thomas v. Atascadero Unified School District, 662 F. Supp. 376 (CD Cal. 1986)* (kindergarten student with AIDS excluded from class).

n13 *E.g., Doe v. Rowe, 156 F. Supp. 2d 35 (Me. 2001)* (disenfranchisement of persons under guardianship by reason of mental illness). See also, *e.g., New York ex rel. Spitzer v. County of Delaware, 82 F. Supp. 2d 12 (NDNY 2000)* (mobility-impaired voters unable to access county polling places).

n14 *E.g., Ferrell v. Estelle, 568 F.2d 1128, 1132-1133 (CA5)* (deaf criminal defendant denied interpretive services), opinion withdrawn as moot, *573 F.2d 867 (1978)*; *State v. Schaim, 65 Ohio St. 3d 51, 64, 1992 Ohio 31, 600 N.E.2d 661, 672 (1992)* (same); *People v. Rivera, 125 Misc. 2d 516, 528, 480 N. Y. S. 2d 426, 434 (Sup. Ct. 1984)* (same). See also, *e.g., Layton v. Elder, 143 F.3d 469, 470-472 (CA8 1998)* (mobility-impaired litigant excluded from a county quorum court session held on the second floor of an inaccessible courthouse); *Matthews v. Jefferson, 29 F. Supp. 2d 525, 533-534 (WD Ark. 1998)* (wheelchair-bound litigant had to be carried to the second floor of an inaccessible courthouse, from which he was unable to leave to use restroom facilities or obtain a meal, and no arrangements were made to carry him downstairs at the end of the day); *Pomerantz v. County of Los Angeles, 674 F.2d 1288, 1289 (CA9 1982)* (blind persons categorically excluded from jury service); *Galloway v. Superior Court of District of Columbia, 816 F. Supp. 12 (DC 1993)* (same); *DeLong v. Brumbaugh, 703 F. Supp. 399, 405*

(WD Pa. 1989) (deaf individual excluded from jury service); *People v. Green, 148 Misc. 2d 666, 561 N. Y. S. 2d 130, 133 (Cty. Ct. 1990)* (prosecutor exercised peremptory strike against prospective juror solely because she was hearing impaired).

[*32]**

This pattern of disability discrimination persisted despite several federal and state legislative efforts to address it. In the deliberations that led up to the enactment of the ADA, Congress identified important shortcomings in existing laws that rendered them "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 101-116, at 18. See also H. R. Rep. No. 101-485, pt. 2, at 47. n15 It also uncovered further evidence of those shortcomings, in the form of hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions. See *Garrett, 531 U.S., at 379, 148 L. Ed. 2d 866, 121 S. Ct. 955* (Breyer, J., dissenting). See also *id., at 391, 148 L. Ed. 2d 866, 121 S. Ct. 955* (App. C to opinion of Breyer, J., dissenting). As the Court's opinion in *Garrett* observed, the "overwhelming majority" of these examples concerned discrimination in the administration of public programs and services. *Id., at 371, n. 7, 148 L. Ed. 2d 866, 121 S. Ct. 955*; Government's Lodging in *Garrett*, O. T. 2000, No. 99-1240 (available in Clerk of Court's case file).

n15 For a comprehensive discussion of the shortcomings of state disability discrimination statutes, see Colker & Milani, The Post-*Garrett* World: Insufficient State Protection against Disability Discrimination, *53 Ala. L. Rev. 1075 (2002)*.

[*33]**

[LEdHR12A]** [12A] **[**LEdHR13A]** [13A] With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs might be restructured **[*1991]** or relocated to other parts of the buildings. U. S. Civil Rights Commission, Accommodating the Spectrum of Individual Abilities 39 (1983). Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. Oversight Hearing on H. R. 4468 before the House Subcommittee **[**840]** on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess., 40-41, 48 (1988). And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments **[***34]** to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities. Government's Lodging in *Garrett*, O. T. 2000, No. 99-1240. See also Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment (Oct. 12, 1990). n16

n16

[LEdHR12B]** [12B] The Chief Justice dismisses as "irrelevant" the portions of this evidence that concern the conduct of nonstate governments. *Post,* at ____ - ____, *158 L. Ed. 2d, at 849-850* (dissenting opinion). This argument rests on the mistaken premise that a valid exercise of Congress' *§ 5* power must always be predicated solely on evidence of constitutional violations by the States themselves. To operate on that premise in this case would be particularly inappropriate because this case concerns the provision of judicial services, an area in which local governments are typically treated as "arm[s] of the State" for *Eleventh Amendment* purposes, *Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 280, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977)*, and thus enjoy precisely the same immunity from unconsented suit as the States. See, *e.g., Callahan v. Philadelphia, 207 F.3d 668, 670-674 (CA3 2000)* (municipal court is an "arm of the State" entitled to *Eleventh Amendment* immunity); *Kelly v. Municipal Courts, 97 F.3d 902, 907-908 (CA7 1996)* (same); *Franceschi v. Schwartz, 57 F.3d 828, 831 (CA9 1995)* (same). Cf. *Garrett, 531 U.S., at 368-369, 148 L. Ed. 2d 866, 121 S. Ct. 955.*

[LEdHR12C]** [12C] **[**LEdHR13B]** [13B] In any event, our cases have recognized that evidence of constitutional violations on the part of nonstate governmental actors is relevant to the *§ 5* inquiry. To be sure, evidence of constitutional violations by the States themselves is particularly important when, as in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999)*, *Kimel v. Florida Bd. of Regents, 528 U.S. 62, 145 L. Ed. 2d 522,*

120 S. Ct. 631 (2000), and *Garrett*, the sole purpose of reliance on *§ 5* is to place the States on equal footing with private actors with respect to their amenability to suit. But much of the evidence in *South Carolina v. Katzenbach, 383 U.S., at 312-315, 15 L. Ed. 2d 769, 86 S. Ct. 803*, to which The Chief Justice favorably refers, *post,* at ____, *158 L. Ed. 2d, at 853*, involved the conduct of county and city officials, rather than the States. Moreover, what The Chief Justice calls an "extensive legislative record documenting States' gender discrimination in employment leave policies" in *Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003), post,* at ____, *158 L. Ed. 2d, at 853*, in fact contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States. Indeed, the evidence before the Congress that enacted the FMLA related primarily to the practices of private-sector employers and the Federal Government. See *Hibbs, 538 U.S., at 730-735, 155 L. Ed. 2d 953, 123 S. Ct. 1972.* See also *id., at 745-750, 155 L. Ed. 2d 953, 123 S. Ct. 1972* (Kennedy, J., dissenting).

[*35]**

[LEdHR7B]** [7B] Given the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services, the dissent's contention that the record is insufficient to justify Congress' exercise of its prophylactic power is puzzling, to say the least. Just last Term in *Hibbs*, we approved the family-care leave provision of the FMLA as valid *§ 5* legislation based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional state conduct. *538 U.S., at 728-733, 155 L. Ed. 2d 953, 123 S. Ct. 1972.* **[*1992]** n17 We **[**841]** explained that because the FMLA was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, "it was easier for Congress to show a pattern of state constitutional violations" than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review. *538 U.S., at 735-737, 155 L. Ed. 2d 953, 123 S. Ct. 1972.* Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, **[***36]** and in some cases more searching, than the standard that applies to sex-based classifications. And in any event, the record of constitutional violations in this case--including judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services--far exceeds the record in *Hibbs*.

n17 Specifically, we relied on (1) a Senate Report citation to a Bureau of Labor Statistics survey revealing disparities in private-sector provision of parenting leave to men and women; (2) submissions from two sources at a hearing on the *Parental and Medical Leave Act of 1986*, a predecessor bill to the FMLA, that public-sector parental leave polices "'diffe[r] little'" from private-sector policies; (3) evidence that 15 States provided women up to one year of extended maternity leave, while only 4 States provided for similarly extended paternity leave; and (4) a House Report's quotation of a study that found that failure to implement uniform standards for parenting leave would "'leav[e] Federal employees open to discretionary and possibly unequal treatment,'" H. R. Rep. No. 103-8, pt. 2, p 11 (1993). *Hibbs, 538 U.S., at 728-733, 155 L. Ed. 2d 953, 123 S. Ct. 1972.*

[*37]**

[LEdHR1C]** [1C] The conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself: "[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and *access to public services.*" *42 U.S.C. § 12101(a)(3)* [*42 USCS § 12101*(a)(3)] (emphasis added). This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.

V

[LEdHR14A]** [14A] The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment. At the outset, we must determine the scope of that inquiry. Title II--unlike RFRA, the *Patent Remedy Act*, and the other statutes we have reviewed for validity under *§ 5* -- reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees. Petitioner urges us both to examine the broad range of Title II's applications all at once, and to treat that **[***38]** breadth as a mark of the law's invalidity. According to petitioner, the fact that Title II applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks indicates that Title II is not appropriately tailored to serve its objectives. But nothing in our case law requires us to

consider Title II, with its wide variety of applications, as an undifferentiated whole. n18 Whatever might be said **[**842]** **[*1993]** about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under *§ 5* to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid *§ 5* legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further. See *United States v. Raines, 362 U.S. 17, 26, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960)*. n19

n18

[LEdHR14B]** [14B] Contrary to The Chief Justice, *post,* at ____, *158 L. Ed. 2d, at 855-856*, neither *Garrett* nor *Florida Prepaid* lends support to the proposition that the *Boerne* test requires courts in all cases to "measur[e] the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce." In fact, the decision in *Garrett*, which severed *Title I of the ADA* from Title II for purposes of the *§ 5* inquiry, demonstrates that courts need not examine "the full breadth of the statute" all at once. Moreover, *Garrett* and *Florida Prepaid*, like all of our other recent *§ 5* cases, concerned legislation that narrowly targeted the enforcement of a single constitutional right; for that reason, neither speaks to the issue presented in this case.

Nor is The Chief Justice's approach compelled by the nature of the *Boerne* inquiry. The answer to the question *Boerne* asks--whether a piece of legislation attempts substantively to redefine a constitutional guarantee--logically focuses on the manner in which the legislation operates to enforce that particular guarantee. It is unclear what, if anything, examining Title II's application to hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts. **[***39]**

n19 In *Raines*, a State subject to suit under the *Civil Rights Act of 1957* contended that the law exceeded Congress' power to enforce the *Fifteenth Amendment* because it prohibited "any person," and not just state actors, from interfering with voting rights. We rejected that argument, concluding that "if the complaint here called for an application of the statute clearly constitutional under the *Fifteenth Amendment*, that should have been an end to the question of constitutionality." *362 U.S., at 24-25, 4 L. Ed. 2d 524, 80 S. Ct. 519.*

[LEdHR1D]** [1D] Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult **[***40]** and intractable proble[m]" warranted "added prophylactic measures in response." *Hibbs, 538 U.S., at 737, 155 L. Ed. 2d 953, 123 S. Ct. 1972* (internal quotation marks omitted).

[LEdHR1E]** [1E] **[**LEdHR15]** [15] The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. *42 U.S.C. § 12131(2)* [*42 USCS § 12131*(2)]. But Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. *Ibid.* As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways. In the case of facilities built or altered after **[**843]** 1992, the regulations require compliance with specific architectural **[***41]** accessibility standards. *28 CFR § 35.151 (2003)*. But in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. *§ 35.150(b)(1)*. Only if **[*1994]** these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. *Ibid.* And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service. *§§ 35.150(a)(2), (a)(3)*.

[LEdHR1F]** [1F] **[**LEdHR16]** [16] This

duty to accommodate is perfectly consistent with the well-established due process principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts. *Boddie, 401 U.S., at 379, 28 L. Ed. 2d 113, 91 S. Ct. 780* (internal quotation marks and citation omitted). n20 Our cases have recognized a number of affirmative obligations that flow from **[***42]** this principle: the duty to waive filing fees in certain family-law and criminal cases, n21 the duty to provide transcripts to criminal defendants seeking review of their convictions, n22 and the duty to provide counsel to certain criminal defendants. n23 Each of these cases makes clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne, 521 U.S., at 532, 138 L. Ed. 624, 117 S. Ct. 2157*; *Kimel, 528 U.S., at 86, 145 L. Ed. 2d 522, 120 S. Ct. 631.* n24 It is, rather, a reasonable **[**844]** prophylactic measure, reasonably targeted to a legitimate end.

n20 Because this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne*'s prohibition on irrational discrimination. See *Garrett, 531 U.S., at 372, 148 L. Ed. 2d 866, 121 S. Ct. 955.* **[***43]**

n21 *Boddie v. Connecticut, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)* (divorce filing fee); *M.L.B. v. S.L.J., 519 U.S. 102, 136 L. Ed. 2d 473, 117 S. Ct. 555 (1996)* (record fee in parental rights termination action); *Smith v. Bennett, 365 U.S. 708, 6 L. Ed. 2d 39, 81 S. Ct. 895 (1961)* (filing fee for habeas petitions); *Burns v. Ohio, 360 U.S. 252, 3 L. Ed. 2d 1209, 79 S. Ct. 1164 (1959)* (filing fee for direct appeal in criminal case).

n22 *Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956).*

n23 *Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963)* (trial counsel for persons charged with felony offenses); *Douglas v. California, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963)* (counsel for direct appeals as of right).

n24 The Chief Justice contends that Title II cannot be understood as remedial legislation because it "subjects a State to liability for failing to make a vast array of special accommodations, *without regard for whether the failure to accommodate results in a constitutional wrong.*" *Post, at ____, 158 L. Ed. 2d, at 856-857* (emphasis in original). But as we have often acknowledged, Congress "is not confined to the enactment of legislation that merely parrots the precise wording of the *Fourteenth Amendment*," and may prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel, 528 U.S., at 81, 145 L. Ed. 2d 522, 120 S. Ct. 631.* Cf. *Hibbs, 538 U.S. 721, 155 L. Ed. 2d 953, 123 S. Ct. 1972* (upholding the FMLA as valid remedial legislation without regard to whether failure to provide the statutorily mandated 12 weeks' leave results in a violation of the *Fourteenth Amendment*).

[*44]**

[LEdHR1G]** [1G] For these reasons, we conclude that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' *§ 5* authority to enforce the guarantees of the *Fourteenth Amendment.* The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

CONCURBY: SOUTER; GINSBURG

CONCUR: **[*1995]** Justice **Souter,** with whom Justice **Ginsburg** joins, concurring.

I join the Court's opinion subject to the same caveats about the Court's recent cases on the *Eleventh Amendment* and *§ 5* of the Fourteenth that I noted in *Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 740, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003)* (Souter, J., concurring).

Although I concur in the Court's approach applying the congruence-and-proportionality criteria to *Title II of the Americans with Disabilities Act of 1990* as a guarantee of access to courts and related rights, I note that if the Court engaged in a more expansive enquiry as The Chief Justice suggests, *post,* at ____, *158 L. Ed. 2d, at 855* (dissenting opinion), the evidence to be considered would underscore the appropriateness of action under *§ 5* to address the situation of disabled individuals before the courts, for that evidence **[***45]** would show that the judiciary itself has endorsed the

basis for some of the very discrimination subject to congressional remedy under *§ 5. Buck v. Bell, 274 U.S. 200, 71 L. Ed. 1000, 47 S. Ct. 584 (1927)*, was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities. See *id., at 207, 71 L. Ed. 1000, 47 S. Ct. 584* ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough"). Laws compelling sterilization were often accompanied by others indiscriminately requiring institutionalization, and prohibiting certain individuals with disabilities from marrying, from voting, from attending public schools, and even from appearing in public. One administrative action along these lines was judicially sustained in part as a justified precaution against the very sight of a child with cerebral palsy, lest he "produc[e] a depressing and nauseating effect" upon others. *State ex rel. Beattie v. Board of Ed. of Antigo, 169 Wis. 231, 232, 172 N. W. 153 (1919)* **[***46]** (approving his exclusion from public school). n1

n1 See generally *Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 463-464, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)* (Marshall, J., concurring in judgment in part and dissenting in part); Burgdorf & Burgdorf, A History of Unequal Treatment, *15 Santa Clara Law. 855 (1975)*; Brief for United States 17-19.

Many of these laws were enacted to implement the quondam science of eugenics, which peaked in the **[**845]** 1920's, yet the statutes and their judicial vindications sat on the books long after eugenics lapsed into discredit. n2 See U. S. Civil Rights Commission, Accommodating the Spectrum of Individual Abilities 19-20 (1983). Quite apart from the fateful inspiration behind them, one pervasive fault of these provisions was their failure to reflect the "amount of flexibility and freedom" required to deal with "the wide variation in the abilities and needs" of people with disabilities. *Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 445, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).* **[***47]** Instead, like other invidious discrimination, they classified people without regard to individual capacities, and by that lack of regard did great harm. In sustaining the application of Title II today, the Court takes a welcome step away from the judiciary's prior endorsement of blunt instruments imposing legal handicaps.

n2 As the majority opinion shows, some of them persist to this day, *ante*, at ____ - ____, *158 L. Ed. 2d, at 837-839*, to say nothing of their lingering effects on society.

[*1996]

Justice **Ginsburg**, with whom Justice **Souter** and Justice **Breyer** join, concurring.

For the reasons stated by the Court, and mindful of Congress' objective in enacting the Americans with Disabilities Act--the elimination or reduction of physical and social structures that impede people with some present, past, or perceived impairments from contributing, according to their talents, to our Nation's social, economic, and civic life--I join the Court's opinion.

The Americans with Disabilities Act of 1990 (ADA or Act), *42 U.S.C. § § 12101-12213* **[***48]** [*42 USCS § § 12101*-12213], is a measure expected to advance equal-citizenship stature for persons with disabilities. See Bagenstos, Subordination, Stigma, and "Disability," *86 Va. L. Rev. 397, 471 (2000)* (ADA aims both to "guarante[e] a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities, and [to] protec[t] society against the loss of valuable talents"). As the Court's opinion relates, see *ante*, at ____, *158 L. Ed. 2d, at 833*, the Act comprises three parts, prohibiting discrimination in employment (Title I), public services, programs, and activities (Title II), and public accommodations (Title III). This case concerns Title II, which controls the conduct of administrators of public undertakings.

Including individuals with disabilities among people who count in composing "We the People," Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation. Central to the Act's primary objective, Congress extended the statute's range to reach all government activities, *§ 12132* (Title II), and required "reasonable modifications to [public actors'] rules, **[***49]** policies, or practices," *§ § 12131(2)-12132* (Title II). See also *§ 12112(b)(5)* (defining discrimination to include the failure to provide "reasonable accommodations") (Title I); *§ 12182(b)(2)(A)(ii)* (requiring "reasonable modifications in [public accommodations'] policies, practices, or procedures") (Title III); *Bagenstos, supra, at 435* (ADA supporters sought "to eliminate the practices that combine with physical and mental conditions to **[**846]** create what we call 'disability.' The society-wide universal access rules serve this function on the macro level, and the requirements of individualized accommodation and modification fill in the gaps on the micro level." (footnote omitted)).

In *Olmstead v. L. C., 527 U.S. 581, 144 L. Ed. 2d 540, 119 S. Ct. 2176 (1999)*, this Court responded with fidelity to the ADA's accommodation theme when it held

a State accountable for failing to provide community residential placements for people with disabilities. The State argued in *Olmstead* that it had acted impartially, for it provided no community placements for individuals without disabilities. *Id., at 598, 144 L. Ed. 2d 540, 119 S. Ct. 2176.* Congress, the Court observed, advanced in the ADA "a more comprehensive view of the **[***50]** concept of discrimination," *ibid.*, one that embraced failures to provide "reasonable accommodations," *id., at 601, 144 L. Ed. 2d 540, 119 S. Ct. 2176.* The Court today is similarly faithful to the Act's demand for reasonable accommodation to secure access and avoid exclusion.

Legislation calling upon all government actors to respect the dignity of individuals with disabilities is entirely compatible with our Constitution's commitment to federalism, properly conceived. It seems to me not conducive to a harmonious federal system to require Congress, before it exercises authority under *§ 5 of the Fourteenth Amendment*, essentially to indict each State for disregarding the equal-citizenship stature of persons with disabilities. **[*1997]** But see *post*, at ____, *158 L. Ed. 2d, at 863-864* (Scalia, J., dissenting) ("Congress may impose prophylactic *§ 5* legislation only upon those particular States in which there has been an identified history of relevant constitutional violations."); *Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 743, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003)* (Scalia, J., dissenting) (to be controlled by *§ 5* legislation, State "can demand that *it* be shown to have been acting in violation of the *Fourteenth Amendment*" (emphasis **[***51]** in original)). Members of Congress are understandably reluctant to condemn their own States as constitutional violators, complicit in maintaining the isolated and unequal status of persons with disabilities. I would not disarm a National Legislature for resisting an adversarial approach to lawmaking better suited to the courtroom.

As the Court's opinion documents, see *ante*, at ____ - ____, *158 L. Ed. 2d, at 837-841*, Congress considered a body of evidence showing that in diverse parts of our Nation, and at various levels of government, persons with disabilities encounter access barriers to public facilities and services. That record, the Court rightly holds, at least as it bears on access to courts, sufficed to warrant the barrier-lowering, dignity-respecting national solution the People's representatives in Congress elected to order.

DISSENTBY: REHNQUIST; SCALIA

DISSENT: Chief Justice **Rehnquist,** with whom Justice **Kennedy** and Justice **Thomas** join, dissenting.

In *Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001)*, we held that Congress did not validly abrogate States' *Eleventh Amendment* immunity when it enacted Title I of the Americans with Disabilities Act of 1990 (ADA), *42 U.S.C. §§ 12111-12117* [*42 USCS §§ 12111-12117*] **[***52]** . **[**847]** Today, the Court concludes that Title II of that *Act, §§ 12131-12165*, does validly abrogate that immunity, at least insofar "as it applies to the class of cases implicating the fundamental right of access to the courts." *Ante, at ____, 158 L. Ed. 2d, at 841-842.* Because today's decision is irreconcilable with *Garrett* and the well-established principles it embodies, I dissent.

The *Eleventh Amendment* bars private lawsuits in federal court against an unconsenting State. *E.g., Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003)*; *Garrett, supra, at 363, 148 L. Ed. 2d 866, 121 S. Ct. 955*; *Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000).* Congress may overcome States' sovereign immunity and authorize such suits only if it unmistakably expresses its intent to do so, and only if it "acts pursuant to a valid exercise of its power under *§ 5 of the Fourteenth Amendment.*" *Hibbs, supra, at 726, 155 L. Ed. 2d 953, 123 S. Ct. 1972.* While the Court correctly holds that Congress satisfied the first prerequisite, *ante*, at ____, *158 L. Ed. 2d, at 833*, I disagree with its conclusion that Title II is valid *§ 5* enforcement legislation.

Section 5 of the Fourteenth Amendment grants Congress the authority "to **[***53]** enforce, by appropriate legislation," the familiar substantive guarantees contained in *§ 1* of that Amendment. *U.S. Const., Amdt. 14, § 1* ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). Congress' power to enact "appropriate" enforcement legislation is not limited to "mere legislative repetition" of this Court's *Fourteenth Amendment* jurisprudence. *Garrett, supra, at 365, 148 L. Ed. 2d 866, 121 S. Ct. 955.* Congress may "remedy" and "deter" state violations of constitutional rights by "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Hibbs, 538 U.S., at 727, 155 L. Ed. 2d 953, 123 S. Ct. 1972* (internal quotation **[*1998]** marks omitted). Such "prophylactic" legislation, however, "must be an appropriate remedy for identified constitutional violations, not 'an attempt to substantively redefine the States' legal obligations.'" *Id., at 727-728, 155 L. Ed. 953, 123 S. Ct. 1972* (quoting *Kimel, supra, at 88, 145 L. Ed. 2d 522, 120 S. Ct. 631*); *City of Boerne v. Flores, 521 U.S. 507, 525, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997)* (enforcement power is "corrective or preventive, not **[***54]** definitional"). To ensure that Congress does not usurp this Court's responsibility to define the meaning of the *Fourteenth Amendment*, valid *§ 5* legislation must exhibit "'congruence and

proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Hibbs, supra, at 728, 155 L. Ed. 953, 123 S. Ct. 1972* (quoting *City of Boerne, supra, at 520, 138 L. Ed. 2d 624, 117 S. Ct. 2157*). While the Court today pays lipservice to the "congruence and proportionality" test, see *ante*, at ____, *158 L. Ed. 2d, at 835*, it applies it in a manner inconsistent with our recent precedents.

In *Garrett*, we conducted the three-step inquiry first enunciated in *City of Boerne* to determine whether *Title I of the ADA* satisfied the congruence-and-proportionality test. A faithful application of that test to **[**848]** Title II reveals that it too "'substantively redefine[s],'" rather than permissibly enforces, the rights protected by the *Fourteenth Amendment. Hibbs, supra, at 728, 155 L. Ed. 2d 953, 123 S. Ct. 1972.*

The first step is to "identify with some precision the scope of the constitutional right at issue." *Garrett, supra, at 365, 148 L. Ed. 2d 866, 121 S. Ct. 955.* This task was easy in *Garrett, Hibbs, Kimel,* and *City of Boerne* because the statutes in those **[***55]** cases sought to enforce only one constitutional right. In *Garrett*, for example, the statute addressed the equal protection right of disabled persons to be free from unconstitutional employment discrimination. *Garrett, supra, at 365, 148 L. Ed. 2d 866, 121 S. Ct. 955.* See also *Hibbs, supra, at 728, 155 L. Ed. 2d 953, 123 S. Ct. 1972* ("The [*Family and Medical Leave Act of 1993* (FMLA)] aims to protect the right to be free from gender-based discrimination in the workplace"); *Kimel, supra, at 83, 145 L. Ed. 2d 522, 120 S. Ct. 631* (right to be free from unconstitutional age discrimination in employment); *City of Boerne, supra, at 529, 138 L. Ed. 2d 624, 117 S. Ct. 2157* (right of free exercise of religion). The scope of that right, we explained, is quite limited; indeed, the *Equal Protection Clause* permits a State to classify on the basis of disability so long as it has a rational basis for doing so. *Garrett, supra, at 366-368, 148 L. Ed. 2d 866, 121 S. Ct. 955* (discussing *Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)*); see also *ante*, at ____, *158 L. Ed. 2d, at 836-837.*

In this case, the task of identifying the scope of the relevant constitutional protection is more difficult because Title II purports to enforce a panoply of constitutional rights of disabled persons: **[***56]** not only the equal protection right against irrational discrimination, but also certain rights protected by the *Due Process Clause. Ante*, at ____ - ____, *158 L. Ed. 2d, at 836-837.* However, because the Court ultimately upholds Title II "as it applies to the class of cases implicating the fundamental right of access to the courts," *ante*, at ____, *158 L. Ed. 2d, at 841-842*, the proper inquiry focuses on the scope of those due process rights. The Court cites four access-to-the-courts rights that Title II purportedly enforces: (1) the right of the criminal defendant to be present at all critical stages of the trial, *Faretta v. California, 422 U.S. 806, 819, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975)*; (2) the right of litigants to have a "meaningful opportunity to be heard" in judicial proceedings, *Boddie v. Connecticut, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)*; (3) the right of the criminal defendant to trial by a jury composed of a fair cross section of the community, **[*1999]** *Taylor v. Louisiana, 419 U.S. 522, 530, 42 L. Ed. 2d 690, 95 S. Ct. 692 (1975)*; and (4) the public right of access to criminal proceedings, *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside, 478 U.S. 1, 8-15, 92 L. Ed. 2d 1, 106 S. Ct. 2735 (1986). Ante*, at ____ - ____, *158 L. Ed. 2d, at 836-837.*

Having traced the "metes **[***57]** and bounds" of the constitutional rights at issue, the next step in the congruence-and-proportionality inquiry requires us to examine whether Congress "identified a history and pattern" of violations of these constitutional rights by the States with respect to the disabled. *Garrett, 531 U.S., at 368, 148 L. Ed. 2d 866, 121 S. Ct. 955.* This step is crucial **[**849]** to determining whether Title II is a legitimate attempt to remedy or prevent actual constitutional violations by the States or an illegitimate attempt to rewrite the constitutional provisions it purports to enforce. Indeed, "Congress' *§ 5* power is appropriately exercised *only* in response to state transgressions." *Ibid.* (emphasis added). But the majority identifies nothing in the legislative record that shows Congress was responding to widespread violations of the due process rights of disabled persons.

Rather than limiting its discussion of constitutional violations to the due process rights on which it ultimately relies, the majority sets out on a wide-ranging account of societal discrimination against the disabled. *Ante, at ____, 158 L. Ed. 2d, at 837-839.* This digression recounts historical discrimination against the disabled through institutionalization laws, **[***58]** restrictions on marriage, voting, and public education, conditions in mental hospitals, and various other forms of unequal treatment in the administration of public programs and services. Some of this evidence would be relevant if the Court were considering the constitutionality of the statute as a whole; but the Court rejects that approach in favor of a narrower "as-applied" inquiry. n1 We discounted much the same type of outdated, generalized evidence in *Garrett* as unsupportive of Title I's ban on employment discrimination. *531 U.S., at 368-372, 148 L. Ed. 2d 866, 121 S. Ct. 955*; see also *City of Boerne, 521 U.S., at 530, 138 L. Ed. 2d 624, 117 S. Ct. 2157* (noting that the "legislative record lacks . . . modern instances of . . . religious bigotry"). The evidence here is likewise irrelevant to Title II's purported enforcement of Due Process access-to-the-courts rights.

n1 For further discussion of the propriety of this approach, see *infra*, at ____ - ____, *158 L. Ed. 2d, at 855.*

Even if it were proper to consider this broader category of evidence, much of it does not **[***59]** concern *unconstitutional* action by the *States.* The bulk of the Court's evidence concerns discrimination by nonstate governments, rather than the States themselves. n2 We have repeatedly held that such evidence is irrelevant to the inquiry whether Congress has validly abrogated *Eleventh Amendment* immunity, a privilege enjoyed only by the sovereign States. *Garrett, supra, at 368-369, 148 L. Ed. 2d 866, 121 S. Ct. 955*; *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 640, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999)*; *Kimel, 528 U.S., at 89, 145 L. Ed. 2d 522, 120 S. Ct. 631.* Moreover, the majority today cites the same congressional task force evidence we rejected in *Garrett.* **[*2000]** *Ante, at ____, 158 L. Ed. 2d, at 839* (citing *Garrett, supra, at 379, 148 L. Ed. 2d 866, 121 S. Ct. 955* (Breyer, J., dissenting), and *531 U.S., at 391-424, 148 L. Ed. 2d 866, 121 S.* **[**850]** *Ct. 955* (App. C to opinion of Breyer, J., dissenting) (chronicling instances of "unequal treatment" in the "administration of public programs")). As in *Garrett*, this "unexamined, anecdotal" evidence does not suffice. *531 U.S., at 370, 148 L. Ed. 2d 866, 121 S. Ct. 955.* Most of the brief anecdotes do not involve States at all, and those that do are not sufficiently detailed to determine whether the instances of "unequal **[***60]** treatment" were irrational, and thus unconstitutional under our decision in *Cleburne. Garrett, supra, at 370-371, 148 L. Ed. 2d 866, 121 S. Ct. 955.* Therefore, even outside the "access to the courts" context, the Court identifies few, if any, constitutional violations perpetrated by the States against disabled persons. n3

n2 *E.g., ante,* at ____, *158 L. Ed. 2d, at 838* (citing *Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)* (irrational discrimination by city zoning board)); *ante,* at ____, n 12, *158 L. Ed. 2d, at 838* (citing *New York ex rel. Spitzer v. County of Delaware, 82 F. Supp. 2d 12 (NDNY 2000)* (ADA lawsuit *brought by State* against a county)); *ante,* at ____ - ____, n 11, *158 L. Ed. 2d, at 838* (citing four cases concerning local school boards' unconstitutional actions); *ante,* at ____, n 13, *158 L. Ed. 2d, at 839* (citing one case involving conditions in federal prison and another involving a county jail inmate); *ante,* at ____, *158 L. Ed. 2d, at 839* (referring to "hundreds of examples of unequal treatment . . . by States *and their political subdivisions*" (emphasis added)).

n3 The majority obscures this fact by repeatedly referring to congressional findings of "discrimination" and "unequal treatment." Of course, generic findings of discrimination and unequal treatment *vel non* are insufficient to show a pattern of *constitutional* violations where rational-basis scrutiny applies. *Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 370, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001).*

[*61]**

With respect to the due process "access to the courts" rights on which the Court ultimately relies, Congress' failure to identify a pattern of actual constitutional violations by the States is even more striking. Indeed, there is *nothing* in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials. n4

n4 Certainly, respondents Lane and Jones were not denied these constitutional rights. The majority admits that Lane was able to attend the initial hearing of his criminal trial. *Ante, at ____, 158 L. Ed. 2d, at 831.* Lane was arrested for failing to appear at his second hearing only after he refused assistance from officers dispatched by the court to help him to the courtroom. *Ante, at ____, 158 L. Ed. 2d, at 831.* The court conducted a preliminary hearing in the first-floor library to accommodate Lane's disability, App. to Pet. for Cert. 16, and later offered to move all further proceedings in the case to a handicapped-accessible courthouse in a nearby town. In light of these facts, it can hardly be said that the State violated Lane's right to be present at his trial; indeed, it made affirmative attempts to secure that right. Respondent Jones, a disabled court reporter, does not seriously contend that she suffered a constitutional injury.

[*62]**

The Court's attempt to disguise the lack of congressional documentation with a few citations to judicial decisions cannot retroactively provide support for Title II, and in any event, fails on its own terms. See, *e.g., Garrett, 531 U.S., at 368, 148 L. Ed. 2d 866, 121 S. Ct. 955* ("[W]e examine whether *Congress* identified a history and pattern" of constitutional violations); *ibid.* ("[t]he *legislative record* . . . fails to show that *Congress* did in fact identify a pattern" of constitutional violations)

(emphases added). Indeed, because this type of constitutional violation occurs in connection with litigation, it is particularly telling that the majority is able to identify only *two* reported cases finding that a disabled person's federal constitutional rights were violated. n5 See *ante*, at ____, n 14, *158 L. Ed. 2d, at 839* (citing *Ferrell v. Estelle, 568 F.2d 1128, 1132-1133 (CA5)*, opinion withdrawn as moot, *573 F.2d 867 (1978)*; *People v. Rivera, [**851] 125 Misc. 2d 516, 528, 480 N. Y. S. 2d 426, 434 (Sup. Ct. 1984))*. n6

n5 As two Justices noted in *Garrett*, if the States were violating the Due Process rights of disabled . . . persons, "one would have expected to find in decisions of the courts . . . extensive litigation and discussion of the constitutional violations." *531 U.S., at 376, 148 L. Ed. 2d 866, 121 S. Ct. 955* (Kennedy, J., joined by O'Connor, J., concurring). **[***63]**

n6 The balance of the Court's citations refer to cases arising *after* enactment of the ADA or do not contain findings of federal constitutional violations. *Ante*, at ____ - ____, n 14, *158 L. Ed. 2d, at 838-839* (citing *Layton v. Elder, 143 F.3d 469 (CA8 1998)* (post-ADA case finding ADA violations only); *Matthews v. Jefferson, 29 F. Supp. 2d 525 (WD Ark. 1998)* (same); *Galloway v. Superior Court, 816 F. Supp. 12 (DC 1993)* (same); *State v. Schaim, 65 Ohio St. 3d 51, 1992 Ohio 31, 600 N.E.2d 661 (1992)* (remanded for hearing on constitutional issue); *People v. Green, 148 Misc. 2d 666, 561 N. Y. S. 2d 130 (County Ct. 1990)* (finding violation of state constitution only); *DeLong v. Brumbaugh, 703 F. Supp. 399 (WD Pa. 1989)* (statute upheld against facial constitutional challenge; *Rehabilitation Act of 1973* violations only); *Pomerantz v. Los Angeles County, 674 F.2d 1288 (CA9 1982)* (Rehabilitation Act of 1973 claim; challenged jury-service statute later amended)). Accordingly, they offer no support whatsoever for the notion that Title II is a valid response to documented constitutional violations.

[*64]**

[*2001] Lacking any real evidence that Congress was responding to actual due process violations, the majority relies primarily on three items to justify its decision: (1) a 1983 US Civil Rights Commission Report showing that 76% of "public services and programs housed in state-owned buildings were inaccessible" to persons with disabilities, *ante*, at ____ - ____, *158 L. Ed. 2d, at 839-840*; (2) testimony before a House subcommittee regarding the "physical inaccessibility" of local courthouses, *ante*, at ____, *158 L. Ed. 2d, at 839-840*; and (3) evidence submitted to Congress' designated ADA task force that purportedly contains "numerous examples of the exclusion of persons with disabilities from state judicial services and programs." *Ibid.*

On closer examination, however, the Civil Rights Commission's finding consists of a single conclusory sentence in its report, and it is far from clear that its finding even includes courthouses. The House subcommittee report, for its part, contains the testimony of *two* witnesses, neither of whom reported being denied the right to be present at constitutionally protected court proceedings. n7 Indeed, the witnesses' testimony, like the U. S. Civil Rights Commission Report, concerns only physical **[***65]** barriers to access, and does not address whether States either provided means to overcome those barriers or alternative locations for proceedings involving disabled persons. Cf., n 4, *supra* (describing alternative means of access offered to respondent Lane).

n7 Oversight Hearing on H. R. 4468 before the House Subcommittee on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess., 40-41 (1988) (statement of Emeka Nwojke) (explaining that he encountered difficulties appearing in court due to physical characteristics of the courthouse and courtroom and the rudeness of court employees); *id.*, at 48 (statement of Ellen Telker) (blind attorney "know[s] of at least one courthouse in New Haven where the elevators do not have tactile markings").

Based on the majority's description, *ante*, at ____, *158 L. Ed. 2d, at 840*, the report of the ADA Task Force on the Rights and Empowerment of Americans with Disabilities sounds promising. But the report itself says nothing about any disabled person being denied access **[***66]** to court. The Court thus apparently relies solely on a general citation to the Government's Lodging in *Garrett*, O. T. 2000, No. 99-1240 which, amidst thousands of pages, contains only a few anecdotal handwritten reports of physically inaccessible courthouses, again with no mention of whether States provided alternate means of access. This evidence, moreover, **[**852]** was submitted not to Congress, but only to the task force, which itself made no findings regarding disabled persons' access to judicial proceedings. Cf. *Garrett, 531 U.S., at 370-371, 148 L. Ed. 2d 866, 121 S. Ct. 955* (rejecting anecdotal task force evidence for similar reasons). As we noted in *Garrett*, "had Congress truly understood this [task force] information as reflecting a pattern of unconstitutional

behavior by the States, one would expect some mention of that conclusion in **[*2002]** the Act's legislative findings." *Id., at 371, 148 L. Ed. 2d 866, 121 S. Ct. 955.* Yet neither the legislative findings, nor even the Committee Reports, contain a single mention of the seemingly vital topic of access to the courts. n8 Cf. *ibid.; Florida Prepaid, 527 U.S., at 641, 144 L. Ed. 575, 119 S. Ct. 2199* (observing that Senate Report on Patent and Plant Variety Protection Remedy Clarification **[***67]** Act (Patent Remedy Act) "contains no evidence that unremedied patent infringement by States had become a problem of national import"). To the contrary, the Senate Report on the ADA observed that "[a]ll states currently mandate accessibility in newly constructed state-owned public buildings." S. Rep. No. 101-116, p 92 (1989).

n8 The majority rather peculiarly points to Congress' finding that "'discrimination against individuals with disabilities persists in such critical areas as *access to public services*'" as evidence that Congress sought to vindicate the Due Process rights of disabled persons. *Ante, at ____, 158 L. Ed. 2d, at 841* (quoting *42 U.S.C. § 12101(a)(3)* [*42 USCS § 12101*(a)(3)] (emphasis added by the Court)). However, one does not usually refer to the right to attend a judicial proceeding as "access to [a] public servic[e]." Given the lack of any concern over courthouse accessibility issues in the legislative history, it is highly unlikely that this legislative finding obliquely refers to state violations of the due process rights of disabled persons to attend judicial proceedings.

[*68]**

Even if the anecdotal evidence and conclusory statements relied on by the majority could be properly considered, the mere existence of an architecturally "inaccessible" courthouse--*i.e.*, one a disabled person cannot utilize without assistance--does not state a constitutional violation. A violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding. We have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance. Indeed, the fact that the State may need to assist an individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding. Nor does an "inaccessible" courthouse violate the *Equal Protection Clause*, unless it is irrational for the State not to alter the courthouse to make it "accessible." But financial considerations almost always furnish a rational basis for a State to decline to make those alterations. See *Garrett, 531 U.S., at 372, 148 L. Ed. 2d 866, 121 S. Ct. 955* (noting that it would be constitutional for an employer to "conserve scarce financial resources" by **[***69]** hiring employees who can use existing facilities rather than making the facilities accessible to disabled employees). Thus, evidence regarding inaccessible courthouses, because it is not evidence of constitutional violations, provides no basis to abrogate States' sovereign immunity.

The near-total lack of actual constitutional violations in the congressional record is reminiscent of *Garrett*, wherein we found that the same **[**853]** type of minimal anecdotal evidence "f[e]ll far short of even suggesting the pattern of unconstitutional [state action] on which *§ 5* legislation must be based." *Id., at 370, 148 L. Ed. 2d 866, 121 S. Ct. 955.* See also *Kimel, 528 U.S., at 91, 145 L. Ed. 2d 522, 120 S. Ct. 631* ("Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary"); *Florida Prepaid, supra, at 645, 144 L. Ed. 2d 575, 119 S. Ct. 2199* ("The legislative record thus suggests that the Patent Remedy Act did not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic *§ 5* legislation" (quoting *City of Boerne, 521 U.S., at 526, 138 L. Ed. 2d 624, 117 S. Ct. 2157*)). **[***70]**

[*2003] The barren record here should likewise be fatal to the majority's holding that Title II is valid legislation enforcing due process rights that involve access to the courts. This conclusion gains even more support when Title II's nonexistent record of constitutional violations is compared with legislation that we have sustained as valid *§ 5* enforcement legislation. See, *e.g., Hibbs, 538 U.S., at 729-732, 155 L. Ed. 2d 953, 123 S. Ct. 1972* (tracing the extensive legislative record documenting States' gender discrimination in employment leave policies); *South Carolina v. Katzenbach, 383 U.S. 301, 312-313, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966)* (same with respect to racial discrimination in voting rights). Accordingly, Title II can only be understood as a congressional attempt to "rewrite the *Fourteenth Amendment* law laid down by this Court," rather than a legitimate effort to remedy or prevent state violations of that Amendment. *Garrett, supra, at 374, 148 L. Ed. 2d 866, 121 S. Ct. 955.* n9

n9 The Court correctly explains that "'it [i]s easier for Congress to show a pattern of state constitutional violations'" when it targets state action that triggers a higher level of constitutional scrutiny. *Ante*, at 18 (quoting *Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003)).* However,

this Court's precedents attest that Congress may not dispense with the required showing altogether simply because it purports to enforce due process rights. See *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 645-646, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999)* (invalidating Patent Remedy Act, which purported to enforce the *Due Process Clause*, because Congress failed to identify a record of constitutional violations); *City of Boerne v. Flores, 521 U.S. 507, 530-531, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997)* (same with respect to *Religious Freedom Restoration Act of 1993* (RFRA)). As the foregoing discussion demonstrates, that is precisely what the Court has sanctioned here. Because the record is utterly devoid of proof that Congress was responding to state violations of due process access-to-the-courts rights, this case is controlled by *Florida Prepaid* and *City of Boerne*, rather than *Hibbs*.

[*71]**

The third step of our congruence-and-proportionality inquiry removes any doubt as to whether Title II is valid *§ 5* legislation. At this stage, we ask whether the rights and remedies created by Title II are congruent and proportional to the constitutional rights it purports to enforce and the record of constitutional violations adduced by Congress. *Hibbs, supra, at 737-739, 155 L. Ed. 2d 953, 123 S. Ct. 1972*; *Garrett, supra, at 372-373, 148 L. Ed. 2d 866, 121 S. Ct. 955*.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, **[**854]** or be subjected to discrimination by any such entity." *42 U.S.C. § 12132 [42 USCS § 12132]*. A disabled person is considered "qualified" if he "meets the essential eligibility requirements" for the receipt of the entity's services or participation in the entity's programs, "*with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services.*" *§ 12131(2)* (emphasis added). The ADA's findings make **[***72]** clear that Congress believed it was attacking "discrimination" in all areas of public services, as well as the "discriminatory effect" of "architectural, transportation, and communication barriers." *§§ 12101(a)(3), (a)(5)*. In sum, Title II requires, on pain of money damages, special accommodations for disabled persons in virtually every interaction they have with the State.

"Despite subjecting States to this expansive liability," the broad terms of Title II "d[o] nothing to limit the coverage of the Act to cases involving arguable constitutional violations." *Florida Prepaid, 527 U.S., at 646, 144 L. Ed. 2d 575, 119 S. Ct. 2199*. By requiring **[*2004]** special accommodation and the elimination of programs that have a disparate impact on the disabled, Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination. We invalidated Title I's similar requirements in *Garrett*, observing that "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the *Equal Protection Clause*." *531 U.S., at 368*; *id., at 372-373, 148 L. Ed. 2d 866, 121 S. Ct. 955* (contrasting Title I's reasonable accommodation and disparate impact provisions **[***73]** with the *Fourteenth Amendment's* requirements). Title II fails for the same reason. Like Title I, Title II may be laudable public policy, but it cannot be seriously disputed that it is also an attempt to legislatively "redefine the States' legal obligations" under the *Fourteenth Amendment. Kimel, 528 U.S., at 88, 145 L. Ed. 2d 522, 120 S. Ct. 631*.

The majority, however, claims that Title II also vindicates fundamental rights protected by the *Due Process Clause* --in addition to access to the courts--that are subject to heightened *Fourteenth Amendment* scrutiny. *Ante, at ____, 158 L. Ed. 2d, at 837* (citing *Dunn v. Blumstein, 405 U.S. 330, 336-337, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972)* (voting); *Shapiro v. Thompson, 394 U.S. 618, 634, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969)* (right to move to a new jurisdiction); *Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942)* (marriage and procreation)). But Title II is not tailored to provide prophylactic protection of these rights; instead, it applies to any service, program, or activity provided by any entity. Its provisions affect transportation, health, education, and recreation programs, among many others, all of which are accorded only rational-basis scrutiny under the **[***74]** *Equal Protection Clause*. A requirement of accommodation for the disabled at a state-owned amusement park or sports stadium, for example, bears no permissible prophylactic relationship to enabling disabled persons to exercise their fundamental constitutional rights. Thus, as with Title I in *Garrett*, the Patent Remedy Act in *Florida Prepaid*, the Age Discrimination in Employment Act of 1967 in *Kimel*, and the RFRA in *City of Boerne*, all of **[**855]** which we invalidated as attempts to substantively redefine the *Fourteenth Amendment*, it is unlikely "that many of the [state actions] affected by [Title II] ha[ve] any likelihood of being unconstitutional." *City of Boerne, supra, at 532, 138 L. Ed. 2d 624, 117 S. Ct. 2157*. Viewed as a whole, then, there is little doubt that Title II of the ADA does not validly abrogate state sovereign immunity. n10

n10 Title II's all-encompassing approach to regulating public services contrasts starkly with the more closely tailored laws we have upheld as legitimate prophylactic § 5 legislation. In *Hibbs*, for example, the FMLA was "narrowly targeted" to remedy widespread gender discrimination in the availability of family leave. *538 U.S., at 738-739, 155 L. Ed. 2d 953, 123 S. Ct. 1972* (distinguishing *City of Boerne, Kimel v. Florida Bd. of Regents, 528 U.S. 62, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000)*, and *Garrett* on this ground). Similarly, in cases involving enforcement of the *Fifteenth Amendment*, we upheld "limited remedial scheme[s]" that were narrowly tailored to address massive evidence of discrimination in voting. *Garrett, 531 U.S., at 373, 148 L. Ed. 2d 866, 121 S. Ct. 955* (discussing *South Carolina v. Katzenbach, 383 U.S. 301, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966)*). Unlike these statutes, Title II's "indiscriminate scope . . . is particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy." *Florida Prepaid, 527 U.S., at 647, 144 L. Ed. 2d 575, 119 S. Ct. 2199.*

[*75]**

The majority concludes that Title II's massive overbreadth can be cured by considering the statute only "as it applies to the class of cases implicating the accessibility of judicial services." *Ante, at ____, 158 L. Ed. 2d, at 842* **[*2005]** (citing *United States v. Raines, 362 U.S. 17, 26, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960)*). I have grave doubts about importing an "as applied" approach into the § 5 context. While the majority is of course correct that this Court normally only considers the application of a statute to a particular case, the proper inquiry under *City of Boerne* and its progeny is somewhat different. In applying the congruence-and-proportionality test, we ask whether Congress has attempted to statutorily redefine the constitutional rights protected by the *Fourteenth Amendment*. This question can only be answered by measuring the breadth of a statute's coverage against the scope of the constitutional rights it purports to enforce and the record of violations it purports to remedy.

In conducting its as-applied analysis, however, the majority posits a hypothetical statute, never enacted by Congress, that applies only to courthouses. The effect is to rig the congruence-and-proportionality test by artificially **[***76]** constricting the scope of the statute to closely mirror a recognized constitutional right. But Title II is not susceptible of being carved up in this manner; it applies indiscriminately to all "services," "programs," or "activities" of any "public entity." Thus, the majority's approach is not really an assessment of whether Title II is "appropriate *legislation*" at all, *U.S. Const., Amdt. 14, § 5* (emphasis added), but a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation.

Our § 5 precedents do not support this as-applied approach. In each case, we measured the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce. If we had arbitrarily constricted the scope of the statutes to match the scope of a core constitutional right, those cases might have come out differently. In *Garrett*, for example, Title I might **[**856]** have been upheld "as applied" to irrational employment discrimination; or in *Florida Prepaid*, the Patent Remedy Act might have been upheld "as applied" to intentional, uncompensated patent infringements. **[***77]** It is thus not surprising that the only authority cited by the majority is *Raines, supra*, a case decided long before we enunciated the congruence-and-proportionality test. n11

n11 *Raines* is inapposite in any event. The Court there considered the constitutionality of the Civil Rights Act of 1957--a statute designed to enforce the *Fifteenth Amendment* --whose narrowly tailored substantive provisions could "unquestionably" be applied to state actors (like the respondents therein). *362 U.S., at 25, 26, 4 L. Ed. 2d 524, 80 S. Ct. 519*. The only question presented was whether the statute was facially invalid because it might be read to constrain nonstate actors as well. *Id., at 20, 4 L. Ed. 2d 524, 80 S. Ct. 519*. The Court upheld the statute as applied to respondents and declined to entertain the facial challenge. *Id., at 24-26, 4 L. Ed. 2d 524, 80 S. Ct. 519*. The situation in this case is much different: The very question presented is whether Title II's indiscriminate substantive provisions can constitutionally be applied to the petitioner State. *Raines* thus provides no support for avoiding this question by conjuring up an imaginary statute with substantive provisions that might pass the congruence-and-proportionality test.

[*78]**

I fear that the Court's adoption of an as-applied approach eliminates any incentive for Congress to craft § 5 legislation for the purpose of remedying or deterring actual constitutional violations. Congress can now simply rely on the courts to sort out which hypothetical applications of an undifferentiated statute, such as Title II, may be enforced against the States. All the while, States will be subjected to substantial litigation in a

piecemeal attempt to vindicate their *Eleventh Amendment* rights. The majority's as-applied approach **[*2006]** simply cannot be squared with either our recent precedent or the proper role of the Judiciary.

Even in the limited courthouse-access context, Title II does not properly abrogate state sovereign immunity. As demonstrated in depth above, Congress utterly failed to identify any evidence that disabled persons were denied constitutionally protected access to judicial proceedings. Without this predicate showing, Title II, even if we were to hypothesize that it applies only to courthouses, cannot be viewed as a congruent and proportional response to state constitutional violations. *Garrett, 531 U.S., at 368, 148 L. Ed. 2d 866, 121 S. Ct. 955* ("Congress' *§ 5* authority is appropriately **[***79]** exercised only in response to state transgressions").

Moreover, even in the courthouse-access context, Title II requires substantially more than the *Due Process Clause*. Title II subjects States to private lawsuits if, *inter alia,* they fail to make "reasonable modifications" to facilities, such as removing "architectural . . . barriers." *42 U.S.C. §§ 12131(2), 12132* [*42 USCS §§ 12131*(2), 12132]. Yet the statute is not limited to occasions when the failure to modify results, or will likely result, in an actual due process violation--*i.e.*, the inability of a disabled person to participate in a judicial proceeding. Indeed, liability is triggered if an inaccessible building results in a disabled person being "subjected to discrimination"--a term that presumably encompasses any sort of inconvenience in accessing the facility, for whatever purpose. *§ 12132*.

The majority's reliance on *Boddie v. Connecticut, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)*, and other **[**857]** cases in which we held that due process requires the State to waive filing fees for indigent litigants, is unavailing. While these cases support the principle that the State must remove financial requirements that in fact prevent an individual from **[***80]** exercising his constitutional rights, they certainly do not support a statute that subjects a State to liability for failing to make a vast array of special accommodations, *without regard for whether the failure to accommodate results in a constitutional wrong.*

In this respect, Title II is analogous to the Patent Remedy Act at issue in *Florida Prepaid.* That statute subjected States to monetary liability for any act of patent infringement. *527 U.S., at 646-647, 144 L. Ed. 2d 575, 119 S. Ct. 2199.* Thus, "Congress did nothing to limit" the Act's coverage "to cases involving arguable [Due Process] violations," such as when the infringement was nonnegligent or uncompensated. *Ibid.* Similarly here, Congress has authorized private damages suits against a State for merely maintaining a courthouse that is not readily accessible to the disabled, without regard to whether a disabled person's due process rights are ever violated. Accordingly, even as applied to the "access to the courts" context, Title II's "indiscriminate scope offends [the congruence-and-proportionality] principle," particularly in light of the lack of record evidence showing that inaccessible courthouses cause actual Due Process **[***81]** violations. *Id., at 647, 144 L. Ed. 2d 575, 119 S. Ct. 2199.* n12

n12 The majority's invocation of *Hibbs* to justify Title II's overbreadth is unpersuasive. See *ante*, at ____, n 24, *158 L. Ed. 2d, at 843-844.* The *Hibbs* Court concluded that "in light of the evidence before Congress" the FMLA's 12-week family-leave provision was necessary to "achiev[e] Congress' remedial object." *538 U. S, at 748, 155 L. Ed. 2d 953, 123 S. Ct. 1972.* The Court found that the legislative record included not only evidence of state constitutional violations, but evidence that a provision merely enforcing the *Equal Protection Clause* would actually perpetuate the gender stereotypes Congress sought to eradicate because employers could simply eliminate family leave entirely. *Ibid.* Without comparable evidence of constitutional violations and the necessity of prophylactic measures, the Court has no basis on which to uphold Title II's special-accommodation requirements.

[*2007] For the foregoing reasons, I respectfully dissent.

Justice **Scalia,** dissenting.

Section 5 of the Fourteenth Amendment provides **[***82]** that Congress "shall have power to enforce, by appropriate legislation, the provisions" of that Amendment--including, of course, the Amendment's *Equal Protection* and *Due Process Clauses.* In *Katzenbach v. Morgan, 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966)*, we decided that Congress could, under this provision, forbid English literacy tests for Puerto Rican voters in New York State who met certain educational criteria. Though those tests were not themselves in violation of the *Fourteenth Amendment*, we held that *§ 5* authorizes prophylactic legislation--that is, "legislation that proscribes facially constitutional conduct," *Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003)*, when Congress determines such proscription is desirable "'to make the amendments fully effective,'" *Morgan, supra, at 648, 16 L. Ed. 2d 828, 86 S. Ct. 1717* (quoting *Ex parte Virginia, 100 U.S. 339, 345, 25 L. Ed. 676 (1880))*. We said that "the measure of what constitutes 'appropriate **[**858]** legislation' under *§ 5 of the Fourteenth Amendment*" is the flexible "necessary and

proper" standard of *McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 342, 421, 4 L. Ed. 579 (1819). Morgan, 384 U.S., at 651, 16 L. Ed. 2d 828, 86 S. Ct. 1717.* **[***83]** We described *§ 5* as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the *Fourteenth Amendment.*" *Ibid.*

The *Morgan* opinion followed close upon our decision in *South Carolina v. Katzenbach, 383 U.S. 301, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966)*, which had upheld prophylactic application of the similarly worded "enforce" provision of the *Fifteenth Amendment (§ 2)* to challenged provisions of the Voting Rights Act of 1965. But the *Fourteenth Amendment*, unlike the *Fifteenth*, is not limited to denial of the franchise and not limited to the denial of other rights on the basis of race. In *City of Boerne v. Flores, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997)*, we confronted Congress's inevitable expansion of the *Fourteenth Amendment*, as interpreted in *Morgan*, beyond the field of racial discrimination. n1 There Congress had sought, in the Religious Freedom Restoration Act of 1993, 107 Stat 1488, *42 U.S.C. § 2000bb et seq.et seq.* [*42 USCS § § 2000bb et seq.*], to impose upon the States an interpretation of the *First Amendment's Free Exercise Clause* that this Court had explicitly rejected. **[***84]** To avoid placing in congressional hands effective power to rewrite the *Bill of Rights* through the medium of *§ 5*, we formulated the "congruence and proportionality" test for determining what legislation is "appropriate." When Congress enacts prophylactic legislation, we said, there must be "proportionality or congruence between the means adopted and the legitimate end to be achieved." *521 U.S., at 533, 138 L. Ed. 2d 624, 117 S. Ct. 2157.*

> n1 Congress had previously attempted such an extension in the Voting Rights Act Amendments of 1970, 84 Stat 318, which sought to lower the voting age in state elections from 21 to 18. This extension was rejected, but in three separate opinions, none of which commanded a majority of the Court. See *infra*, at ____, *158 L. Ed. 2d, at 863.*

I joined the Court's opinion in *Boerne* with some misgiving. I have generally rejected tests based on such malleable standards as "proportionality," because **[*2008]** they have a way of turning into vehicles for the implementation of individual judges' policy preferences. See, *e.g., Ewing v. California, 538 U.S. 11, 31-32, 155 L. Ed. 2d 108, 123 S. Ct. 1179 (2003)* **[***85]** (Scalia, J., concurring in judgment) (declining to apply a "proportionality" test to the *Eighth Amendment's* ban on cruel and unusual punishment); *Stenberg v. Carhart, 530 U.S. 914, 954-956, 147 L. Ed. 2d 743, 120 S. Ct. 2597 (2000)* (Scalia, J., dissenting) (declining to apply the "undue burden" standard of *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)*); *BMW of North America, Inc. v. Gore, 517 U.S. 559, 599, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996)* (Scalia, J., dissenting) (declining to apply a "reasonableness" test to punitive damages under the *Due Process Clause*). Even so, I signed on to the "congruence and proportionality" test in *Boerne*, and adhered to it in later cases: *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999)*, where we held that the provisions of the **[**859]** Patent and Plant Variety Protection Remedy Clarification Act, *35 U.S.C. § § 271(h), 296(a)* [*35 USCS § § 271*(h), 296(a)], were "'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,'" *527 U.S., at 646, 144 L. Ed. 2d 575, 119 S. Ct. 2199* (quoting **[***86]** *Boerne, supra, at 532, 138 L. Ed. 2d 624, 117 S. Ct. 2157*); *Kimel v. Florida Bd. of Regents, 528 U.S. 62, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000)*, where we held that the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, *29 U.S.C. § 621 et seq. (1994 ed. and Supp. III)* [*29 USCS § § 621 et seq.*], imposed on state and local governments requirements "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act," *528 U.S., at 83, 145 L. Ed. 2d 522, 120 S. Ct. 631*; *United States v. Morrison, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000)*, where we held that a provision of the Violence Against Women Act, *42 U.S.C. § 13981* [*42 USCS § 13981*], lacked congruence and proportionality because it was "not aimed at proscribing discrimination by officials which the *Fourteenth Amendment* might not itself proscribe," *529 U.S., at 626, 146 L. Ed. 2d 658, 120 S. Ct. 1740*; and *Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001)*, where we said that Title I of the Americans with Disabilities Act of 1990 (ADA), 104 Stat 330, *42 U.S.C. § § 12111-12117* [*42 USCS § § 12111*-12117], raised "the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*," *531 U.S., at 372, 148 L. Ed. 2d 866, 121 S. Ct. 955.* **[***87]**

But these cases were soon followed by *Nevada Dept. of Human Resources* v *Hibbs*, in which the Court held that the Family and Medical Leave Act of 1993, 107 Stat 9, *29 U.S.C. § 2612 et seq.* [*29 USCS § § 2612 et seq.*], which required States to provide their employees up to 12 work weeks of unpaid leave (for various purposes) annually, was "congruent and proportional to its remedial object [of preventing sex discrimination], and can be understood as responsive to, or designed to prevent, unconstitutional behavior." *538 U.S., at 740, 155 L. Ed.*

2d 953, 123 S. Ct. 1972 (internal quotation marks omitted). I joined Justice Kennedy's dissent, which established (conclusively, I thought) that Congress had identified no unconstitutional state action to which the statute could conceivably be a proportional response. And now we have today's decision, holding that Title II of the ADA is congruent and proportional to the remediation of constitutional violations, in the face of what seems to me a compelling demonstration of the opposite by the Chief Justice's dissent.

I yield to the lessons of experience. The "congruence and proportionality" standard, like all such flabby tests, is a standing **[*2009]** invitation to **[***88]** judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to **[**860]** do battle with the United States Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed. As I wrote for the Court in an earlier case, "low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239, 131 L. Ed. 2d 328, 115 S. Ct. 1447 (1995).*

I would replace "congruence and proportionality" with another test--one that provides a clear, enforceable limitation supported by the text of *§ 5. Section 5* grants Congress the power "to *enforce* **[***89]** , by appropriate legislation," the other provisions of the *Fourteenth Amendment. U.S. Const., Amdt. 14* (emphasis added). *Morgan* notwithstanding, one does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, "enforce" a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit--even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit. And one does not "enforce" the right of access to the courts at issue in this case, see *ante*, at ____, *158 L. Ed. 2d, at 841-842*, by requiring that disabled persons be provided access to *all* of the "services, programs, or activities" furnished or conducted by the State, *42 U.S.C. § 12132 [42 USCS § 12132]*. That is simply not what the power to enforce means--or ever meant. The 1860 edition of Noah Webster's American Dictionary of the English Language, current when the *Fourteenth Amendment* was adopted, defined "enforce" as: "To put in execution; to cause to take effect; as, to *enforce* the laws." *Id.*, at 396. See also J. Worcester, Dictionary **[***90]** of the English Language 484 (1860) ("To put in force; to cause to be applied or executed; as, 'To *enforce* a law'"). Nothing in *§ 5* allows Congress to go *beyond* the provisions of the *Fourteenth Amendment* to proscribe, prevent, or "remedy" conduct that does not *itself* violate any provision of the *Fourteenth Amendment*. So-called "prophylactic legislation" is reinforcement rather than enforcement.

Morgan asserted that this commonsense interpretation "would confine the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of *§ 1 of the Amendment.*" *384 U.S., at 648-649, 16 L. Ed. 2d 828, 86 S. Ct. 1717.* That is not so. One must remember "that in 1866 the lower federal courts had no general jurisdiction of cases alleging a deprivation of rights secured by the Constitution." R. Berger, Government By Judiciary 147 (2d ed. 1997). If, just after the *Fourteenth Amendment* was ratified, a State had enacted a law imposing racially discriminatory literacy tests (different questions for different races) a **[***91]** citizen prejudiced by such a test would have had no means of asserting his constitutional right to be free of it. *Section 5* authorizes Congress to create a cause of action through which the citizen may vindicate **[*2010]** his *Fourteenth Amendment* rights. One of the first pieces **[**861]** of legislation passed under Congress's *§ 5* power was the Ku Klux Klan Act of April 20, 1871, 17 Stat 13, entitled "*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States*, and for other Purposes." Section 1 of that Act, later codified as Rev Stat § 1979, *42 U.S.C. § 1983 [42 USCS § 1983]*, authorized a cause of action against "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." 17 Stat 13. *Section 5* would also authorize measures that do not restrict the States' substantive scope of action but impose requirements directly related to the *facilitation* of "enforcement"--for example, reporting requirements **[***92]** that would enable violations of the *Fourteenth Amendment* to be identified. n2 But what *§ 5* does *not* authorize is so-called "prophylactic" measures, prohibiting primary conduct that is itself not forbidden by the *Fourteenth Amendment*.

n2 Professor Tribe's treatise gives some examples of such measures that facilitate

enforcement in the context of the *Fifteenth Amendment*:

> "The Civil Rights Act of 1957, 71 Stat. 634, authorized the Attorney General to seek injunctions against interference with the right to vote on racial grounds. The Civil Rights Act of 1960, 74 Stat. 86, permitted joinder of states as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systemic discrimination. The Civil Rights Act of 1964, 78 Stat. 241, expedited the hearing of voting cases before three-judge courts . . . ." L. Tribe, American Constitutional Law 931, n 5 (3d ed. 2000).

The major impediment to the approach I have suggested is *stare decisis*. A **[***93]** lot of water has gone under the bridge since *Morgan*, and many important and well-accepted measures, such as the Voting Rights Act, assume the validity of *Morgan* and *South Carolina*. As Prof. Archibald Cox put it in his Supreme Court Foreword: "The etymological meaning of *section 5* may favor the narrower reading. Literally, 'to enforce' means to compel performance of the obligations imposed; but the linguistic argument lost much of its force once the *South Carolina* and *Morgan* cases decided that the power to enforce embraces any measure appropriate to effectuating the performance of the state's constitutional duty." Foreword: Constitutional Adjudication and the Promotion of Human Rights, *80 Harv. L. Rev. 91, 110-111 (1966)*.

However, *South Carolina* and *Morgan*, all of our later cases except *Hibbs* that give an expansive meaning to "enforce" in *§ 5 of the Fourteenth Amendment*, and all of our earlier cases that even suggest such an expansive meaning in dicta, involved congressional measures that were directed exclusively against, or were used in the particular case to remedy, *racial discrimination*. See *Oregon v. Mitchell, 400 U.S. 112, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970)* **[***94]** (see discussion *infra*); *Ex parte Virginia, 100 U.S. 339, 25 L. Ed. 676 (1880)* (dictum in a case involving a statute that imposed criminal penalties for officials' racial discrimination in jury selection); *Strauder v. West Virginia, 100 U.S. 303, 311-312, 25 L. Ed. 664 (1880)* (dictum in a case involving a statute that permitted removal to federal court of a black man's claim that his jury had been selected in a racially discriminatory manner); *Virginia v. Rives, 100 U.S. 313, 318, 25 L.* **[**862]** *Ed. 667 (1880)* (dictum in a racial discrimination case involving the same statute). See also **[*2011]** *City of Rome v. United States, 446 U.S. 156, 173-178, 64 L. Ed. 2d 119, 100 S. Ct. 1548 (1980)* (upholding as valid legislation under *§ 2 of the Fifteenth Amendment* the most sweeping provisions of the Voting Rights Act of 1965); *Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439-441, 20 L. Ed. 2d 1189, 88 S. Ct. 2186 (1968)* (upholding a law, *42 U.S.C. § 1982 [42 USCS § 1982]*, banning public or private racial discrimination in the sale and rental of property as appropriate legislation under *§ 2 of the Thirteenth Amendment*).

Giving *§ 5* more expansive scope with regard to measures directed against racial discrimination **[***95]** by the States accords to practices that are distinctively violative of the principal purpose of the *Fourteenth Amendment* a priority of attention that this Court envisioned from the beginning, and that has repeatedly been reflected in our opinions. In the *Slaughter-House Cases, 83 U.S. 36, 16 Wall. 36, 81, 21 L. Ed. 394 (1873)*, the Court's first confrontation with the *Fourteenth Amendment*, we said the following with respect to the *Equal Protection Clause*:

> "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

Racial discrimination was the practice at issue in the early cases (cited in *Morgan*) that gave such an expansive description of the effects of *§ 5*. See *384 U.S., at 648, 16 L. Ed. 2d 828, 86 S. Ct. 1717* (citing *Ex parte Virginia*); *384 U.S., at 651, 16 L. Ed. 2d 828, 86 S. Ct. 1717* (citing *Strauder* v *West Virginia*, and *Virginia* v *Rives*). n3 In those early days, bear in mind, the guarantee of equal protection had **[***96]** not been extended beyond race to sex, age, and the many other categories it now covers. Also still to be developed were the incorporation doctrine (which holds that the *Fourteenth Amendment* incorporates and applies against the States the *Bill of Rights*, see *Duncan v. Louisiana, 391 U.S. 145, 147-148, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968))* and the doctrine of so-called "substantive due process" (which holds that the *Fourteenth Amendment's Due Process Clause* **[**863]** protects unenumerated liberties, see generally *Lawrence v. Texas, 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003)*; *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992))*. Thus, the *Fourteenth Amendment* did not include the many guarantees that it now provides. In such a seemingly limited context, it did not appear to be a massive expansion of **[*2012]** congressional power to interpret *§ 5* broadly. Broad interpretation was particularly appropriate with regard to racial discrimination, since that was the principal evil against which the *Equal Protection Clause* was directed, and the principal

constitutional prohibition that some of the States stubbornly ignored. The former is still true, and the latter remained true at least **[***97]** as late as *Morgan.*

n3 A later case cited in *Morgan, James Everard's Breweries v. Day, 265 U.S. 545, 558-563, 68 L. Ed. 1174, 44 S. Ct. 628 (1924)*, applied the more flexible standard of *McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819)*, to the *Eighteenth Amendment*, which, in *§ 1*, forbade the "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States . . . for beverage purposes" and provided, in *§ 2*, that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." Congress had provided, in the Supplemental Prohibition Act of 1921, § 2, 42 Stat 222, that "only spirituous and vinous liquor may be prescribed for medicinal purposes." That was challenged as unconstitutional because it went beyond the regulation of intoxicating liquors for beverage purposes, and hence beyond "enforcement." In an opinion citing none of the *Thirteenth*, *Fourteenth*, and *Fifteenth Amendment* cases discussed in text, the Court held that the *McCulloch* v *Maryland* test applied. Unlike what is at issue here, that case did not involve a power to control the States in respects not otherwise permitted by the Constitution. The only consequence of the Federal Government's going beyond "enforcement" narrowly defined was its arguable incursion upon powers left to the States--which is essentially the same issue that *McCulloch* addressed.

[*98]**

When congressional regulation has not been targeted at racial discrimination, we have given narrower scope to *§ 5*. In *Oregon v. Mitchell, 400 U.S. 112, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970)*, the Court upheld, under *§ 2 of the Fifteenth Amendment*, that provision of the Voting Rights Act Amendments of 1970, 84 Stat 314, which barred literacy tests and similar voter-eligibility requirements--classic tools of the racial discrimination in voting that the *Fifteenth Amendment* forbids; but found to be *beyond* the *§ 5* power of the *Fourteenth Amendment* the provision that lowered the voting age from 21 to 18 in state elections. See *400 U.S., at 124-130, 27 L. Ed. 2d 272, 91 S. Ct. 260* (opinion of Black, J.); *id., at 153-154, 27 L. Ed. 2d 272, 91 S. Ct. 260* (Harlan, J., concurring in part and dissenting in part); *id., at 293-296, 27 L. Ed. 2d 272, 91 S. Ct. 260* (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in part and dissenting in part). A third provision, which forbade States from disqualifying voters by reason of residency requirements, was also upheld--but only a minority of the Justices believed that *§ 5* was adequate authority. Justice Black's opinion in that case described exactly the line I am drawing here, suggesting that Congress's **[***99]** enforcement power is broadest when directed "to the goal of eliminating discrimination on account of race." *Id., at 130, 27 L. Ed. 2d 272, 91 S. Ct. 260.* And of course the *results* reached in *Boerne, Florida Prepaid, Kimel, Morrison*, and *Garrett* are consistent with the narrower compass afforded congressional regulation that does not protect against or prevent racial discrimination.

Thus, principally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States. I would not, however, abandon the requirement that Congress may impose prophylactic *§ 5* legislation only upon those particular States in which there has been an identified history of relevant constitutional violations. See *Hibbs, 538 U.S., at 741-743, 155 L. Ed. 2d 953, 123 S. Ct. 1972* (Scalia, J., dissenting); *Morrison, 529 U.S., at 626-627, 146 L. Ed. 2d 658, 120 S. Ct. 1740*; *Morgan, 384 U.S., at 666-667, 669, 670-671, 16 L. Ed. 2d 828, 86 S. Ct. 1717* (Harlan, J., dissenting). n4 I would also adhere to the requirement that the prophylactic remedy predicated upon such **[**864]** state violations must be directed against the States or state actors rather than the public at large. **[***100]** See *Morrison, supra, at 625-626, 146 L. Ed. 2d 658, 120 S. Ct. 1740.* And I would not, of course, permit any congressional measures that violate other **[*2013]** provisions of the Constitution. When those requirements have been met, however, I shall leave it to Congress, under constraints no tighter than those of the *Necessary and Proper Clause*, to decide what measures are appropriate under *§ 5* to prevent or remedy racial discrimination by the States.

n4 Dicta in one of our earlier cases seemed to suggest that even *nonprophylactic* provisions could not be adopted under *§ 5* except in response to a State's constitutional violations:

"When the State has been guilty of no violation of [the *Fourteenth Amendment's*] provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments,

recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress." *United States v. Harris, 106 U.S. 629, 639, 27 L. Ed. 290, 1 S. Ct. 601, 4 Ky. L. Rptr. 739 (1883)*. I do not see the textual basis for this interpretation.

[*101]**

I shall also not subject to "congruence and proportionality" analysis congressional action under *§ 5* that is *not* directed to racial discrimination. Rather, I shall give full effect to that action when it consists of "enforcement" of the provisions of the *Fourteenth Amendment*, within the broad but not unlimited meaning of that term I have described above. When it goes beyond enforcement to prophylaxis, however, I shall consider it ultra vires. The present legislation is plainly of the latter sort.

* * *

Requiring access for disabled persons to all public buildings cannot remotely be considered a means of "enforcing" the *Fourteenth Amendment*. The considerations of long accepted practice and of policy that sanctioned such distortion of language where state racial discrimination is at issue do not apply in this field of social policy far removed from the principal object of the *Civil War Amendments*. "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the **[***102]** aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'" *United States v. 12 200-ft. Reels of Super 8mm Film, 413 U.S. 123, 127, 37 L. Ed. 2d 500, 93 S. Ct. 2665 (1973)* (Burger, C. J., for the Court) (footnote omitted). It is past time to draw a line limiting the uncontrolled spread of a well-intentioned textual distortion. For these reasons, I respectfully dissent from the judgment of the Court.

Justice **Thomas**, dissenting.

I join The Chief Justice's dissent. I agree that Title II of the Americans with Disabilities Act of 1990 cannot be a congruent and proportional remedy to the States' alleged practice of denying disabled persons access to the courts. Not only did Congress fail to identify any evidence of such a **[**865]** practice when it enacted the ADA, *ante*, at ____, ____, *158 L. Ed. 2d, at 833-834, 836*, Title II regulates far more than the provision of access to the courts, *ante*, at ____ - ____, *158 L. Ed. 2d, at 839-840*. Because I joined the dissent in *Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003)*, and continue to believe that **[***103]** *Hibbs* was wrongly decided, I write separately only to disavow any reliance on *Hibbs* in reaching this conclusion.

REFERENCES: Go To Full Text Opinion

Go to Supreme Court Brief(s)

Go to Supreme Court Transcripts

15 Am Jur 2d, Civil Rights § 280; 72 Am Jur 2d, States, Territories, and Dependencies § § 99, 101; Am Jur 2d New Topic Service, Americans With Disabilities Act: Analysis and Implications § 308

USCS, *Constitution, Amendments 11, 14; 42 USCS § § 12131 et seq.*

L Ed Digest, Civil Rights § 3; Constitutional Law § 786

L Ed Index, Access to Courts; Americans with Disabilities Act; Due Process; *Eleventh Amendment*

Annotation References

Supreme Court's views as to what constitutes reasonable accommodation or modification, for purposes of Americans with Disabilities Act of 1990, as amended **[***104]** (ADA) (*42 USCS § § 12101 et seq.*). *152 L Ed 2d 1141.*

Supreme Court's views concerning § 5 of *Federal Constitution's Fourteenth Amendment*, authorizing Congress to enforce *Fourteenth Amendment's* provisions. *146 L Ed 2d 1035.*

Accused's right, under Federal Constitution, to be present at accused's own trial--Supreme Court cases. *146 L Ed 2d 985.*

Congressional abrogation of states' immunity, under or as reflected in *Federal Constitution's Eleventh Amendment*, from suits in federal court--Supreme Court cases. *144 L Ed 2d 869.*

What, in view of Supreme Court, constitutes the constitutional right of access to the courts. *52 L Ed 2d 779.*

Comment Note.--What provisions of the *Federal Constitution's Bill of Rights* are applicable to the states. *18 L Ed 2d 1388, 23 L Ed 2d 985.*

AUBARY DELANO-PYLE, Plaintiff-Appellee, versus VICTORIA COUNTY, TEXAS; ET AL., Defendants, VICTORIA COUNTY, TEXAS, Defendant-Appellant.

No. 00-41038

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

302 F.3d 567; 2002 U.S. App. LEXIS 18060; 13 Am. Disabilities Cas. (BNA) 18060

September 3, 2002, Decided
September 3, 2002, Filed

SUBSEQUENT HISTORY: Rehearing, en banc, denied by *Delano-Pyle v. Victoria County, 54 Fed. Appx. 415, 2002 U.S. App. LEXIS 24507 (2002)*
US Supreme Court certiorari denied by *Vict. County v. Pyle, 2003 U.S. LEXIS 5495* (U.S., Oct. 6, 2003)

PRIOR HISTORY: [**1] Appeals from the United States District Court for the Southern District of Texas. B-99-CV-171. Hilda G Tagle, US District Judge.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff arrestee sued defendants, including a county, under Title II of the Americans with Disabilities Act, *42 U.S.C.S. § 12132* et seq. (ADA), the Rehabilitation Act (RA), and state law claims. The arrestee, who was hearing-impaired, was in a car accident. He was arrested after failing sobriety tests. The United States District Court for the Southern District of Texas denied the county's motion under *Fed. R. Civ. P. 50* and the county appealed.

OVERVIEW: The officer administered the sobriety tests after finding prescription pain medication in the arrestee's vehicle. The arrestee legally possessed the medication and he was not impaired. He failed the tests because he could not hear the officer's instructions, and although he informed the officer of his hearing impairment, he alleged that the officer made no effort to accommodate him. The appellate court noted that the county failed to renew its motion or judgment as a matter of law at the close of all the evidence. Thus, the county waived any challenge on appeal to the sufficiency of the evidence. The appellate court held that because the arrestee sued under the ADA and RA, he was not required to show that the county had a policy of discrimination as in suits under *42 U.S.C.S. § 1983.* Finally, the appellate court held that the facts supported the finding of intentional discrimination. It was clear that no matter how loudly the officer spoke, the arrestee could not understand what he was saying. This merely annoyed the officer and he continued to further instruct the arrestee through verbal communication; yet, the officer admitted that he knew the arrestee had a hearing problem.

OUTCOME: The appellate court affirmed the decision of the district court.

CORE TERMS: matter of law, disability, directed verdict, waived, intentional discrimination, warnings, nose, deliberate indifference, departure, minimis, public entity, policymaker, subjected, effective, renew, claims asserted, plain error, insufficiency, interrogatory, noncompliance, asserting, answered, compensatory damages, case-in-chief, demonstrating, communicated, sobriety, tilted, verbal, arm

LexisNexis(R) Headnotes

Civil Procedure > Trials > Judgment as Matter of Law
Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN1] An appellate court reviews a district court's ruling on a motion under *Fed. R. Civ. P. 50(a)* for judgment as a matter of law de novo. Under this standard, the appellate court views all of the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion. A district court may not grant a *Fed. R. Civ. P. 50(a)* motion unless a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.

Civil Procedure > Appeals > Standards of Review > Standards Generally

[HN2] An appellate court reviews a jury's verdict for sufficiency of the evidence by determining whether reasonable and fair-minded jurors in the exercise of impartial judgment might reach different conclusions.

Civil Procedure > Jury Trials > Province of Court & Jury

[HN3] A mere scintilla of evidence is insufficient to present a question for the jury. However, it is the function of the jury as the traditional finder of facts, and not a court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Civil Procedure > Trials > Judgment as Matter of Law

[HN4] According to *Fed. R. Civ. P. 50(b)*, it is well-settled that a motion for directed verdict or judgment as a matter of law made at the close of a plaintiff's case-in-chief must be renewed at the close of the all evidence in the case.

Civil Procedure > Trials > Judgment as Matter of Law

[HN5] In cases where the Fifth Circuit has departed from the strict requirements of *Fed. R. Civ. P. 50(b)*, the deviation from the rule was de minimis, and the purposes of the rule were deemed accomplished.

Civil Procedure > Trials > Judgment as Matter of Law

[HN6] The rule requiring a motion for directed verdict or judgment as a matter of law under *Fed. R. Civ. P. 50* made at the close of a plaintiff's case-in-chief to be renewed at the close of the all evidence in the case serves two fundamental purposes: (1) to enable a trial court to re-examine the sufficiency of the evidence as a matter of law if, after verdict, the court must address a motion for judgment as a matter of law; and (2) to alert the opposing party to the insufficiency of his case before being submitted to the jury.

Civil Procedure > Trials > Judgment as Matter of Law
Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN7] The Fifth Circuit has allowed a party to raise a sufficiency of the evidence contention, although failing to comply with the requirements of *Fed. R. Civ. P. 50(b)*, when the purposes of the rule have been satisfied because the court has had the opportunity to reconsider sufficiency as a matter of law and because the nonmovant has had the opportunity to cure any insufficiencies. Generally, however, the Fifth Circuit has only excused departures from *Fed. R. Civ. P. 50(b)* where the trial court had taken under advisement an earlier motion for directed verdict, which was made after the plaintiff rested; the defendant presented no more than two witnesses prior to closing; only a few minutes elapsed from the time the motion for directed verdict was made and the conclusion of all the evidence; and no rebuttal evidence was introduced by the plaintiff. In the absence of the circumstances stated above, the purposes of the rule have not been satisfied, and therefore, the complaining party has waived its right to contest the jury's verdict on sufficiency of the evidence grounds.

Civil Procedure > Trials > Judgment as Matter of Law
Civil Procedure > Appeals > Standards of Review > Plain Error

[HN8] Where a party fails to timely move for judgment as a matter of law under *Fed. R. Civ. P. 50*, and such failure does not constitute a de minimis departure, the issue is considered waived and the issue is treated as being raised for the first time on appeal. Accordingly, in this situation, an appellate court reviews any challenge to the sufficiency of the evidence only for plain error.

Civil Procedure > Appeals > Standards of Review > Plain Error

[HN9] Under the plain error standard, an appellate court will only reverse a jury's verdict if the judgment works a manifest miscarriage of justice. Such review requires the appellate court to merely ascertain if a plaintiff has submitted any evidence in support of his claim. If it is determined that no evidence supports the jury's verdict, the appellate court will not simply enter judgment for the defendant; instead, the appellate court must order a new trial.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
Constitutional Law > Civil Rights Enforcement > Rehabilitation Act > Coverage

[HN10] Title II of the Americans with Disabilities Act, *42 U.S.C.S. § 12132* et seq. (ADA), is a federal anti-discrimination statute designed to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. The Rehabilitation Act, codified at *29 U.S.C.S. § 794* (RA), was enacted to ensure that handicapped individuals are

not denied jobs or other benefits because of prejudiced attitudes or ignorance of others. The language in the ADA generally tracks the language set forth in the RA. In fact, the ADA expressly provides that the remedies, procedures and rights available under the RA are also accessible under the ADA. *42 U.S.C.S. § 12133.* Thus, jurisprudence interpreting either section is applicable to both.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
Constitutional Law > Civil Rights Enforcement > Rehabilitation Act > Coverage
[HN11] A plaintiff asserting a private cause of action for violations of Title II of the Americans with Disabilities Act, *42 U.S.C.S. § 12132* et seq., or the Rehabilitation Act, codified at *29 U.S.C.S. § 794,* may only recover compensatory damages upon a showing of intentional discrimination.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN12] See *42 U.S.C.S. § 12132.*

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN13] A "public entity" is broadly defined under Title II of the Americans with Disabilities Act, *42 U.S.C.S. § 12132* et seq., as any state or local government and any department, agency, special purpose district, or other instrumentality of a state or states or local government. *42 U.S.C.S. § 12131*(1).

Constitutional Law > Civil Rights Enforcement > Rehabilitation Act > Coverage
[HN14] See *29 U.S.C.S. § 794.*

Constitutional Law > Civil Rights Enforcement > Immunity > Local Governments
[HN15] Municipal liability under *42 U.S.C.S. § 1983* requires proof of three elements: (1) a policymaker; (2) an official policy; and (3) a violation of constitutional rights whose "moving force" is the policy or custom.

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions
Labor & Employment Law > Discrimination > Disability Discrimination > Rehabilitation Act
[HN16] The Americans with Disabilities Act, *42 U.S.C.S. § 12101* et seq. (ADA), and the Rehabilitation Act, codified at *29 U.S.C.S. § 794,* impose liability upon certain employers for disability discrimination. The definition of "employer" under the ADA specifically encompasses any agent of an employer covered by the statute. *42 U.S.C.S. § 12111.*

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
Constitutional Law > Civil Rights Enforcement > Rehabilitation Act > Coverage
[HN17] When a plaintiff asserts a cause of action against an employer-municipality, under either Title II of the Americans with Disabilities Act, *42 U.S.C.S. § 12132* et seq. (ADA), or the Rehabilitation Act, codified at *29 U.S.C.S. § 794* (RA), the public entity is liable for the vicarious acts of any of its employees as specifically provided by the ADA. The doctrine of respondeat superior applies to claims asserted directly under the ADA and the RA in part because the historical justification for exempting municipalities from respondeat superior liability does not apply to these statutes, and in part because the doctrine would be entirely consistent with the policy of that statute, which is to eliminate discrimination against the handicapped. Thus, the first element of a claim under *42 U.S.C.S. § 1983* -- i.e., a policymaker -- is not required under either the ADA or the RA.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN18] A county could be held liable under Title II of the Americans with Disabilities Act, *42 U.S.C.S. § 12132* et seq., even in the absence of a policy of discrimination.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
Constitutional Law > Civil Rights Enforcement > Rehabilitation Act > Coverage
[HN19] Title II of the Americans with Disabilities Act, *42 U.S.C.S. § 12132* et seq. (ADA), expressly provides that a disabled person is discriminated against when an entity fails to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services. *42 U.S.C.S. § 12182*(b)(2)(A)(iii). A plain reading of the ADA evidences that Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability. *42 U.S.C.S. § 12182*(b)(2)(A)(ii)-(iii) (1985). Thus, although it is true that for claims asserted under *42 U.S.C.S. § 1983,* an official policy must be identified, the same rule cannot be reconciled with Congress's legislative objectives in enacting the ADA and the Rehabilitation Act, codified at *29 U.S.C.S. § 794.*

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage

Constitutional Law > Civil Rights Enforcement > Rehabilitation Act > Coverage

[HN20] There is no "deliberate indifference" standard applicable to public entities for purposes of Title II of the Americans with Disabilities Act, *42 U.S.C.S. § 12132* et seq., or the Rehabilitation Act, codified at *29 U.S.C.S. § 794*. However, in order to receive compensatory damages for violations of the acts, a plaintiff must show intentional discrimination.

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For VICTORIA COUNTY, Texas, Defendant - Appellant: Kevin D Cullen, Venable Bland Proctor, Jr, Cullen, Carsner, Seerden & Cullen, Victoria, TX.

JUDGES: Before JONES, EMILIO M. GARZA, and STEWART, Circuit Judges.

OPINIONBY: CARL E. STEWART

OPINION: [*570]

CARL E. STEWART, Circuit Judge:

Victoria County appeals the district court's denial of its motion for judgment as a matter of law on Aubary Delano-Pyle's ("Pyle") Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA") claims. For the reasons stated herein, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On July 17, 1998, Pyle, who is severely hearing-impaired, was involved in a car accident when he rear-ended another vehicle traveling on the shoulder of Highway 77 in Victoria County. Victoria County Deputies Anthony Daniel ("Daniel") and Dana Wager ("Wager") arrived at the scene of the accident in response to a report of an incoherent subject at the location. Shortly after the officers arrived, Pyle informed them of his hearing disability. While investigating the accident, Daniel searched Pyle's vehicle and discovered Hydrocodone and Darvocet. n1 Despite his knowledge of Pyle's disability, Daniel proceeded to administer three sobriety tests without asking Pyle which form of communication **[**2]** would be effective for him. Daniel testified that, prior to administering the tests, he turned on the video camera in his patrol car, which is standard procedure when an officer suspects that there may be a need for an arrest.

n1 A physician prescribed Hydrocodone to Pyle for shoulder pain and the Darvocet was prescribed to his uncle Charles Pyle. There is no evidence that Pyle was under the influence of either of the medications at the time the accident took place.

First, Daniel administered what is known as the "walk and turn" test. This test requires the individual to take nine steps, heel-to-toe, along a straight designated line while counting the steps out loud and watching his feet. After taking nine steps, the subject must then turn around and return to the starting point in the same manner. Daniel demonstrated the test for Pyle, however, Daniel had his back turned to Pyle while giving instructions. Pyle performed the task as demonstrated, but because he did not understand the instructions as communicated, **[**3]** he took more than nine steps before turning around.

Second, Daniel administered a test called the "one-leg stand." This required Pyle to stand on one-leg and count to ten. The videotape revealed that Daniel demonstrated the task, but spoke very quickly when giving instructions. Again, Pyle was able to complete the task as demonstrated, however, he counted to fourteen, rather than ten. Lastly, Daniel conducted a finger-to-nose test. Daniel instructed Pyle to stand straight with his heels together, his arms at his sides, and his head tilted back. He further requested that Pyle touch the end of his nose with his index finger by bringing his arm and hand from his side directly to the end of his nose. In demonstrating this test, Daniel tilted his head back, extended his arms, and reached and touched his nose. With his head still tilted, Daniel requested that Pyle touch his nose six times. Pyle performed the task as demonstrated, however, due to his failure to understand Daniel's instructions, he touched his nose approximately twenty-five times. Daniel concluded that Pyle **[*571]** was unable to complete the tests as instructed, and arrested him for driving while intoxicated. n2 Pyle asserts that **[**4]** he did not understand the directions given by the officer because he was unable to read his lips and, had he understood, he would have performed the tests as requested. Prior to arresting Pyle, Daniel read him his Miranda warnings. When Daniel asked Pyle if he understood his rights as communicated to him, Pyle did not respond. Daniel testified that he was not sure if Pyle understood either the verbal instructions given by Daniel during the administration of the sobriety tests or the Miranda warnings given at the scene.

n2 Pyle asserts that he was also arrested for failure to produce proof of insurance. However, the police report does not evidence such an offense.

At the police station, Daniel read Pyle his legal rights once again and wrote the Miranda warnings on a blackboard. With the knowledge that Pyle is hearing-impaired and may not have understood his verbal communications, Daniel, nonetheless, interrogated him without any accommodations to ensure that Pyle understood the circumstances of his arrest. After **[**5]** the interrogation, Daniel requested that Pyle consent to a blood test. Pyle maintains that Daniel asked him six times before he finally agreed. After passing the blood test, Pyle was released on July 19, 1998.

Subsequently, Pyle filed a lawsuit against Victoria County alleging violations of Title II of the ADA, *42 U.S.C. § 12132,* et seq.; section 504 of the RA, *29 U.S.C. § 794,* et seq.; chapter 121 of the Texas Human Resources Code ("THRC"); and *42 U.S.C. § 1983.* During trial, after Pyle rested, Victoria County moved for judgment as a matter of law pursuant to *Rule 50(a) of the Federal Rules of Civil Procedure.* The district court granted its motion on the § 1983 claim for denial of medical attention and unauthorized medical testing, but denied the motion as to Pyle's ADA, RA, and THRC claims. As to these claims, the district court ruled that a fact issue existed as to whether there was intentional discrimination or deliberate indifference in Victoria County's treatment of Pyle.

Victoria County presented its case and the claims were submitted to the jury. Victoria County did not renew its motion for judgment **[**6]** as a matter of law. Specifically, the jury found that (1) Pyle, by reason of his hearing disability, was excluded from participation in, or denied the benefits of, the services, programs, or activities of a public entity, or otherwise subjected to discrimination by Victoria County; (2) Victoria County's conduct was intentional; and (3) Victoria County's exclusion, denial, or discrimination proximately caused damages to Pyle. The jury awarded Pyle compensatory damages in the amount of $ 230,000. Victoria County appeals the denial of judgment as a matter of law on the ADA and RA claims, but does not appeal the denial on the THRC claim. n3

> n3 Pyle asserts that his THRC claim is an independent basis upon which to sustain the jury verdict absent an appeal by Victoria County. Victoria County correctly responds that the jury did not answer either of the interrogatories which related to the THRC claim, and Pyle failed to object to them not being answered. Thus, Pyle has waived this claim. See *Hess Oil Virgin Islands Corp. v. UOP, Inc., 861 F.2d 1197, 1203 (10th Cir. 1988)* (holding that when a party is aware of the jury's failure to answer an interrogatory and does not object, nor request the district court to resubmit the interrogatory to the jury, the party has waived his right to assert the issue on appeal).

[7]**

STANDARD OF REVIEW

Victoria County appeals the district court's denial of its motion for judgment as a matter of law made at the close of Pyle's **[*572]** case-in-chief. Essentially, it argues that Pyle failed to present sufficient evidence establishing that (1) a policymaker for Victoria County acted with deliberate indifference to the strong likelihood that Pyle's rights under the ADA or the RA would be violated, or (2) its conduct was intentional.

[HN1] We review a district court's ruling on a Rule 50(a) motion for judgment as a matter of law *de novo. Resolution Trust Corp. v. Cramer, 6 F.3d 1102, 1109 (5th Cir. 1993).* Under this standard, we view all of the evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion." Id. (citation omitted). A district court may not grant a Rule 50(a) motion "unless a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Fitzgerald v. Weasler Eng'g, Inc., 258 F.3d 326, 337 (5th Cir. 2001).* [HN2] This court reviews a jury's verdict for sufficiency of the evidence by determining **[**8]** whether

> reasonable and fair-minded [jurors] in the exercise of impartial judgment might reach different conclusions . . . . [HN3] A mere scintilla is insufficient to present a question for the jury. . . . However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

MacArthur v. Univ. of Tex. Health Ctr. at Tyler, 45 F.3d 890, 896 (5th Cir. 1995) (citation omitted).

[HN4] According to *Rule 50(b) of the Federal Rules of Civil Procedure,* it is well-settled that a motion for directed verdict or judgment as a matter of law made at the close of the plaintiff's case-in-chief must be renewed at the close of the all evidence in the case. Id. (citing *McCann v. Texas City Refining, Inc., 984 F.2d 667, 671(5th Cir. 1993)).* Thus, prior to addressing Victoria County's insufficiency of the evidence claim, we

must first determine whether it is procedurally barred from challenging the evidentiary support for the jury's verdict when Victory County failed to renew its motion at the close of all the evidence. As a general rule, a party **[**9]** that fails to renew his motion for judgment as a matter of law at the conclusion of all the evidence waives its right to challenge the sufficiency of the evidence on appeal. *United States ex rel. Wallace v. Flintco Inc., 143 F.3d 955, 960 (5th Cir. 1998).* However, we have excused technical noncompliance with Rule 50(b) in limited circumstances. [HN5] In cases where this court has departed from the strict requirements of Rule 50(b), the "deviation from the rule was 'de minimis,' and the purposes of the rule were deemed accomplished." *Polanco v. City of Austin, Tex., 78 F.3d 968, 974 (5th Cir. 1996).*

[HN6] We have determined that this rule serves two fundamental purposes: "to enable the trial court to re-examine the sufficiency of the evidence as a matter of law if, after verdict, the court must address a motion for judgment as a matter of law, and to alert the opposing party to the insufficiency of his case before being submitted to the jury." Id. (citation omitted). Thus, [HN7] we have allowed a party to raise a sufficiency of the evidence contention, although failing to comply with the requirements of Rule 50(b), "when the purposes of the rule have been satisfied **[**10]** because the court has had the opportunity to reconsider sufficiency as a matter of law and because the nonmovant has had the opportunity to cure any insufficiencies." *Purcell v. Seguin State Bank & Trust Co., 999 F.2d 950, 956 (5th Cir. 1993)* (citation omitted). Generally, however, we have only excused departures from Rule 50(b) where the trial court had taken under advisement an earlier motion for directed verdict, which was made after the plaintiff rested; **[*573]** the defendant presented no more than two witnesses prior to closing; only a few minutes elapsed from the time the motion for directed verdict was made and the conclusion of all the evidence; and no rebuttal evidence was introduced by the plaintiff. E.g., *Giles v. General Elec. Co., 245 F.3d 474, 483 (5th Cir. 2001)* (citation omitted). In the absence of the circumstances stated above, we have found that the purposes of the rule have not been satisfied, and therefore, the complaining party has waived its right to contest the jury's verdict on sufficiency of the evidence grounds. See *Purcell, 999 F.2d at 956.*

Considering the facts before us, we conclude that Victoria County's departure **[**11]** from Rule 50(b) is not de minimis, and thus, it has waived any challenge on appeal to the sufficiency of the evidence supporting the jury's verdict. This case presents a factual pattern very similar to that addressed by this court in McCann. In McCann, the plaintiff filed suit against Hill Petroleum, Inc. ("Hill") asserting Age Discrimination in Employment Act violations. At the conclusion of the plaintiff's case-in-chief, Hill moved for directed verdict asserting that the plaintiff failed to establish intentional discrimination by Hill. The motion was flatly rejected by the district court. As in this case, Hill neglected to inform this court, either in briefs or at oral argument, that it had not moved for judgment as a matter of law at the close of all of the evidence. We held that Hill's failure to renew its motion had the consequence of precluding this court's review of Hill's sufficiency of the evidence claim. *Id., 984 F.2d at 671.* In determining that Hill's noncompliance with Rule 50 was not de minimis, we noted that (1) Hill's motion for directed verdict was flatly rejected, instead of being taken under advisement; and (2) Hill presented numerous witnesses after the close of **[**12]** the plaintiff's case. We concluded that "neither the district court nor the plaintiff[] could have been aware that Hill continued to challenge the sufficiency of the plaintiff [sic] *prime facie* case." *Id., 984 F.2d at 672.* This court further noted that in Hill "[it] [was] not faced with a "de minimis" departure but rather a complete failure to follow the requirements of Rule 50(b)." Id. We acknowledged that this circuit "approaches such questions of technical compliance with 'liberal spirit,'" however, we declined to judicially rewrite the Federal Rules of Civil Procedure. Id.

Here, the district court ruled on Victoria County's motion for directed verdict immediately after it was made. Further, although Victoria County only presented two witnesses, an entire day, rather than a few minutes, elapsed from the time the motion was made and the close of all the evidence. In addition, Pyle submitted rebuttal evidence. Because we find Giles and McCann to be controlling precedent, we conclude that Victoria County's noncompliance with Rule 50(b) cannot be regarded as de minimis.

[HN8] Where a party fails to timely move for judgment as a matter of law, and such failure **[**13]** does not constitute a de minimis departure, "we will consider the issue as waived by the defendant and will treat the issue as being raised for the first time on appeal." *Polanco v. City of Austin, Tex., 78 F.3d 968, 974 (5th Cir. 1996).* Accordingly, we review any challenge to the sufficiency of the evidence only for plain error. Id. [HN9] Under the plain error standard, we will only reverse the jury's verdict "if the judgment works a manifest miscarriage of justice." *Giles, 245 F.3d at 482* (citation omitted). Such review requires this court to merely ascertain if the plaintiff has submitted "*any* evidence in support of his claim." Id. If it is determined that no evidence supports the jury's verdict, "we will not simply enter judgment for the defendant; instead, **[*574]** we must order a new trial." Id. (citation omitted).

DISCUSSION

[HN10] The ADA is a federal anti-discrimination statute designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." n4 *Rizzo v. Children's World Learning Ctr., Inc., 173 F.3d 254, 261 (5th Cir. 1999).* The RA was enacted "to ensure **[**14]** that handicapped individuals are not denied jobs or other benefits because of prejudiced attitudes or ignorance of others." n5 *Brennan v. Stewart, 834 F.2d 1248, 1259 (5th Cir. 1988).* The language in the ADA generally tracks the language set forth in the RA. In fact, the ADA expressly provides that "the remedies, procedures and rights" available under the RA are also accessible under the ADA. *42 U.S.C. § 12133* (1995). Thus, "jurisprudence interpreting either section is applicable to both." *Hainze v. Richards, 207 F.3d 795, 799 (5th Cir. 2000).* [HN11] A plaintiff asserting a private cause of action for violations of the ADA or the RA may only recover compensatory damages upon a showing of intentional discrimination. *Carter v. Orleans Parish Pub. Sch., 725 F.2d 261, 264 (5th Cir. 1984).*

n4 [HN12] The ADA states in relevant part:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (1995). [HN13] A "public entity" is broadly defined under the statute as "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." Id. § 12131(1). **[**15]**

n5 [HN14] The RA provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.

29 U.S.C. § 794 (1995).

In the instant case, the jury instructions provided that, in order for Pyle to sustain a claim under the ADA or the RA, he must prove the following facts by a preponderance of the evidence: "First: That [he] was either 1) excluded from participation in or denied the benefits of services, programs, or activities of [Victoria County], or 2) was subjected to discrimination by Victoria County. Second: That Victoria County's conduct was intentional."

In addressing this issue, Victoria County argues that we should apply analogous case law involving § 1983 suits against municipalities. In Piotrowski v. City of Houston, we held that [HN15] "municipal liability **[**16]** under § 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *237 F.3d 567, 578 (5th Cir. 2001).*

Victoria County argues that Pyle has failed to produce any evidence of policies, customs, or practices implemented by the Sheriff, which violated Pyle's rights under the ADA or the RA. [HN16] The ADA and RA impose liability upon certain employers for disability discrimination. The definition of "employer" under the ADA specifically encompasses any agent of an employer covered by the statute. *42 U.S.C. § 12111* (1995). In this case, Victoria County does not dispute that it is covered under the ADA. The Fourth, Seventh, Ninth, and Eleventh circuits have all agreed that [HN17] when a plaintiff asserts a cause of action against an employer-municipality, under either the ADA or the RA, the public entity is liable for the vicarious acts of *any* of its employees as specifically **[*575]** provided by the ADA. *Rosen v. Montgomery County Md., 121 F.3d 154, 157 (4th Cir. 1997); Silk v. City of Chicago, 194 F.3d 788, 806 (7th Cir. 1999); Duvall v. County of Kitsap, 260 F.3d 1124, 1141 (9th Cir. 2001)* **[**17]** (holding that the doctrine of respondeat superior applies to claims asserted directly under the ADA and the RA "in part because the historical justification for exempting municipalities from respondeat superior liability does not apply to [these statutes], and in part because the doctrine "would be entirely consistent with the policy of that statute, which is to eliminate discrimination against the handicapped"); *Mason v. Stallings, 82 F.3d 1007, 1009 (11th Cir. 1996).* Thus, the first element of a § 1983 claim -- i.e., a policymaker -- is not required under either the ADA or the RA.

Furthermore, while we have not yet spoken on the question of whether a policy of discrimination must be identified to sustain a claim under the ADA or the RA, the Fourth Circuit has considered the issue and has concluded that a policy is not required. See *Rosen, 121 F.3d at 157 n.3* (finding that [HN18] a county could be held liable under the ADA even in the absence of a *policy* of discrimination). We agree with our sister circuit on this point. [HN19] The ADA expressly provides that a disabled person is discriminated against when an entity fails to "*take such steps as may be* **[**18]** *necessary* to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." Id. at § 12182(b)(2)(A)(iii) (emphasis added). A plain reading of the ADA evidences that Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability. Id. § 12182(b)(2)(A)(ii)-(iii) (1985). Thus, although it is true that for claims asserted under § 1983, an official policy must be identified, the same rule cannot be reconciled with Congress's legislative objectives in enacting the ADA and the RA, and Victoria County has not cited any authority supporting this position.

Having concluded that neither a policymaker, nor an official policy must be identified for claims asserted under the ADA or the RA, we now turn our attention to Victoria County's assertion that Pyle failed to establish deliberate indifference. [HN20] There is no "deliberate indifference" standard applicable to public entities for purposes of the ADA or the RA. However, in order to receive compensatory damages for violations **[**19]** of the Acts, a plaintiff must show intentional discrimination. *Carter, 725 F.2d at 264.* The facts addressed at trial support the jury's finding of intentional discrimination.

It is clear from the videotape of the accident that no matter how many times Daniel repeated himself and no matter how loudly he spoke, Pyle could not understand most of what he was saying. For example, while Daniel was demonstrating the sobriety tests, he told Pyle several times not to start the test until after he was finished demonstrating. Nonetheless, each time, Pyle started to perform the task while observing Daniel. Instead of viewing these actions as an indication that Pyle was not understanding his verbal commands and trying a more effective form of communication, Daniel only became annoyed and continued to further instruct Pyle through verbal communication. When asked whether his communications with Pyle were effective in that Pyle understood him, Daniel answered "well, I don't know his state of mind. I knew he had a hearing problem."

In addition, during trial, Pyle's counsel asked Daniel if he was speaking quickly when informing Pyle of his legal rights. Daniel responded "yes, probably **[**20]** so, yes." Pyle's counsel proceeded to inquire as to **[*576]** whether Daniel believed this form of communication was effective. Daniel answered "somewhat, but no." Further, Daniel acknowledged that an officer must continue to provide Miranda warnings or whatever warnings required to be given an arrestee until the officer has a genuine belief that the arrestee actually understood him. However, Daniel admitted that he did not know whether Pyle understood his rights as verbally communicated.

After conducting a thorough review of the record, we cannot conclude that there was no evidence produced to support the verdict. Therefore, the jury was not plainly erroneous in finding that Pyle sustained a claim under the ADA and the RA against Victoria County.

CONCLUSION

Having concluded that Victoria County waived its sufficiency of the evidence claim and finding no plain error, we AFFIRM the district court's judgment.

AFFIRMED.

AUBREY DELANO-PYLE, Plaintiff - Appellee v. VICTORIA COUNTY, Texas; ET AL, Defendants; VICTORIA COUNTY TEXAS, Defendant - Appellant

No. 00-40138

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

54 Fed. Appx. 415; 2002 U.S. App. LEXIS 24507

November 7, 2002, Filed

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Southern District of Texas, Brownsville. *Delano-Pyle v. Victoria County, 302 F.3d 567, 2002 U.S. App. LEXIS 18060* (5th Cir. Tex., 2002)

JUDGES:

Before JONES, EMILIO M. GARZA, and STEWART, Circuit Judges.

OPINION:

ON PETITION FOR REHEARING EN BANC

Before JONES, EMILIO M. GARZA, and STEWART, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.APP.P. and 5THCIR.R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Carl E. Stewart

United States Circuit Judge

KIM MICHAEL HAINZE, ET AL., Plaintiffs, KIM MICHAEL HAINZE, Plaintiff-Appellant, versus ED RICHARDS, Sheriff; STEVE ALLISON; and various unknown Williamson County Sheriff's deputies; WILLIAMSON COUNTY, Texas; KEVIN HALLMARK; SCOTT ZION, Williamson County Sheriff's Deputies, individually and in their official capacities, Defendants-Appellees.

No. 99-50222

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

207 F.3d 795; 2000 U.S. App. LEXIS 6293

April 7, 2000, Decided

SUBSEQUENT HISTORY: [**1] As Revised April 26, 2000. Rehearing and Rehearing En Banc Denied May 12, 2000, Reported at: *2000 U.S. App. LEXIS 12717.* Certiorari Denied October 30, 2000, Reported at: *2000 U.S. LEXIS 7074.*

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Texas, Austin. A-97-CV-845-SS. Sam Sparks, US District Judge.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant challenged a grant of summary judgment in favor of appellee officers from the United States District Court for the Western District of Texas, Austin, in a civil rights action under *42 U.S.C.S. § 1983.*

OVERVIEW: Appellant brought an action against appellee deputies under *42 U.S.C.S. § 1983* claiming that they acted with deliberate indifference in shooting him. Originally, appellant was approached by appellee officers as a result of a dispatcher call that warned of a disturbed person at a convenience store parking lot. Appellees subsequently shot appellant when he ignored warnings and approached them with a knife. The court held that appellees were entitled to assert their qualified immunity privileges; their actions under the circumstances were objectively reasonable in light of the fact that they were threatened with deadly force. Appellant could also not assert a claim under Title II of the Americans with Disabilities Act, *42 U.S.C.S. § 12131* et seq., because he was not denied a public entity service or benefit by the agency that provides such service or benefit. Appellant had no claim based upon appellees' training in handling the mentally ill.

OUTCOME: Summary judgment was affirmed; appellees could not be held liable for deprivation of liberty, because qualified immunity applied when responding to deadly threat; though appellees did have mental illness training, appellant could not thereby assert Title II claim, because Title II did not apply prior to appellees securing scene.

CORE TERMS: disability, arrest, mental health, deputy, knife, public entity, regulations, training, aggravated assault, deadly force, Rehabilitation Act, convicted, excessive, self-evaluation, handle, injunctive relief, summary judgment, deadly weapon, mentally ill, declaratory, discriminatory treatment, convenience store, law enforcement, matter of law, pickup truck, parking lot, right hand, accommodate, disturbance, subjected

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN1] The United States Court of Appeals for the Fifth Circuit reviews de novo a grant of summary judgment applying the same standard as the district court, viewing the facts and resolving all inferences in favor of the non-movant. The standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record evidence before the court.

Constitutional Law > Civil Rights Enforcement > Civil Rights Generally

[HN2] An action under *42 U.S.C.S. § 1983* is not an appropriate vehicle for challenging the validity of outstanding criminal judgments.

Civil Procedure > Jury Trials > Province of Court & Jury

Constitutional Law > Civil Rights Enforcement > Civil Rights Generally

[HN3] When a person brings a *42 U.S.C.S. § 1983* claim against certain arresting officers a district court must first consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence. If so, the claim is barred unless the conviction has been reversed or declared invalid.

Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871 > Coverage
[HN4] An excessive force claim under *42 U.S.C.S. § 1983* is barred as a matter of law if brought by an individual convicted of aggravated assault related to the same events.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN5] Title II of the Americans with Disabilities Act, *42 U.S.C.S. § 12131* et seq., provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. *42 U.S.C.S. § 12132.* A "public entity" includes any department, agency, special purpose district, or other instrumentality of a state or states or local government. *42 U.S.C.S. § 12131*(1)(B).

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN6] In the context of civil rights actions under Title II of the Americans with Disabilities Act (Title II), *42 U.S.C.S. § 12131* et seq., the remedies, procedures and rights available under Section 504 of the Rehabilitation Act of 1973, *29 U.S.C.S. § 794,* shall be the same as those available under Title II. *42 U.S.C.S. § 12133.* Jurisprudence interpreting either section is applicable to both.

Constitutional Law > Civil Rights Enforcement > Civil Rights Generally
Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN7] See *29 U.S.C.S. § 794*(a) (1994).

Constitutional Law > Civil Rights Enforcement > Civil Rights Generally
Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN8] A disabled plaintiff can succeed in an action under Title II of the Americans with Disabilities Act (Title II), *42 U.S.C.S. § 12131* et seq., if he can show that, by reason of his disability, he was either excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or was otherwise subjected to discrimination by any such entity. *42 U.S.C.S. § 12132.* The broad language of the statute and the absence of any stated exceptions has occasioned the courts' application of Title II protections into areas involving law enforcement.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN9] In the context of civil rights actions, a necessary prerequisite to a successful claim under Title II of the Americans with Disabilities Act, *42 U.S.C.S. § 12131* et seq., is that a disabled person be denied the benefits of a service, program or activity by the public entity that provides such service, program or activity.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN10] See *28 C.F.R. § 35.101.*

Constitutional Law > Civil Rights Enforcement > Civil Rights Generally
Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN11] The provisions of Title II of the Americans with Disabilities Act, *42 U.S.C.S. § 12131* et seq., do not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN12] See *28 C.F.R. § 35.103(b).*

Civil Procedure > Remedies > Declaratory Relief
Civil Procedure > Injunctions
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN13] An appellate court's review of the district court's denial of injunctive and declaratory relief is for abuse of discretion.

Civil Procedure > Remedies > Declaratory Relief
[HN14] A precondition to asserting a claim for a declaratory judgment is that a viable case or controversy exist.

Civil Procedure > Injunctions
[HN15] For an injunction to issue based on a past violation, a plaintiff must establish that there is a real or immediate threat that he will be wronged again.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN16] See 28 C.F.R. § 35, App. A, Subpart B.

COUNSEL: For KIM MICHAEL HAINZE, Plaintiff - Appellant: James C Harrington, Ted Anthony Ross, Texas Civil Rights Project, Austin, TX.

For ED RICHARDS, STEVE ALLISON, WILLIAMSON COUNTY, KEVIN HALLMARK, SCOTT ZION, Defendants - Appellees: R Mark Dietz, Jerry Lee Jarrard, Jr, Dietz & Associates, Round Rock, TX.

JUDGES: Before POLITZ, GARWOOD, and DAVIS, Circuit Judges.

OPINIONBY: POLITZ

OPINION: [*797]

POLITZ, Circuit Judge:

Kim Michael Hainze appeals an adverse summary judgment in his action under *42 U.S.C. § 1983,* the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. For the reasons assigned, we affirm.

BACKGROUND

In the early morning hours of November 16, 1997, Alicia Cluck made a 911 call requesting that the police transport her suicidal nephew, Kim Michael Hainze, to a hospital for mental health treatment. Cluck advised that Hainze had a history of depression and currently was under the influence of alcohol and anti-depressants, carrying a knife, and threatening **[**2]** to commit suicide or "suicide by cop." n1 Uniformed Williamson County Sheriff's deputies, defendants-appellees Steve Allison, Kevin Hallmark, and Scott Zion, were given this information and dispatched in marked police cars to a convenience store where Hainze was located. Upon arriving at the store the officers observed a man, believed to be Hainze, standing by the passenger door of a pickup truck occupied by two unidentified individuals. Hainze appeared to be holding the door's handle and talking to the individuals. He had a knife in his hand and was not wearing shoes, despite the cold temperature. Deputy Allison exited his vehicle, drew his weapon, and ordered Hainze away from the truck. Hainze responded with profanities and began to walk towards Allison. At this point, Zion, who was riding with Allison, and Hallmark had also exited their vehicles with their weapons drawn. Allison twice ordered Hainze to stop but Hainze ignored him. When Hainze was within four to six feet Allison fired two shots in rapid succession into Hainze's chest. Allison immediately called EMS. Hainze survived. Approximately twenty seconds elapsed from the time the officers pulled into the store parking lot **[**3]** until Hainze was shot.

n1 "Suicide by cop" refers to an instance in which a person attempts to commit suicide by provoking the police to use deadly force.

On August 21, 1998, Hainze was convicted by a Williamson County jury of aggravated assault with a deadly weapon for his conduct at the convenience store on November 16, 1997. The instant action was filed on November 20, 1997, before Hainze was charged with the criminal offense of which he was convicted. Hainze asserted claims against Williamson County Sheriff Ed Richards, the county, and Deputies Allison, Zion, and Hallmark in their individual capacities under *42 U.S.C. § 1983,* alleging that they acted with deliberate indifference to his fourth and fourteenth amendment rights by using "excessive, unreasonable, and deadly force against him." He also asserted the same claim against Williamson County and Sheriff Richards in his official capacity for failing to adopt or enforce policies to adequately handle individuals who are mentally ill **[**4]** and in crisis situations, and to protect against the use of excessive and deadly force in such situations. Hainze sought a declaratory judgment, injunctive relief, and damages. In addition, Hainze brought assault and battery claims against the three deputies under Texas law.

Hainze also sought declaratory, injunctive, and compensatory relief under Title **[*798]** II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act against Williamson County and Sheriff Richards in his official capacity. These claims were based on the defendants' alleged failure to establish a policy or train deputies to protect the well-being of mentally ill individuals, for having actually discriminated against Hainze on the basis of his disability, and for failing to conduct a self-evaluation, all of which Hainze contends were the direct and proximate causes of the near-fatal shooting. Summary judgment was ultimately granted in favor of all defendants on all claims. Hainze timely appealed. n2

n2 Christopher Cluck, one of the occupants of the pickup truck and Hainze's cousin, joined in Hainze's complaint and asserted various claims against the defendants. Cluck's claims were also dismissed. Cluck has not appealed.

[5]**

ANALYSIS

[HN1] We review *de novo* a grant of summary judgment applying the same standard as the district court, viewing the facts and resolving all inferences in favor of the non-movant. n3 "The standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record evidence before the court." n4 Our review of the record and controlling law persuades that Hainze's

claims fail as a matter of law and, thus, summary judgment was appropriate.

n3 ***James v. Sadler, 909 F.2d 834 (5th Cir. 1990)*** (citation omitted).

n4 ***Id. at 837*** (citing ***Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)).***

Section 1983 claims:

Hainze initially alleged that the defendants violated his rights under the fourth and fourteenth amendments. He has briefed the issue only with **[**6]** respect to the fourth amendment and his fourteenth amendment claim is deemed abandoned. n5 Defendants contend that Hainze's constitutional claims are barred as a matter of law under the Supreme Court's decision in ***Heck v. Humphrey [512 U.S. 477]*** n6 which held that a civil tort action, [HN2] including an action under *42 U.S.C. § 1983,* is "not [an] appropriate vehicle[ ] for challenging the validity of outstanding criminal judgments." n7 **Heck** dictates that [HN3] when a person such as Hainze brings a section 1983 claim against the arresting officers the district court must first "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." n8 If so, the claim is barred unless the conviction has been reversed or declared invalid. n9 In ruling on the summary judgment motion in the instant case, the district court held that **Heck** did not bar Hainze's suit because "a conviction for aggravated assault against a police officer does not necessarily preclude a finding of excessive force against the 'assaulter.' " The court went on to find, however, that the defendants were entitled to qualified immunity because **[**7]** their actions under the circumstances were objectively reasonable.

n5 ***Rutherford v. Harris County, Texas, 197 F.3d 173 (5th Cir. 1999)*** (citing ***Dardar v. Lafourche Realty Co., 985 F.2d 824 (5th Cir. 1993)).***

n6 *512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).*

n7 ***Id. at 486.***

n8 ***Id. at 487.***

n9 **Id.** Hainze waived his right to appeal his conviction.

Subsequent to the district court's decision we held that, based on **Heck,** [HN4] an excessive force claim under section 1983 is barred as a matter of law if brought by an individual convicted of aggravated assault related to the same events. n10 In the case at bar, the jury found Hainze guilty of aggravated assault with a deadly weapon. Thus, as in **Sappington,** the force used by **[*799]** the deputies to restrain Hainze, up to and including deadly force, cannot be deemed excessive. n11 Concluding that Hainze has not established a violation of a constitutional right, we need not address whether **[**8]** the individual defendants were entitled to qualified immunity. n12

n10 ***Sappington v. Bartee, 195 F.3d 234 (5th Cir. 1999).***

n11 ***Id. at 237.*** Like Hainze, Sappington was convicted of aggravated assault under Texas law.

n12 ***Id. at 236*** (citing ***Wells v. Bonner, 45 F.3d 90 (5th Cir. 1995)).***

Hainze's state law assault and battery claims against the officers are premised on the same basis advanced in support of his constitutional claim. For the above noted reasons, we conclude that these causes of action also were properly dismissed.

ADA/Section 504 claims:

[HN5] Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." n13 A "public entity" includes "any department, agency, special purpose district, **[**9]** or other instrumentality of a State or States or local government." n14 The language of Title II generally tracks the language of Section 504 of the Rehabilitation Act of 1973, n15 and Congress' intent was that Title II extend the protections of the Rehabilitation Act "to cover all programs of state or local governments, regardless of the receipt of federal financial assistance" and that it "work in the same manner as Section 504." n16 [HN6] In fact, the statute specifically provides that "the remedies, procedures and rights" available under Section 504 shall be the same as those available under Title II. n17 Jurisprudence interpreting either section is applicable to both. n18 Title II further directs the Attorney General to promulgate regulations to effectuate the statute's purpose. n19

n13 *42 U.S.C. § 12132* (1994).

n14 *42 U.S.C. § 12131*(1)(B).

n15 [HN7] *29 U.S.C. § 794*(a) (1994). Section 504 provides that "no otherwise qualified individual with a disability... shall, solely by reason of her or his disability, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...." *Id.* A "program or activity" includes "all of the operations of... a department, agency, special purpose district, or other instrumentality of a State or of a local government...." *29 U.S.C. § 794*(b)(1)(A). **[**10]**

n16 H.R. Rep. No. 101-485, pt. III at 49-50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 472-73.

n17 *42 U.S.C. § 12133.*

n18 ***Gorman v. Bartch,*** *152 F.3d 907 (8th Cir. 1998)* (citation omitted).

n19 *42 U.S.C. § 12134*(a). Those regulations have been codified at 28 C.F.R. § 35 (1999).

[HN8] A disabled plaintiff can succeed in an action under Title II if he can show that, by reason of his disability, he was either "excluded from participation in or denied the benefits of the services, programs, or activities of a public entity," or was otherwise "subjected to discrimination by any such entity." n20 Neither party disputes that Hainze is a disabled person or that the Williamson County Sheriff's Department is a public entity. The broad language of the statute and the absence of any stated exceptions has occasioned the courts' application of Title II protections into areas involving law enforcement. n21 **[*800]** There is some disagreement, however, whether an arrest falls within the ambit of Title II, n22 and only one court has considered **[**11]** whether Title II applies to in-the-field investigations by police officers that may or may not lead to an arrest.

n20 *42 U.S.C. § 12132; **Patrice v. Murphy,** 43 F. Supp. 2d 1156 (W.D. Wash. 1999)* (noting cases brought under either prong of the statute).

n21 *See, e.g., **Pennsylvania Dep't of Corrections v. Yeskey,** 524 U.S. 206, 141 L. Ed. 2d 215, 118 S. Ct. 1952 (1998)* (holding that state prisons are a "public entity" under the ADA); ***Gorman,** 152 F.3d at 912* ("Transportation of an arrestee to the station house is thus a service of the police within the meaning of the ADA."); ***Lewis v. Truitt,** 960 F. Supp. 175 (S.D. Ind. 1997)* (applying ADA to the arrest of a deaf man where arresting officers knew or should have known the man could not hear but nonetheless arrested him because he did not respond to officers appropriately).

n22 *See, e.g., **Rosen v. Montgomery County, Maryland,** 121 F.3d 154, 157 (4th Cir. 1997)* ("Calling an... arrest a 'program or activity' of the County... strikes us as a stretch of the statutory language and of the underlying legislative intent."); ***Barber v. Guay,** 910 F. Supp. 790 (D.Me. 1995)* (plaintiff's claim that he was denied proper police protection and fair treatment due to his disabilities during the course of his arrest is a valid cause of action under the ADA).

[12]**

In **Gohier v. Enright** n23 the Tenth Circuit recently addressed a case strikingly similar to the one at bar. There the defendant, Officer Enright, responded to a disturbance call shortly after midnight and encountered Lucero, a paranoid schizophrenic, walking down the middle of the road clutching his right hand to his chest. n24 Enright exited his vehicle armed with his nightstick, pepper spray and a pistol, identified himself and asked Lucero to talk to him. Lucero continued walking and Enright ordered him to stop. n25 Lucero stopped for a moment, put his right hand behind his back and again began to approach Enright "at a 'fast pace.'" He then brought his right hand from behind his back and began swinging, in a stabbing motion, an object that Enright perceived to be a knife. n26 Enright ordered Lucero to "drop the knife" and attempted to retreat behind his vehicle. When Lucero reached Enright's vehicle he "either stepped or lunged toward Enright, making a stabbing motion with the object." Enright fired his pistol twice, killing Lucero. n27 The entire confrontation lasted between 20 and 30 seconds. As representative of Lucero's estate, Gohier asserted various claims against Officer **[**13]** Enright and the City of Colorado Springs, and sought to amend her complaint to include claims under Title II of the ADA.

n23 *186 F.3d 1216 (10th Cir. 1999).*

n24 ***Id.** at 1217.*

n25 ***Id.** at 1218.*

n26 **Id.**

n27 **Id.**

After a careful analysis of arrest cases arising under Title II the Tenth Circuit held that Gohier could not establish a viable claim and affirmed the decision denying the motion to amend. First, the court noted that this case did not fit into the "wrongful arrest" n28 category of Title II claims because Lucero's conduct was not lawful conduct attributable to Lucero's mental illness that Enright perceived as unlawful activity. Indeed, Lucero's conduct of attacking Enright with a knife was criminal. n29 Second, the court did not answer the question whether a valid cause of action exists under the second category of Title II arrest cases, the "reasonable accommodation" theory, because Gohier did not claim that Colorado Springs **[**14]** failed to train its police officers properly to investigate and handle situations involving mentally ill individuals in a manner that reasonably accommodates their disability. n30 We, however, must resolve that question and, viewing the facts in the light most favorable to Hainze, now answer it in the negative.

n28 The court used the term "arrest" to include arrests, pre-arrest investigations, and "violent confrontations not technically involving an arrest, as in this case." ***Id.** at 1220.*

n29 ***Id.** at 1221-22.*

n30 ***Id.** at 1222.*

Hainze first claims he was denied the benefits and protections of Williamson County's mental health training provided to its deputies when, in contravention of that training, Allison used excessive and deadly force to restrain him. Specifically, Hainze alleges that Allison never engaged him in conversation to calm him, never tried to give him space by backing away, never attempted to defuse the situation, never tried to use **[**15]** less than deadly force, and never attempted to create any opportunities **[*801]** for the foregoing to occur. We must conclude that this argument fails. [HN9] A necessary prerequisite to a successful claim under Title II is that a disabled person be denied the benefits of a service, program or activity by the public entity that provides such service, program or activity. n31 Hainze was not denied the benefits and protections of Williamson County's mental health training *by* the County, Sheriff Richards, or the officers. Rather, Hainze's assault of Allison with a deadly weapon denied him the benefits of that program.

n31 [HN10] *28 C.F.R. § 35.101* ("The purpose of this part is to effectuate subtitle A of title II..., which prohibits discrimination on the basis of disability *by* public entities.") (emphasis added).

Second, Hainze claims that the county failed to reasonably accommodate his disability by "failing and refusing to adopt a policy protecting the well-being of [Hainze], as a person with a mental illness in a mental **[**16]** health crisis situation, thus resulting in discriminatory treatment from [the] sheriff's deputies." n32 He advances the same contentions as raised above, and stresses that the county's policy of treating mental health calls identical to criminal response calls and those not involving people with mental disabilities resulted in his discriminatory treatment. Despite Hainze's claims, we hold that [HN11] Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life. Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the **[**17]** discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public. Our decision today does not deprive disabled individuals, who suffer discriminatory treatment at the hands of law enforcement personnel, of all avenues of redress because Title II does not preempt other remedies available under the law. n33 We simply hold that such a claim is not available under Title II under circumstances such as presented herein.

n32 While Hainze acknowledges that Williamson County has a mental health training program, he asserts that this policy was not enacted in response to the ADA and does not comport with its mandate.

n33 [HN12] *28 C.F.R. § 35.103.* This section is entitled "Relationship to other laws" and provides in subsection (b):

> *Other laws.* This part does not invalidate or limit the remedies,

> rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

Id.

[18]**

When the officers reached the convenience store parking lot, Hainze was holding a knife and standing next to a pickup truck occupied by two persons. The police did not then know that the persons were unharmed and were related to Hainze. After being ordered to get away from the truck, Hainze immediately walked quickly towards Allison with the knife, ignoring Allison's repeated orders to stop. Allison did not shoot until Hainze was within a few feet. Approximately twenty seconds elapsed from the time the officers drove into the parking lot until Allison fired. Allison's actions were the result of a quick discretionary decision made in self-defense and for the safety of those at the scene. We are not persuaded that requiring Allison and other similarly situated officers to use less than reasonable force in defending themselves and others, or to hesitate to **[*802]** consider other possible actions in the course of making such split-second decisions, is the type of "reasonable accommodation" contemplated by Title II.

Once the area was secure and there was no threat to human safety, the Williamson County Sheriff's deputies would have been under a duty to reasonably accommodate Hainze's disability **[**19]** in handling and transporting him to a mental health facility. n34 That would have put this case squarely within the holdings of **Pennsylvania Dep't of Corrections v. Yeskey n35** and the cases that have followed. But that was not the situation at bar.

n34 *28 C.F.R. § 35.130(b).*

n35 *524 U.S. 206, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998); **Gorman v. Bartch,** 152 F.3d 907 (8th Cir. 1998).*

Hainze's last contention is that Williamson County failed to conduct a self-evaluation of its existing policies and procedures to ensure that they were ADA compliant and that its failure to do so caused his injuries. Hainze also seeks declaratory and injunctive relief. [HN13] Our review of the district court's denial of injunctive and declaratory relief is for abuse of discretion. n36

n36 ***Gabriel v. City of Plano,*** *202 F.3d 741, 2000 WL 96019 (5th Cir. 2000).*

[20]**

The regulations issued by the Justice Department require all public entities, within one year of the regulations' effective date, to "evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of [the regulations]" and to modify such services, policies, and practices to the extent necessary to bring them into compliance. n37 The regulations further provide an opportunity for interested persons to participate in the evaluation process by submitting comments. n38 A self-evaluation of Williamson County's existing physical facilities was performed in October, 1992, but no similar evaluation was conducted of the County's policies and procedures in responding to mental health disturbances and effectuating seizures of mentally disabled individuals. Such an evaluation was clearly required of the County to ensure its compliance with the ADA. n39 We do not suggest that the County's law enforcement officers received no training to deal with mental health situations. During the course of their regular training, all officers are required to undergo some measure of mental health instruction, and some officers are certified to **[**21]** handle mental health related issues. Allison was certified as a mental health officer based on his completion of a program offered by the County which included at least sixteen hours of such training. Hainze's causation claim lacks merit. As stated earlier, Hainze's injuries were caused by his own criminal actions, not Williamson County's failure to perform a self-evaluation. Consequently, we hold that Hainze lacks standing to seek declaratory or injunctive relief. [HN14] A precondition to asserting a claim for a declaratory judgment is that a viable case or controversy exist. n40 [HN15] Further, for an injunction to issue based on a past violation, Hainze must establish that there is "a real or immediate threat that he will be wronged again." n41 Because Hainze cannot state a claim under either Title II or Section 504 the district court did not abuse its discretion in summarily denying the requested relief.

n37 *28 C.F.R. § 35.105(a).*

n38 *28 C.F.R. § 35.105(b).*

n39 [HN16] 28 C.F.R. § 35, App. A, Subpart B ("The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that

result in discriminatory arrests or abuse of individuals with disabilities."). **[**22]**

n40 ***Plumley v. Landmark Chevrolet, Inc.,*** *122 F.3d 308 (5th Cir. 1997)* (citing ***Lawson v. Callahan,*** *111 F.3d 403 (5th Cir. 1997)).*

n41 ***Plumley,*** *122 F.3d at 312* (citing ***City of Los Angeles v. Lyons,*** *461 U.S. 95, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983)).*

[*803] The judgment dismissing all claims against all defendants is AFFIRMED.

SETTLEMENT AGREEMENT BETWEEN

THE UNITED STATES OF AMERICA,

RASHAD GORDON, MICHAEL EDWARDS,

AND

THE CITY OF HOUSTON, TEXAS

re:

police, city jail and municipal courts providing effective communication

with people who are deaf or hard-of-hearing

SETTLEMENT

This Settlement Agreement (the "Agreement") is entered into by the City of Houston ("the City"), Michael Edwards, Rashad Gordon, and the United States of America, through the United States Department of Justice, Civil Rights Division, Disability Rights Section ("the Department").

BACKGROUND

This matter was initiated by a complaint filed with the Department by Rashad Gordon, an individual with a hearing impairment who is represented by Advocacy, Inc. and the NAD Law Center

(Department of Justice Complaint No. 204-74-102). The complaint was filed under title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134. The complaint alleges various violations of title II by the City, including allegations that City police officers, jail officials and court officials do not effectively communicate with people with hearing impairments. The City disputes the allegations contained in the complaints. The Department is authorized under 28 C.F.R. Part 35 to investigate this complaint to determine whether the City is in compliance with title II of the ADA. The City is a "public entity" for purposes of 42 U.S.C. § 12132 and the implementing regulations, 28 C.F.R. § 35.104. The Department is authorized to investigate the facts, issue findings, and, where appropriate, negotiate and secure a voluntary compliance agreement. Furthermore, the Department is authorized to bring a civil action enforcing title II of the ADA should it fail to secure a voluntary compliance agreement.

The Department is also monitoring Edwards v. City of Houston, No. H-98-1369 (S.D. Tex.). Mr. Edwards claims that when he was questioned by a City of Houston police officer, he was not provided with a sign language interpreter. The officer then arrested him and he was incarcerated at the City jail. Mr. Edwards alleges that he was not provided with effective communication that he needed in order to receive life-sustaining medications, and that he was not allowed to use a telecommunication device for the deaf ("TDD") to call an attorney or his family. During his first court appearance at the City of Houston municipal court, Mr. Edwards alleges that he was not provided with an interpreter. Mr. Edwards also alleges that he was not provided a sign language interpreter when he needed to report a criminal act against him. The City also disputes the allegations in the lawsuit filed by Mr. Edwards.

AGREEMENT

Because the City, Mr. Edwards, Mr. Gordon and the Department desire to settle this matter, the parties agree to the following:

1. In consideration for the City's performance of its obligations under this Agreement, the Department agrees to refrain from undertaking further investigation of the complaints described above or from filing a civil suit based upon the complaints described above.

2. In consideration for the City's performance of its obligations under this Agreement, Mr. Gordon and Mr. Edwards waive, release and covenant not to sue or commence any proceeding against the City with respect to any matters contained within the allegations in Department of Justice Complaint No. 204-74-102 or Edwards v. City of Houston, No. H-98-1369 (S.D. Tex.). Mr. Gordon's signature on this Agreement constitutes a request to withdraw with prejudice Department of Justice Complaint No. 204-74-102.

3. According to terms set forth in separate agreements, the City has made or will make payments to Mr. Gordon, Mr. Edwards and their counsel.

4. The City agrees that its policy is that individuals with hearing impairments are entitled to effective communication -- communication that is equally as effective as that provided for others without hearing impairments. In order to ensure effective communication with people with hearing impairments in the City's programs, activities and services, the City agrees:

A. To provide, at the City's expense, appropriate auxiliary aids and services, including qualified interpreters when necessary to provide effective communication.

B. To give primary consideration to the requests of individuals with disabilities in determining what type of auxiliary aid or service is necessary. "Primary consideration" means that the City will defer to the individual's request unless the City has an equally effective alternative (or if the City establishes in writing that the chosen auxiliary aid or service would result in a fundamental alteration of its services, programs or activities, or would be an undue financial or administration burden. In those circumstances, the City shall take any other action that would not result in such a burden but would nevertheless ensure that, to the fullest extent possible, individuals with disabilities receive the benefits or services provided by the City. See 28 C.F.R. § 35.150(a)(3)).

C. To notify people with hearing impairments about the provision of auxiliary aids and services. The City will distribute this information through pamphlets, posters or other appropriate means.

Provisions Applicable to the City of Houston Police Department

5. The City agrees that individuals with disabilities, including but not limited to crime victims, witnesses to crimes, and people under arrest, are entitled to effective communication - communication that is equally as effective as that provided for others without hearing impairments.

6. The City agrees that within thirty days of the effective date of this Agreement, it will designate one or more employees as the City Police Department's ADA Coordinator.

A. The ADA Coordinator(s) will serve as a resource to the officers and employees of the Houston Police Department regarding the ADA.

B. The ADA Coordinator(s) will also serve as a resource for members of the public who have questions regarding the Police Department's procedures for dealing with individuals with disabilities.

C. The ADA Coordinator(s) will know the specific procedures for requesting an interpreter.

D. Within one hundred and twenty days of the effective date of this Agreement, the ADA Coordinator(s) will:

(1) attend a seminar concerning a public entity's obligations under title II of the ADA; or

(2) view an educational videotape concerning a public entity's obligations under title II of the ADA. If the ADA Coordinator(s) elects this option, the educational videotape will be specified by the Department and the Department will give the City instructions on how to obtain a copy of the

videotape.

E. The City agrees that the ADA Coordinator(s) will attend a similar educational seminar, or view a similar educational videotape, annually.

7. Grievance procedures. If a person with a disability is dissatisfied with the auxiliary aid or service proposed or used by the department, the individual may file a grievance with the Police Department's ADA Coordinator. The ADA Coordinator will attempt to resolve the grievance within one week.

8. The City agrees to adopt a revised General Order 500-13, as Exhibit A, as the formal policy of its Police Department. The General Order will be included in the manual distributed to all police officers.

9. The City agrees that within fourteen months of the effective date of this Agreement it will complete training for all classified and dispatch supervisory personnel of the Police Department (at the rank of Lieutenant and Sergeant, or the civilian equivalents). The training shall include discussions of:

A. The contents of this Agreement.

B. General Order 500-13.

C. The contents of the document titled, "Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement," which is attached as Exhibit B.

D. The identity of the Police Department's ADA Coordinator.

10. The City agrees to give notice of General Order 500-13 to every officer and employee of the Police Department within thirty days of the effective date of this Agreement.

11. The City agrees to incorporate instructions on General Order 500-13 into the standard curriculum of the police academy where its new recruits receive pre-service training.

12. The City Police Department agrees to purchase TDDs so that its services, programs and activities are accessible to people with hearing impairments, as required by 28 C.F.R. § 35. 161. For purposes of this Agreement the Police Department will provide TDDs at the main Police Administration building, at each of the patrol sub-stations, and at the Central and Southeast jails.

13. The City agrees that within ninety days of the effective date of this Agreement it will train at least one supervisor for every shift at all Central and Southeast jail facilities and the Emergency Communications Division in how to operate and maintain TDDs. The City further agrees to provide annual training on the proper operation of TDDs to at least one supervisor for every shift.

14. The City agrees that within thirty days of the effective date of this Agreement it will post a copy of the Notice contained in Exhibit C in all places where notices to the public, employees and job applicants are normally posted.

Provisions Applicable to City of Houston Detention Facilities

15. The City agrees that individuals with disabilities, including but not limited to detainees, visitors to the detention facilities and individuals who place telephone calls to the detention facilities, are entitled to effective communication - communication that is equally as effective as that provided for others without hearing impairments. The City agrees that effective communication is necessary in all of the detention facilities' services, programs and activities, including, but not limited to: initial intake, classification, medical screenings, and medical treatment.

16. The City agrees that each detainee with a hearing impairment shall be informed of all auxiliary aids and services available and shall be informed of the right to place telephone calls using a TDD. Jail Division Standard Operating Procedure 100/2.25 currently reads, in part, as follows:

> If the deaf person has been arrested for a Class B misdemeanor or greater offense, ask the deaf person if he wants a certified interpreter (who is not a police officer), see General Order 500-13 - DEALING WITH HEARING-IMPAIRED INDIVIDUALS.

The City agrees to strike the phrase, "If the deaf person has been arrested for a Class B misdemeanor or greater offense" from SOP 100/2.25 and replace the word "certified" with "qualified." An additional sentence will be added to SOP 100/2.25 as follows:

> Discuss with the deaf person the nature of the arrest, municipal bonding information, phone privileges, scheduled court appearances, medical procedures, visitation privileges, jail security procedures, and meal times.

17. Where a qualified interpreter is required for effective communication, the City agrees to use its best efforts to contact a qualified interpreter within one hour of a request.

18. The City agrees that each of the detention facilities will maintain a list of qualified interpreters, or of the service the detention facilities contracts with to provide qualified interpreters.

19. The City agrees to notify the appropriate municipal court, or any court the Police Department directly transports prisoners to, that an interpreter is necessary prior to every court appearance made by a detainee with a hearing impairment.

20. The City agrees to purchase TDDs so that the detention facilities' services, programs and activities are accessible to people with hearing impairments, as required by 28 C.F.R. § 35. 161.

21. The City agrees that detainees with hearing impairments have a right to access to telephone services which is comparable to the access of detainees without hearing impairments. The City further agrees that all detainees with hearing impairments using a TDD shall have complete access to a relay service.

22. The City agrees that the detention facilities shall provide and maintain closed-captioned television decoders, or built-in decoder televisions, in television viewing areas, so that individuals with hearing impairments have the same opportunity for television viewing as other detainees while in television viewing areas.

23. The City agrees to install visual fire alarms in all appropriate areas of the detention facilities. See 28 C.F.R. Part 36, Appendix A, § 4.28.

24. The City agrees that any detainee with a hearing impairment who indicates that he/she has a health problem or need for medication during the intake process will be immediately brought to the jail health clinic. Clinic personnel will ensure that telephone calls are made on behalf of detainees with hearing impairments so that necessary medications that are not available in the clinic are obtained. If effective communication is not possible in the jail clinic, the detainee will be immediately taken to a hospital for treatment and/or medication. Clinic personnel will communicate with the hospital to ensure that it is aware that a detainee is being transported who has a hearing impairment and has communication needs. Clinic personnel will also take steps to ensure that all relevant jail employees are aware that a detainee has a hearing impairment and has communication needs.

25. The City agrees to give notice of General Order 500-13 and the new standard operating procedures resulting from this Agreement to every officer and employee of the detention facilities and jail health clinic personnel within thirty days of the effective date of this Agreement.

26. The City agrees to incorporate General Order 500-13 into the standard training curriculum provided to new officers. The City further agrees to incorporate General Order 500-13 and the new standard operating procedures resulting from this Agreement into the standard training curriculum provided to new Jail Division employees. The City's Department of Health and Human Services shall provide comparable training for all Jail Health Program personnel.

27. The City agrees that within thirty days of the effective date of this Agreement it will post a copy of the Notice contained in Exhibit D in all places where notices to detainees, family members, visitors and the general public are normally posted, including in the jail's booking area, the jail's medical clinic, the jail's housing units, and in the lobby of jail.

Provisions Applicable to the City of Houston
Courts System

28. The City agrees that the policy of the City of Houston courts system is that an otherwise qualified participant, including a party, witness, juror, or spectator, who is deaf or hard of hearing, may not be denied an equal opportunity to participate in, or benefit from, the services, programs, or activities of the City courts because of the participant's disability or because of the need for interpreting services.

29. The City has developed a written policy, attached as Exhibit E, providing that in those proceedings where an interpreter is required in order to ensure effective participation by any individual who is deaf or hard of hearing, the court system will, upon reasonable notice, secure the services of a qualified interpreter(s), provided that, with regard to spectators, such services shall not create an undue financial and administrative burden or result in a fundamental alteration in the nature of the service, program, or activity conducted by the court system. In those circumstances where the court system believes that the services would result in such a burden or alteration, the court system shall take any other action that would not result in such a burden or such an alteration but would nevertheless ensure that, to the fullest extent possible, individuals with disabilities receive the benefits or services provided by the court system. The City court system shall also be prepared to

provide auxiliary aids and services other than interpreters, such as assistive listening devices or real-time transcription services, where necessary for individuals with hearing impairments to effectively participate in court proceedings.

30. The City agrees that within ninety days of the effective date of this Agreement, it will designate one or more employees as the City court system's ADA Coordinator.

A. The ADA Coordinator(s) will serve as a resource to other employees of the court system regarding the ADA.

B. The ADA Coordinator(s) will also serve as a resource for members of the public who have questions regarding the court system's programs and services for individuals with disabilities.

C. The ADA Coordinator(s) will know the specific procedures for requesting an interpreter.

D. Within ninety days of the effective date of this Agreement, the ADA Coordinator(s) will:

(1) attend a seminar concerning a public entity's obligations under title II of the ADA; or

(2) view an educational videotape concerning a public entity's obligations under title II of the ADA. If the ADA Coordinator(s) elects this option, the educational videotape will be specified by the Department and the Department will give the City instructions on how to obtain a copy of the videotape.

E. The City agrees that the ADA Coordinator(s) will attend a similar educational seminar, or view a similar educational videotape, annually.

31. The City agrees that within ninety days of the effective date of this Agreement, each court will post a copy of the Notice contained in Exhibit F in conspicuous locations, including but not limited to in each court clerk's office, advising individuals with disabilities of the procedures to make a request for an auxiliary aid or service, and listing the name, address and telephone number of the court system's ADA Coordinator.

32. The City agrees that official notices of court dates, including but not limited to tickets, summonses, and other similar notices, will provide notice that if a person with a hearing impairment needs an auxiliary aid or service, he or she should call a TDD phone line. The City agrees that the message on the TDD phone line will also include the phone number of the ADA Coordinator.

33. The City court system agrees to purchase TDDs so that its services, programs and activities are accessible to people with hearing impairments, as required by 28 C.F.R. § 35. 161.

34. The City agrees to install visual fire alarms in all appropriate areas of the City court system's facilities. See 28 C.F.R. Part 36, Appendix A, § 4.28.

35. The City agrees that within ninety days of the effective date of this Agreement, the City will publish the following notice, or an equivalent notice, on two separate occasions in a legal periodical with City-wide circulation:

> In accordance with the requirements of Title II of the Americans with Disabilities Act, the City of Houston courts system will ensure that any party, witness, juror, or spectator who is deaf or hard of hearing will be afforded an equal opportunity to participate in, or benefit from, the services, programs, or activities of the City courts. In those proceedings where an interpreter is required to ensure effective participation by any individual who is deaf or hard of hearing, the court system will, upon reasonable notice, secure the services of a qualified interpreter(s), provided that, with regard to spectators, such services shall not create an undue financial and administrative burden or result in a fundamental alteration in the nature of the service, program, or activity conducted by the court system. In those circumstances where the court system believes that the services would result in such a burden or alteration, the court system shall take any other action that would not result in such a burden or such an alteration but would nevertheless ensure that, to the fullest extent possible, individuals with disabilities receive the benefits or services provided by the court system. The City court system shall also be prepared to provide auxiliary aids and services other than interpreters, such as assistive listening devices or real-time transcription services, where necessary for individuals with hearing impairments to effectively participate in court proceedings. If you have questions, please contact [name of individual], the City court system's ADA Coordinator, at [list telephone number].

36. The City agrees that within ninety days of the effective date of this Agreement, it will distribute a copy of this Agreement and the policy attached as Exhibit E to every judge and court administrator within the court system.

37. The City agrees that within ninety days of the effective date of this Agreement, the City will conduct training for judges and court administrators on the application of this Agreement in jury trials and other court proceedings. The City agrees that it will conduct a similar training on an annual basis.

38. The City agrees that it will include the policy attached at Exhibit E in the manual(s) that govern the administrative procedures of the court system.

General Provisions

39. In the event that the City fails to comply in a timely manner with any provision of this Agreement, the Department may:

A. File a civil suit based upon the complaints described above; and/or,

B. File a civil action seeking to have the terms of this Agreement enforced in the appropriate federal court.

40. Within one hundred and eighty days of the effective date of this Agreement, the City agrees to submit a report to the Department describing the actions it has taken to comply with the provisions of this Agreement.

41. The parties agree that this Agreement is neither an admission by the City of any violation of the ADA, nor an admission by the Department, Advocacy, Inc., or the NAD Law Center of the merits of any of the City's potential defenses.

42. The City agrees that the Department may review compliance with this Agreement at any time.

43. The City agrees that it will not discriminate or retaliate against any person because of his/her participation in this matter.

44. This Agreement is a public document. A copy of this Agreement shall be made available to any person on request.

45. The effective date of this Agreement is the date of the last signature on the Agreement.

46. The term of this Agreement is five years from the effective date.

47. This Agreement does not purport to remedy any other potential violations of the ADA or any other law. This Agreement does not affect the City's continuing responsibility to comply with all aspects of the ADA.

48. The individuals signing this Agreement represent that they are authorized to bind the parties to this Agreement.

49. Failure by the Department to enforce the entire Agreement with regard to any deadline or any other provision of the Agreement, shall not be construed as a waiver of its right to enforce other deadlines or provisions of the Agreement.

50. This Agreement constitutes the entire agreement between the parties relating to the Complaints, and no other statement, promise, or agreement, either written or oral, made by either party or agents of either party, that is not contained in this Agreement, shall be enforceable.

FOR THE UNITED STATES:

_____

John L. Wodatch, Chief
L. Irene Bowen, Deputy Chief
Daniel W. Sutherland, Attorney
Disability Rights Section, Civil Rights Division

U.S. Department of Justice
P.O. Box 66118
Washington, D.C. 20035-6118

Date _____

FOR ADVOCACY, INC.

_____
William Jonson
Senior Regional Attorney, Advocacy, Inc.
7457 Harwin Drive, Suite 100
Houston, Texas 77036
Attorney for Rashad Gordon and Michael Edwards

Date _____

FOR NAD LAW CENTER

_____
Marc Charmatz
NAD Law Center
814 Thayer Avenue
Silver Spring, Maryland 20910
Attorney for Rashad Gordon and Michael Edwards

Date: _____

_____
Rashad Gordon

Date: _____

_____
Michael Edwards

Date: _____

FOR THE CITY:

_____
Tanya Wilder
Assistant City Attorney
Office of the City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251

Date: _____

EXHIBIT A

[General Order 500-13]

GENERAL ORDER
Houston Police Department

Issue Date: [Month], 2000
No.: 500-13
Reference: Supersedes General Order 500-13, dated March 31, 1998

POLICY

This General Order establishes procedures for all employees when they encounter persons who are deaf or hard of hearing.

DEFINITIONS

Auxiliary Aids and Services. Includes qualified interpreters, written materials, notepads and other effective methods of making aurally delivered materials available to individuals with hearing impairments.

ADA Coordinator. Departmental representative designated by the Chief of Police who will resolve grievances concerning the availability and/or use of auxiliary aids and services. The name of the current ADA Coordinator may be obtained via Dispatch.

Qualified Interpreter. An interpreter (usually someone approved by the Texas Commission for the Deaf or equivalent organization) who is able to interpret effectively, accurately, and impartially both receptively and expressively using any specialized vocabulary.

Certified Interpreter. A person who holds at least a Level III certification from the Texas Commission for the Deaf.

Primary Consideration. The choice of auxiliary aids and services made by the individual that will be honored unless there is confidence that there are equally effective means of communication.

TDD/TTY. "Telecommunication Device for the Deaf"/"Teletype". Allows user to send and receive typed messages on an attached screen. May also be used as part of a "relay service" where a system operator transfers the communication.

1. AVAILABILITY OF INTERPRETERS

Interpreters are always available. Instructions for obtaining their services are in the Emergency Communications Division, Command Center, Central Jail booking office, and at all Police Stations.

2. PATROL/FIELD RESPONSE

Whether at the scene of a call for service or on-viewed incident or simply interacting with a member

of the public, upon becoming aware that a member of the public is deaf or hard of hearing, department employees will focus on establishing effective communication. Primary consideration should be given to the deaf or hard of hearing person's preferred choice of communication. While this may require calling an interpreter to the scene if requested by the deaf or hard of hearing person, effective communication may in some situations be achieved through a series of notes, gestures, and lip reading.

Officers are encouraged to arrange interviews through a qualified interpreter to facilitate communication. HPD employees or family members or friends of the person are not usually considered qualified interpreters; however, they may be used in an emergency, in an innocuous situation such as exchanging greetings, or with the approval of the deaf or hard of hearing person.

An officer issuing a common traffic citation generally may be able to effectively communicate using notes and information obtained via documents produced by the driver. This would include routine traffic accident investigation, but an interview with a qualified interpreter should be arranged for a later mutually agreeable date and time to obtain a statement from a deaf or hard of hearing person if it is a situation where a person without a hearing disability would be interviewed to complete the investigation.

If an interview is necessary to establish probable cause for an arrest, a qualified interpreter will be utilized. Likewise a qualified interpreter will be necessary if the facts surrounding the investigation are complex and the deaf or hard of hearing person has not approved the use of other forms of communication. When an interpreter is requested in cases where no immediate police action is required, an interview will be scheduled for a later mutually agreeable date and time.

3. INVESTIGATION RESPONSE

Investigations may require the use of qualified interpreters in order to properly protect the rights of the suspect and/or to ensure the accuracy of the information related to the investigation that is being provided by a deaf or hard of hearing victim or witness.

Appropriate auxiliary aids and services, including a qualified interpreter will always be offered when interviewing a deaf or hard of hearing complainant or witness. While the deaf or hard of hearing person may approve the use of a family member or friend who is eighteen (18) years of age or older to facilitate communication when filing a report, police personnel will arrange an interview with a qualified interpreter if necessary to protect the integrity of the report.

The following situations will always require the use of a certified interpreter by scheduling an interview at a mutually agreeable date and time:

The hearing-impaired person is:

a. Involved in a major accident involving serious injuries.

b. Suspected of a felony offense.

c. Under arrest for any Class B misdemeanor or greater or for driving while intoxicated

(DWI) and is being given the statutory or DWI warning.

d. Suspected of committing a serious offense and is being interrogated under conditions requiring Miranda warnings.

e. Being given an Intoxilyzer, blood or urine test.

f. Giving an oral or sign-language statement.

A certified interpreter will also be used whenever a sworn statement is being obtained from a deaf or hard of hearing person who is a complainant or witness.

4. JAIL SUPERVISOR'S RESPONSIBILITIES

All deaf or hard of hearing suspects being arrested shall only be booked into either the Central or Southeast Jail facilities.

If the arresting and/or the transporting officer is aware that the suspect is deaf or hard of hearing, he or she shall be responsible for advising the suspect of the reason for the arrest in the most effective means of communication reasonably available. Likewise, if the arresting and/or transporting officer is aware that the suspect is deaf or hard of hearing, he or she shall note on the arrest blotter and shall verbally advise Jail personnel that the suspect is deaf or hard of hearing when placing the suspect in custody of the Jail personnel.

Upon becoming aware that a person is deaf or hard of hearing, a supervisor will then be immediately called so that the most appropriate form of communication for the booking process can be determined. After giving primary consideration to the expressed wishes of the deaf or hard of hearing person, a qualified interpreter will be immediately called in, if necessary, to provide general information as to the nature of the arrest and the booking, housing, bonding and court processes.

When a deaf or hard of hearing person is being booked at a city jail, a Jail Division supervisor will:

a. Immediately direct the person to the Medical Screening station.

b. Advise the person of all charges and make the person aware of the various alternatives available and make a TDD immediately available to the prisoner.

c. Direct the deaf or hard of hearing person's attention to notices outlining that person's rights including the name of the ADA Coordinator with whom a grievance may be filed.

d. Try to contact the person's friends or relatives or a specific person if requested.

e. Note on the person's Criminal History Record:

1. The prisoner is deaf or hard of hearing.

2. Whether or not the person requested an interpreter.

3. The name of any interpreter used and the date and time the interpreter was contacted.

f. Arrange visits between the deaf or hard of hearing prisoner and any authorized person.

g. When applicable, ensure that the municipal courts are notified in writing that the prisoner is deaf or hard of hearing and the prisoner's preferred auxiliary aid or service.

h. Ensure that the Jailer(s) assigned to monitor the cell block where a deaf or hard of hearing prisoner is housed makes full eye contact with the prisoner at each cell check to determine whether the prisoner wishes to have access to a TDD/TTY or some other auxiliary aid or service.

i. Ensure that all interactions with the deaf or hard of hearing person are properly documented as required by Jail Division Operating Procedures.

5. DIVISION MANAGER'S RESPONSIBILITIES

Only division managers or their designees can authorize the use of certified interpreters. When a certified interpreter is used, the interpreter will forward an invoice to the requesting division's manager. Upon receipt of the payment invoice, the division manager will authorize payment and immediately forward the invoice to the Office of Budget and Finance Division.

C.O. Bradford
Chief of Police

EXHIBIT B

["Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement"]

Link no longer available

EXHIBIT C

THE AMERICANS WITH DISABILITIES ACT

WHAT YOU SHOULD KNOW

Under the Americans with Disabilities Act of 1990, the City of Houston Police Department does not discriminate on the basis of disability in the operations of its programs, services, or activities. Moreover, the City Police Department does not discriminate on the basis of disability in its hiring or employment practices.

Here are some specific ways the City Police Department is implementing the ADA:

* The Police Department will operate its programs so that they are readily accessible to and usable by individuals with disabilities.

* When a person with a hearing or vision impairment needs an auxiliary aid to make communications effective, the Police Department will give primary consideration to the person's choice of auxiliary aid.

* The Police Department will maintain a "telecommunication device for the deaf" (TDD) at police stations.

* The Police Department will maintain a list of qualified interpreters who are available on short notice to assist in the Department to communicate with people with hearing impairments.

Questions, concerns, or requests for additional information regarding the ADA may be forwarded to the City Police Department's ADA Compliance Coordinator. You can reach the Department's ADA Compliance Coordinator by calling (713) 222-3131 (voice) or (713) 224-0675 (TDD) and asking for the ADA Coordinator.

Individuals who need auxiliary aids for effective communication in programs and services are invited to make their needs and preferences known to the ADA Compliance Coordinator.

For further information, call the Department of Justice's ADA Information Line at 1-800-514-0301 (voice) or 1-800-514-0383 (TDD).

EXHIBIT D

THE AMERICANS WITH DISABILITIES ACT

WHAT YOU SHOULD KNOW

Under the Americans with Disabilities Act of 1990, the City of Houston's detention facilities do not discriminate on the basis of disability in the operations of its programs, services, or activities. Moreover, the City's detention facilities do not discriminate on the basis of disability in their hiring or employment practices.

Here are some specific ways the City's detention facilities are implementing the ADA:

* When a detainee with a hearing or vision impairment needs an auxiliary aid to make communications effective, the detention facility will give primary consideration to the person's choice of auxiliary aid.

* The detention facilities will maintain "telecommunication devices for the deaf" (TDD), and will ensure that detainees with hearing impairments have a right to access to telephone services that is comparable to the access offered to detainees without hearing impairments.

* The detention facilities will maintain a list of qualified interpreters who are available on short notice to assist the officers and staff in communicating with people with hearing

impairments.

Questions, concerns, or requests for additional information regarding the ADA may be forwarded to the City Police Department's ADA Compliance Coordinator. You can reach the Department's ADA Compliance Coordinator by calling (713) 222-3131 (voice) or (713) 224-0675 (TDD) and asking for the ADA Coordinator.

Individuals who need auxiliary aids for effective communication in programs and services are invited to make their needs and preferences known to the ADA Compliance Coordinator.

EXHIBIT E

POLICY FOR INTERPRETING SERVICES IN JUDICIAL PROCEEDINGS INVOLVING INDIVIDUALS WHO ARE DEAF OR HARD OF HEARING

It is the policy of the City of Houston courts system that in those judicial proceedings where an interpreter is necessary to ensure effective participation by any party, witness, juror, or spectator who is deaf or hard of hearing, the courts system shall, upon reasonable notice, secure the services of a qualified interpreter. A "qualified interpreter" is one who interprets effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary. The courts system includes a justice, judge, or designated individual. This policy applies to those situations where other auxiliary aids and services, such as real-time transcription, are not equally effective means of communication or are unavailable. This policy does not apply to those situations where providing interpreters to spectators creates an undue financial and administrative burden or in a fundamental alteration in the nature of the service, program, or activity conducted by the courts.

Before determining the type of interpreting services to be secured, a court should confer with the individual with a disability regarding the individual's preferred mode of communication (e.g., American Sign Language, Signed English, or oral interpreting). In determining what type of auxiliary aid and service is necessary, the court should give *primary consideration,* 28 C.F.R. § 35.160(b)(2), to the requests of the individual with a disability. The court should then determine the type of the services and the date, time, and place those services are required. The court should, at its own expense, secure an interpreter(s) to provide those services.

Upon the date, place, and time noted, and prior to continuing with any proceeding, the court should ask the individual, through the interpreter, whether the individual is confident that the interpreter's

skills ensure an adequate and accurate interpretation of the communication of the proceeding, and whether the individual is confident of the interpreter's impartiality. If either of those questions are answered in the negative, further efforts shall be made by the court to acquire the services of a qualified interpreter. If those two questions are answered in the affirmative, the court should ask the interpreter whether he or she is able to interpret the proceedings. The proceedings shall continue unless the interpreter becomes unable or unwilling to satisfy the criteria for a qualified interpreter, at which time a qualified interpreter shall be obtained. The determination of whether an interpreter is qualified rests with the court.

The courts will also comply with Article 38.31 of the Texas Code of Criminal Procedure, "Interpreters for Deaf Persons."

To effectively communicate over the telephone, the court will maintain one or more "telecommunication devices for the deaf" ("TDD"), and will train administrative staff on the proper use of TDDs. Court employees may also communicate with people with hearing impairments through the state's "relay service." Through the relay service, a court employee can speak to a system operator, who then transfers those communications to the person with a hearing impairment through a TDD.

There is a Municipal Court ADA Coordinator who is available to help members of the public as well as Court judicial officers and employees who need assistance in interpreting the requirements of the ADA and this policy statement. Notice of how to contact the ADA Coordinator will be provided through pamphlets, posters, or other appropriate means.

If a person with a disability is dissatisfied with a court's proposed auxiliary aid or service, the individual may file a grievance with the ADA Coordinator. The ADA Coordinator will attempt to resolve the grievance within one week.

The City courts system shall notify individuals who are deaf or hard of hearing about the availability of auxiliary aids and services to ensure effective participation, and the procedures for securing them. The courts system shall distribute this information, for example, at the information desk, through pamphlets, posters or other appropriate means.

EXHIBIT F

THE AMERICANS WITH DISABILITIES ACT

WHAT YOU SHOULD KNOW

Under the Americans with Disabilities Act of 1990, the City of Houston Municipal Courts system does not discriminate on the basis of disability in the operations of its programs, services, or activities. Moreover, the City's Municipal Courts do not discriminate on the basis of disability in its hiring or employment practices.

Here are some specific ways the Municipal Courts are implementing the ADA:

* An ADA Coordinator has been appointed, with the responsibility of working with people with disabilities to ensure that the proper accommodations are provided.

* Ensuring that a qualified sign language interpreter is present in court whenever necessary to ensure effective participation.

* The courts will confer with an individual with a disability regarding the individual's preferred mode of communication (e.g., American Sign Language, Signed English or oral interpreting). The courts will give primary consideration to the requests of the individual with a disability.

Questions, concerns, or requests for additional information regarding the ADA may be forwarded to the Municipal Courts' ADA Coordinator:

[insert the person's name, title, office address, phone number, both voice and TDD, and days/hours available].

Individuals with disabilities are invited to make their needs and concerns known to the ADA Coordinator.

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Junked Vehicles

OBJECTIVES

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

1. Identify and define junk vehicles versus abandoned vehicles.
2. Recognize the differences between statues and ordinances. identify the source of law.
3. Distinguish between criminal prosecutions and administrative hearings.

"BUT IT'S MY GRANDFATHER'S TRUCK"
Chapter 683 of the Texas Transportation Code

I. JUNKED VEHICLE

A. History and Codification of the Statute

The Highway Beautification Act of 1965 originally authorized a municipality to enact and enforce an ordinance declaring junked vehicles as public nuisances and provided for the abatement of such junked vehicles. *Vernon's Ann. Civ. St. art. 6674v-1.* Texas Civil Statute 6687-9, Sec. 9 declared junked vehicles as public nuisances and indicated the process of abatement of such nuisances. The entire junked vehicle legal process was transferred to Vernon's Ann. Civ. St. art., Sec. 5.01 et seq. and later codified in the Texas Transportation Code in Chapter 683, Subchapter E.

B. What is a Junked Vehicle?

"One person's trash is another person's treasure"
-- Author Unknown--

Section 683.071 of the Texas Transportation Code defines a "junked vehicle".

> § 683.071. DEFINITION.
>
> In this subchapter, "junked vehicle" means a vehicle that is self-propelled and:
>
> (1) does not have lawfully attached to it:
>
> (A) an unexpired license plate; or
>
> (B) a valid motor vehicle inspection certificate; and
>
> (2) is:
>
> (A) wrecked, dismantled or partially dismantled, or discarded; or
>
> (B) inoperable and has remained inoperable for more than:
>
> (i) 72 consecutive hours, if the vehicle is on public property; or
>
> (ii) 30 consecutive days, if the vehicle is on private property.

A junked vehicle is a vehicle that is self-propelled. A "self-propelled vehicle" is a vehicle that has/had the ability to move forward or onward on its own. The determination, whether a self-propelled vehicle is a junked vehicle, is a two-part test.

> Part One: In order for the vehicle to be determined a junked vehicle, it must *NOT* have lawfully attached to it, either an unexpired vehicle registration *OR* a valid motor vehicle inspection certificate. If either the vehicle registration or the vehicle inspection certificate is expired, then one must move to the second part of determination.
>
> Part Two: After we have determined that either the vehicle registration or inspection sticker is expired the self-propelled vehicle must be either "wrecked, dismantled, partially dismantled, or discarded" *OR* "inoperable and has remained inoperable for more than 72 hours on public property *OR* 30 consecutive days on private property."

The terms within the statute according to common usage and defined in *Webster's Encyclopedic Unabridged Dictionary*, are follows:

> Dismantled – to deprive or strip of apparatus, furniture, equipments, defenses; to pull down; or to take apart.
>
> Discarded – to cast aside; reject; dismiss, especially from use.
>
> Wrecked – to be involved in a wrecked; become wrecked; any building, structure, or thing reduced to a state of ruin.
>
> Inoperable – not operable; not capable of being put into use, operation, or practice.

Thus, if the self-propelled vehicle has an expired registration or inspection certificate *AND* is dismantled, discarded, wrecked, or partially dismantled *OR* inoperable for 72 hours if on public property, or 30 days on private property, the vehicle is considered and can be treated as a junked vehicle.

C. Junked Vehicles declared to be a Public Nuisance

The fact that one maintains a junked vehicle does not necessarily mean that it is a public nuisance in violation of the Texas Transportation Code Section 683.073. The junked vehicle must be a public nuisance.

The Texas Transportation Code Section 683.072 declares junked vehicles to be public nuisances IF they are visible at any time of the year from a public place or public right-of-way. Section 683.072 proclaims:

> § 683.072. JUNKED VEHICLE DECLARED TO BE PUBLIC NUISANCE.
>
> A junked vehicle, including a part of a junked vehicle that is visible at any time of the year from a public place or public right-of-way:
>
> (1) is detrimental to the safety and welfare of the public;
> (2) tends to reduce the value of private property;
> (3) invites vandalism;
> (4) creates a fire hazard;
> (5) is an attractive nuisance creating a hazard to the health and safety of minors;
> (6) produces urban blight adverse to the maintenance and continuing development of municipalities; and
> (7) is a public nuisance.

Junked Vehicle Must Be Visible

A junked vehicle "that is visible at any time of the year from a public place or public right-of-way...is a public nuisance. Thus, in order for a junked vehicle to be a public nuisance in violation of this subchapter, the junked vehicle MUST be visible from a public place or public right-of-way. The term "visible" according to its common usage means "capable of being seen; that by its nature is an object of sight; perceptible by the sense of sight." *Op. Tex. Att'y Gen. No. GA-0034 (2003).*

For example, if the vehicle is located behind seasonal bushes, shrubs, or trees, which bloom during a certain time of the year and provide camouflage but the junked vehicle is visible from a public place or public

right-of-way during those off seasons, the junked vehicle would be a public nuisance.

"The municipality or county may abate and remove as a public nuisance any junked vehicle that is visible from public or private property or a public right-of-way but may not require a particular kind of camouflage to render the vehicle non-visible." *Op. Tex. Att'y Gen. No. GA-0034 (2003).*

Aesthetics proper when other factors added

In *Price v. City of Junction, Tex.*, 711 F.2d 582 (5th Cir. 1983), plaintiffs' brought action against the city seeking declaration that the city's "junk car" ordinance was unconstitutional. Residents argued that the City of Junction's ordinance was an invalid use of police power to regulate aesthetics and not a proper basis for the exercise of the city's police power. The Court held that under Texas Law, aesthetics should not be used as the sole basis for the exercise of police powers, but may properly be considered by the city as one of a number of factors followed in the exercise of police powers. *Id.* at 588.

D. Municipal or County Requirements

Texas Transportation Code Section 683.0711 authorizes a municipality or county to adopt an ordinance that imposes additional requirements that exceed the minimum standards for junked vehicles as defined in this subchapter.

E. Court Punishment if Convicted

Section 683.073 provides:

> § 683.073. OFFENSE.
>
> (a) A person commits an offense if the person maintains a public nuisance described by Section 683.072.
>
> (b) An offense under this section is a misdemeanor punishable by a fine not to exceed $200.
>
> (c) The court shall order abatement and removal of the nuisance on conviction.

This violation would be prosecuted in the municipal or justice courts. This section makes it a Class C misdemeanor with the punishment range up to $200.00. Additionally, upon conviction, the court must order the abatement and removal of the nuisance.

F. Junked Vehicle Authority to Abate the Nuisance

Section 683.074 specifically allows a municipality or county to adopt procedures, which provide for the abatement and removal from private or public property or a public right-of-way of a junked vehicle when it is declared a nuisance. Any adopted municipal or county ordinance must conform to the procedures mandated in Chapter 683 of the Transportation Code.

Section 683.074 provides:

> § 683.074. AUTHORITY TO ABATE NUISANCE; PROCEDURES.
>
> (a) A municipality or county may adopt procedures that conform to this subchapter for the abatement and removal from private or public property or a public right-of-way of a junked vehicle or part of a junked vehicle as a public nuisance.
>
> (b) The procedures must:
>
> (1) prohibit a vehicle from being reconstructed or made operable after removal;
>
> (2) require a public hearing before removal of the public nuisance; and
>
> (3) require that notice identifying the vehicle or part of the vehicle be given to the department not later than the fifth day after the date of removal.
>
> (c) An appropriate court of the municipality or county may issue necessary orders to enforce the procedures.
>
> (d) Procedures for abatement and removal of a public nuisance must be administered by

regularly salaried, full-time employees of the municipality or county, except that any authorized person may remove the nuisance.

(e) A person authorized to administer the procedures may enter private property to examine a public nuisance, to obtain information to identify the nuisance, and to remove or direct the removal of the nuisance.

(f) On receipt of notice of removal under Subsection (b)(3), the department shall immediately cancel the certificate of title issued for the vehicle.

(g) The procedures may provide that the relocation of a junked vehicle that is a public nuisance to another location in the same municipality or county after a proceeding for the abatement and removal of the public nuisance has commenced has no effect on the proceeding if the junked vehicle constitutes a public nuisance at the new location.

The municipal or justice courts with authorization from their respective governing bodies, may issue the necessary orders to enforce the procedures, which are set forth above. Such orders typically are judicial seizure orders, which are issued upon either:

1) After trial before a court or jury and the individual is convicted of maintaining a junked vehicle which is visible from a public place or public right-of-way and therefore a public nuisance.

2) Following the adopted municipal or county procedures for the abatement of the nuisance, and the required notice is given and the specific timeframes have passed with no hearing being requested before the municipal or county mandated court, board, commission, or official designated.

3) Following the adopted municipal or county procedures for the abatement of the nuisance, and according to the procedures the municipal or justice court is designated by the governing body to conduct the timely requested hearing, and after the requested hearing the determination of the court is that the junked vehicle is

a public nuisance and all the required notice provisions have to be followed.

G. The Notice of Violation

Section 683.075 provides the notice requirements, and mandates that such notice must be personally delivered or sent by certified mail. Section 683.075 provides:

> § 683.075. NOTICE.
>
> (a) The procedures for the abatement and removal of a public nuisance under this subchapter must provide not less than 10 days' notice of the nature of the nuisance. The notice must be personally delivered or sent by certified mail with a five-day return requested to:
>
> (1) the last known registered owner of the nuisance;
>
> (2) each lienholder of record of the nuisance; and
>
> (3) the owner or occupant of:
>
> (A) the property on which the nuisance is located; or
>
> (B) if the nuisance is located on a public right-of-way, the property adjacent to the right-of-way.
>
> (b) The notice must state that:
>
> (1) the nuisance must be abated and removed not later than the 10th day after the date on which the notice was personally delivered or mailed; and
>
> (2) any request for a hearing must be made before that 10-day period expires.
>
> (c) If the post office address of the last known registered owner of the nuisance is unknown, notice may be placed on the nuisance or, if the owner is located, personally delivered.
>
> (d) If notice is returned undelivered, action to abate the nuisance shall be continued to a date

not earlier than the 11th day after the date of the return.

As indicated above, in Sections (b)(1) and (2), the notice must state that the nuisance must be abated and removed by the 10th day after the notice was delivered or mailed and that any request for a hearing must be made before that 10-day period expires. Many municipalities provide in their municipal code of ordinances that the municipal court judge shall conduct any hearing, if requested.

H. The Hearing to Abate the Nuisance

Section 683.076 provides:

> § 683.076. HEARING.
>
> (a) The governing body of the municipality or county or a board, commission, or official designated by the governing body shall conduct hearings under the procedures adopted under this subchapter.
>
> (b) If a hearing is requested by a person for whom notice is required under Section 683.075(a)(3), the hearing shall be held not earlier than the 11th day after the date of the service of notice.
>
> (c) At the hearing, the junked motor vehicle is presumed, unless demonstrated otherwise by the owner, to be inoperable.
>
> (d) If the information is available at the location of the nuisance, a resolution or order requiring removal of the nuisance must include the vehicle's:
>
> (1) description;
> (2) vehicle identification number; and
> (3) license plate number.

It is very important to review the municipal ordinance in the relevant governing jurisdiction. Governing bodies differ in their choices of the designated board, commission, or official whom they adopt to conduct

the hearings under Section 683.076 (a), as well as how they issue the order or resolution requiring removal under Subsection (d). For example:

> The City of Conroe provides in Section 26-85 of its municipal code that "...a public hearing shall be held before the municipal judge to determine if the motor vehicle constitutes a public nuisance as provided by this article."
>
> The City of McAllen provides in Section 46-100 of its municipal code that "a public hearing shall be held prior to the removal of any vehicle or part thereof as a public nuisance. Such hearing shall be held before a municipal judge of the city. Failure of any party notified under section 46-98 to request a hearing within the ten days after service of notice or return of such notice undelivered by the United States Post Office shall be deemed a waiver of that party's attendance at such public hearing."
>
> The City of Irving provides in Section 19-22 of its municipal code that "upon receiving a request for a hearing made pursuant to section 19-21 hereof, the health department shall set a date and time for such hearing before the director of the health department or his designate." Further, Section 19-21 provides, "...after service of the notice to abate the nuisance, requests of the health department of the city, without the requirement of a bond, that a date and time be set when he may appear before the director of the health department or his designate for a hearing to determine whether or not he is in violation of this article. Upon a determination that the owner or the occupant of the property is in violation of this article, the director of the health department or his designate shall order removal and abatement of the nuisance."
>
> The City of Amarillo provides in Section 8-4-23 of its municipal code that "a public hearing must be held prior to the removal of the vehicle or part thereof as a public nuisance, to be held before

> the Judge of the Municipal Court, when such a hearing is requested by the owner or occupant of the public or private Premises or by the owner or occupant of the Premises adjacent to the..."
>
> The City of Lubbock provides in Section 16-376 of its municipal code that "a public hearing, prior to the removal of a junk vehicle or part thereof under this article as a public nuisance, shall be held before the zoning board of adjustment, or any other board or commission designated by the City Council, when such a hearing is requested by the owner or occupant of the public..."

In (c) of Section 683.076 above, it is indicated that at the junked motor vehicle hearing, held before the official designated by the governing body, it is presumed that the vehicle is inoperable unless otherwise demonstrated by the owner. Further, if the junked vehicle is determined to be a public nuisance and the information is available at the location of the nuisance, a resolution or order requiring the removal of the nuisance must include the vehicle's description, vehicle identification number, and the license plate number.

The 5th Circuit Court of Appeals, upon challenge, upheld a municipal ordinance authorized under Sections 683.074 through 683.077. In *Price,* 711 F.2d 582 (5th Cir. 1983), plaintiffs complained that the City of Junction's ordinance deprived them of their procedural due process rights under both the federal and state constitutions because they were denied a meaningful hearing before an impartial tribunal. The Court held that the notice and hearing provided by the "junk car" ordinance was constitutionally sufficient under state and federal due process clauses where the ordinance gave ten days' notice of pending action, and there was not a showing of actual unfairness or partiality on the part of the city council in conducting the hearings as provided by the ordinance. *Id.* at 583.

Section 683.0765 provides for the possibility by municipal ordinance to provide for an administrative adjudication process under which an administrative penalty may be imposed for the enforcement of an ordinance adopted under this subchapter.

I. Exceptions to Subchapter – Not Junked Vehicle

Section 683.077 identifies the situations where this subchapter is inapplicable. It provides:

> § 683.077. INAPPLICABILITY OF SUBCHAPTER.
>
> (a) Procedures adopted under Section 683.074 or 683.0765 may not apply to a vehicle or vehicle part:
>
> (1) that is completely enclosed in a building in a lawful manner and is not visible from the street or other public or private property; or
>
> (2) that is stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or junkyard, or that is an antique or special interest vehicle stored by a motor vehicle collector on the collector's property, if the vehicle or part and the outdoor storage area, if any, are:
>
> (A) maintained in an orderly manner;
>
> (B) not a health hazard; and
>
> (C) screened from ordinary public view by appropriate means, including a fence, rapidly growing trees, or shrubbery.
>
> (b) In this section:
>
> (1) "Antique vehicle" means a passenger car or truck that is at least 25 years old.
>
> (2) "Motor vehicle collector" means a person who:
>
> (A) owns one or more antique or special interest vehicles; and
>
> (B) acquires, collects, or disposes of an antique or special interest vehicle or part of an antique or special interest vehicle for personal use to restore and preserve an antique or special interest vehicle for historic interest.

(3) "Special interest vehicle" means a motor vehicle of any age that has not been changed from original manufacturer's specifications and, because of its historic interest, is being preserved by a hobbyist.

In *Price*, 711 F.2d 582 (5th Cir. 1983), the appellant challenged the junked vehicle ordinance on the grounds that it violated the equal protection clause of the federal constitution, alleging that the ordinance made an irrational classification in exempting from the ordinance junked car dealers, persons who can afford to hide their vehicles from public view, and persons who can get an extension period. The Court found that such actions did not violate equal protection. The test requires that the ordinance promote a legitimate governmental interest. In addition, the burden is on the challenger to show that any restriction is wholly arbitrary.

II. Abandoned Motor Vehicle

The everyday distinction between a "junked motor vehicle" and an "abandoned motor vehicle" can be confusing. The Texas Transportation Code Chapter 683 defines the circumstance in which a motor vehicle can be identified as an "abandoned motor vehicle". Section 683.002 reads as follows:

§ 683.002. ABANDONED MOTOR VEHICLE.

(a) For the purposes of this chapter, a motor vehicle is abandoned if the motor vehicle:

(1) is inoperable, is more than five years old, and has been left unattended on public property for more than 48 hours;

(2) has remained illegally on public property for more than 48 hours;

(3) has remained on private property without the consent of the owner or person in charge of the property for more than 48 hours;

(4) has been left unattended on the right-of-way of a designated county, state, or federal highway for more than 48 hours;

(5) has been left unattended for more than 24 hours on the right-of-way of a turnpike project

constructed and maintained by the Texas Turnpike Authority division of the Texas Department of Transportation or a controlled access highway; or
(6) is considered an abandoned motor vehicle under Section 644.153(r).

(b) In this section, "controlled access highway" has the meaning assigned by Section 541.302.

The sections in Chapter 683 referring to "abandoned motor vehicles" are primarily enforced and utilized by law enforcement agencies. The citizenry of the county or municipality, along with law enforcement agencies and their officers, tend to witness these abandoned motor vehicles on public highways or right-of-ways, whereas law enforcement agencies take the actions mandated in the Texas Transportation Code Chapter 683, Subchapter B, upon report of these witnessed vehicles. Thus, leaving municipal or justice courts are out of the process. The most commonly used subsections of 683.002 are those, listed above, in (a)(1) thorough (a)(4).

In order to be an abandoned motor vehicle as defined by section (a)(1), the vehicle must be inoperable and more than five years of age. According to Section (a)(2), the vehicle must have remained illegally on public property for more than 48 hours. Section (a)(3) states that, the vehicle must have remained on private property without the consent of the owner or person in charge of the property for more than 48 hours. And, the most common of the abandoned motor vehicles would be defined under section (a)(4). In section (a)(4), the vehicle must have been left unattended on the right-of-way of a designated county, state or federal highway for more than 48 hours. When one is traveling throughout the state, abandoned motor vehicle under section (a)(4) may be seen on a routine basis.

Upon the determination of a motor vehicle to be abandoned as defined above, a law enforcement agency may take the vehicle into custody. The law enforcement agency may take into custody any vehicle found on private or public property, which it has determined to be abandoned. Section 683.012 describes the notice requirements by stating that the law enforcement agency must provide to any owners or lien holders of the vehicle. Section 683.013 provides for charge of reasonable storage fees that a law enforcement agency or an agent of that agency may charge. Section 683.014 and 683.015 provide for the auction procedures, waiver of rights upon auction, and the auction proceeds of

the seized abandoned motor if not claimed by a certain time period. And, finally, section 683.016, provides that the law enforcement agency may use a motor vehicle that is taken into custody and not claimed as provided by the previous sections.

Abandoned motor vehicles, as defined in the Texas Transportation Code and listed above do not come into the purview of the municipal court system. The vehicles are identified, tagged, towed, and auctioned under the direction of the law enforcement agency.

III. Vehicle Abandoned in Storage Facility

Municipal Courts may have cases come before it pertaining to those vehicles abandoned in storage facilities. A storage facility is defined in Section 683.001 of the Transportation Code. Section 683.001 defines a storage facility to include a garage, parking lot, or establishment for the servicing, repairing, or parking of motor vehicles.

> § 683.031. GARAGEKEEPER'S DUTY: ABANDONED MOTOR VEHICLES.
>
> (a) A motor vehicle is abandoned if the vehicle is left in a storage facility operated for commercial purposes after the 10th day after the date on which:
>
> (1) the garagekeeper gives notice by registered or certified mail, return receipt requested, to the last known registered owner of the vehicle and to each lien holder of record of the vehicle under Chapter 501 to remove the vehicle;
>
> (2) a contract for the vehicle to remain on the premises of the facility expires; or
>
> (3) the vehicle was left in the facility, if the vehicle was left by a person other than the registered owner or a person authorized to have possession of the vehicle under a contract of use, service, storage, or repair.
>
> (b) If notice sent under Subsection (a)(1) is returned unclaimed by the post office, substituted notice is sufficient if published in one newspaper of general circulation in the area where the vehicle was left.

(c) The garagekeeper shall report the abandonment of the motor vehicle to a law enforcement agency and shall pay a $5 fee to be used by the law enforcement agency for the cost of the notice required by this subchapter or other cost incurred in disposing of the vehicle. A fee paid to the Department of Public Safety shall be used to administer this chapter.

(d) The garagekeeper shall retain custody of an abandoned motor vehicle until the law enforcement agency takes the vehicle into custody under Section 683.034.

§ 683.032. GARAGEKEEPER'S FEES AND CHARGES.

(a) A garagekeeper who acquires custody of a motor vehicle for a purpose other than repair is entitled to towing, preservation, and notification charges and reasonable storage fees, in addition to storage fees earned under a contract, for each day:

(1) not to exceed five days, until the notice described by Section 683.031(a) is mailed; and

(2) after notice is mailed, until the vehicle is removed and all accrued charges are paid.

(b) A garagekeeper who fails to report an abandoned motor vehicle to a law enforcement agency within seven days after the date it is abandoned may not claim reimbursement for storage of the vehicle.

(c) This subchapter does not impair any lien that a garagekeeper has on a vehicle except for the termination or limitation of claim for storage for the failure to report the vehicle to the law enforcement agency.

§ 683.033. UNAUTHORIZED STORAGE FEE; OFFENSE.

(a) A person commits an offense if the person charges a storage fee for a period for which the fee is not authorized by Section 683.032.

(b) An offense under this subsection is a misdemeanor punishable by a fine of not less than $200 or more than $1,000.

§ 683.034. DISPOSAL OF VEHICLE ABANDONED IN STORAGE FACILITY.

(a) A law enforcement agency shall take into custody an abandoned vehicle left in a storage facility that has not been claimed in the period provided by the notice under Section 683.012.

(b) The law enforcement agency may use the vehicle as authorized by Section 683.016 or sell the vehicle at auction as provided by Section 683.014. If a vehicle is sold, the proceeds of the sale shall first be applied to a garagekeeper's charges for service, storage, and repair of the vehicle.

(c) As compensation for expenses incurred in taking the vehicle into custody and selling it, the law enforcement agency shall retain:

(1) two percent of the gross proceeds of the sale of the vehicle; or

(2) all the proceeds if the gross proceeds of the sale are less than $10.

(d) Surplus proceeds shall be distributed as provided by Section 683.015.

(e) If the law enforcement agency does not take the vehicle into custody before the 31st day after the date notice is sent under Section 683.012:

(1) the law enforcement agency may not take the vehicle into custody; and

(2) the storage facility may dispose of the vehicle under:

(A) Chapter 70, Property Code, except that notice under Section 683.012 satisfies the notice requirements of that chapter; or

(B) Chapter 2303, Occupations Code, if:

(i) the storage facility is a vehicle storage facility; and

(ii) the vehicle is an abandoned nuisance vehicle.

As indicated in Section 683.033, a person commits an offense if the person charges a storage fee for a period for which Section 683.032 does not authorize the fee. The offense has a punishment range of $200.00 to $1,000.00.

Section 683.032 limits the garagekeeper who acquires custody of a motor vehicle for purposes other than repair to only five days worth of storage fees. Then, the garagekeeper must give notice as provided by section 683.031(a). Upon the notice, the garagekeeper may continue to charge storage fees until all accrued charges are paid. If the garagekeeper does not report an abandoned motor vehicle as required to the law enforcement agency by the 7th day after the date it is abandoned, the garagekeeper may not collect reimbursement for the storage of the vehicle. Any collection at that point may be a violation of section 683.033 and fall into the municipal or justice court jurisdiction.

The particular garagekeeper or storage facility owner and the law enforcement agency handle vehicles abandoned in storage facilities. If the improper fees are attempted to be collected, the case may end up in the municipal or justice court.

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Junked Vehicles Addendum

TRANSPORTATION CODE

CHAPTER 683. ABANDONED MOTOR VEHICLES

SUBCHAPTER A. GENERAL PROVISIONS

§ 683.001. DEFINITIONS. In this chapter:

(1) "Department" means the Texas Department of Transportation.

(2) "Garagekeeper" means an owner or operator of a storage facility.

(3) "Law enforcement agency" means:

(A) the Department of Public Safety;

(B) the police department of a municipality;

(C) the police department of an institution of higher education; or

(D) a sheriff or a constable.

(4) "Motor vehicle" means a vehicle that is subject to registration under Chapter 501.

(5) "Motor vehicle demolisher" means a person in the business of:

(A) converting motor vehicles into processed scrap or scrap metal; or

(B) wrecking or dismantling motor vehicles.

(6) "Outboard motor" means an outboard motor subject to registration under Chapter 31, Parks and Wildlife Code.

(7) "Storage facility" includes a garage, parking lot, or establishment for the servicing, repairing, or parking of motor vehicles.

(8) "Watercraft" means a vessel subject to registration under Chapter 31, Parks and Wildlife Code.

(9) "Abandoned nuisance vehicle" means a motor vehicle that is at least 10 years old and is of a condition only to be junked, crushed, or dismantled.

(10) "Vehicle storage facility" means a vehicle storage facility, as defined by Section 2303.002, Occupations Code, that is operated by a person who holds a license issued under Chapter 2303 of that code to operate that vehicle storage facility.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 2003, 78th Leg., ch. 1034, § 14, eff. Sept. 1, 2003.

§ 683.002. ABANDONED MOTOR VEHICLE. (a) For the purposes of this chapter, a motor vehicle is abandoned if the motor

vehicle:

(1) is inoperable, is more than five years old, and has been left unattended on public property for more than 48 hours;

(2) has remained illegally on public property for more than 48 hours;

(3) has remained on private property without the consent of the owner or person in charge of the property for more than 48 hours;

(4) has been left unattended on the right-of-way of a designated county, state, or federal highway for more than 48 hours;

(5) has been left unattended for more than 24 hours on the right-of-way of a turnpike project constructed and maintained by the Texas Turnpike Authority division of the Texas Department of Transportation or a controlled access highway; or

(6) is considered an abandoned motor vehicle under Section 644.153(r).

(b) In this section, "controlled access highway" has the meaning assigned by Section 541.302.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, § 30.157(a), eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 359, § 7, eff. Sept. 1, 2003; Acts 2003, 78th Leg., ch. 1325, § 16.06, eff. Sept. 1, 2003.

§ 683.003. CONFLICT OF LAWS; EFFECT ON OTHER LAWS. (a) Sections 683.051-683.055 may not be read as conflicting with Sections 683.074-683.078.

(b) This chapter does not affect a law authorizing the immediate removal of a vehicle left on public property that is an obstruction to traffic.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

SUBCHAPTER B. ABANDONED MOTOR VEHICLES: SEIZURE AND AUCTION

§ 683.011. AUTHORITY TO TAKE ABANDONED MOTOR VEHICLE INTO CUSTODY. (a) A law enforcement agency may take into custody an abandoned motor vehicle, watercraft, or outboard motor found on public or private property.

(b) A law enforcement agency may use agency personnel, equipment, and facilities or contract for other personnel, equipment, and facilities to remove, preserve, and store an abandoned motor vehicle, watercraft, or outboard motor taken into custody by the agency under this subchapter.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

§ 683.012. TAKING ABANDONED MOTOR VEHICLE INTO CUSTODY: NOTICE. (a) A law enforcement agency shall send notice of abandonment to:

(1) the last known registered owner of each motor vehicle, watercraft, or outboard motor taken into custody by the agency or for which a report is received under Section 683.031; and

(2) each lienholder recorded under Chapter 501 for the motor vehicle or under Chapter 31, Parks and Wildlife Code, for the watercraft or outboard motor.

(b) The notice under Subsection (a) must:

(1) be sent by certified mail not later than the 10th day after the date the agency:

(A) takes the abandoned motor vehicle, watercraft, or outboard motor into custody; or

(B) receives the report under Section 683.031;

(2) specify the year, make, model, and identification number of the item;

(3) give the location of the facility where the item is being held;

(4) inform the owner and lienholder of the right to claim the item not later than the 20th day after the date of the notice on payment of:

(A) towing, preservation, and storage charges; or

(B) garagekeeper's charges and fees under Section 683.032 and, if the vehicle is a commercial motor vehicle impounded under Section 644.153(q), the delinquent administrative penalty and costs; and

(5) state that failure of the owner or lienholder to claim the item during the period specified by Subdivision (4) is:

(A) a waiver by that person of all right, title, and interest in the item; and

(B) consent to the sale of the item at a public auction.

(c) Notice by publication in one newspaper of general circulation in the area where the motor vehicle, watercraft, or outboard motor was abandoned is sufficient notice under this section if:

(1) the identity of the last registered owner cannot be determined;

(2) the registration has no address for the owner; or

(3) the determination with reasonable certainty of the identity and address of all lienholders is impossible.

(d) Notice by publication:

(1) must be published in the same period that is required by Subsection (b) for notice by certified mail and contain all of the information required by that subsection; and

(2) may contain a list of more than one abandoned motor

vehicle, watercraft, or outboard motor.

(e) A law enforcement agency is not required to send a notice, as otherwise required by Subsection (a), if the agency has received notice from a vehicle storage facility that an application has or will be submitted to the department for the disposal of the vehicle.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 2003, 78th Leg., ch. 359, § 8, eff. Sept. 1, 2003; Acts 2003, 78th Leg., ch. 1034, § 15, eff. Sept. 1, 2003; Acts 2003, 78th Leg., ch. 1325, § 16.07, eff. Sept. 1, 2003.

§ 683.013. STORAGE FEES. A law enforcement agency or the agent of a law enforcement agency that takes into custody an abandoned motor vehicle, watercraft, or outboard motor is entitled to reasonable storage fees:

(1) for not more than 10 days, beginning on the day the item is taken into custody and ending on the day the required notice is mailed; and

(2) beginning on the day after the day the agency mails notice and ending on the day accrued charges are paid and the vehicle, watercraft, or outboard motor is removed.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

§ 683.014. AUCTION OR USE OF ABANDONED ITEMS; WAIVER OF RIGHTS. (a) If an abandoned motor vehicle, watercraft, or outboard motor is not claimed under Section 683.012:

(1) the owner or lienholder:

(A) waives all rights and interests in the item; and

(B) consents to the sale of the item by public auction; and

(2) the law enforcement agency may sell the item at a public auction or use the item as provided by Section 683.016.

(b) Proper notice of the auction shall be given. A garagekeeper who has a garagekeeper's lien shall be notified of the time and place of the auction.

(c) The purchaser of a motor vehicle, watercraft, or outboard motor:

(1) takes title free and clear of all liens and claims of ownership;

(2) shall receive a sales receipt from the law enforcement agency; and

(3) is entitled to register the motor vehicle, watercraft, or outboard motor and receive a certificate of title.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

§ 683.015. AUCTION PROCEEDS. (a) A law enforcement agency is entitled to reimbursement from the proceeds of the sale of an abandoned motor vehicle, watercraft, or outboard motor for:

(1) the cost of the auction;

(2) towing, preservation, and storage fees resulting from the taking into custody; and

(3) the cost of notice or publication as required by Section 683.012.

(b) After deducting the reimbursement allowed under Subsection (a), the proceeds of the sale shall be held for 90 days for the owner or lienholder of the vehicle.

(c) After the period provided by Subsection (b), proceeds unclaimed by the owner or lienholder shall be deposited in an account that may be used for the payment of auction, towing, preservation, storage, and notice and publication fees resulting from taking other vehicles, watercraft, or outboard motors into custody if the proceeds from the sale of the other items are insufficient to meet those fees.

(d) A municipality or county may transfer funds in excess of $1,000 from the account to the municipality's or county's general revenue account to be used by the law enforcement agency.

(e) If the vehicle is a commercial motor vehicle impounded under Section 644.153(q), the Department of Public Safety is entitled from the proceeds of the sale to an amount equal to the amount of the delinquent administrative penalty and costs.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 2003, 78th Leg., ch. 359, § 9, eff. Sept. 1, 2003; Acts 2003, 78th Leg., ch. 1325, § 16.08, eff. Sept. 1, 2003.

§ 683.016. LAW ENFORCEMENT AGENCY USE OF CERTAIN ABANDONED MOTOR VEHICLES. (a) The law enforcement agency that takes an abandoned motor vehicle into custody that is not claimed under Section 683.012 may use the vehicle for agency purposes.

(b) The law enforcement agency shall auction the vehicle as provided by this subchapter if the agency discontinues use of the vehicle.

(c) This section does not apply to an abandoned vehicle on which there is a garagekeeper's lien.

(d) This section does not apply to a vehicle that is:

(1) taken into custody by a law enforcement agency located in a county with a population of 2.4 million or more; and

(2) removed to a privately owned storage facility.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

SUBCHAPTER C. VEHICLE ABANDONED IN STORAGE FACILITY

§ 683.031. GARAGEKEEPER'S DUTY: ABANDONED MOTOR VEHICLES. (a) A motor vehicle is abandoned if the vehicle is left in a storage facility operated for commercial purposes after the 10th day after the date on which:

(1) the garagekeeper gives notice by registered or certified mail, return receipt requested, to the last known registered owner of the vehicle and to each lienholder of record of the vehicle under Chapter 501 to remove the vehicle;

(2) a contract for the vehicle to remain on the premises of the facility expires; or

(3) the vehicle was left in the facility, if the vehicle was left by a person other than the registered owner or a person authorized to have possession of the vehicle under a contract of use, service, storage, or repair.

(b) If notice sent under Subsection (a)(1) is returned unclaimed by the post office, substituted notice is sufficient if published in one newspaper of general circulation in the area where the vehicle was left.

(c) The garagekeeper shall report the abandonment of the motor vehicle to a law enforcement agency and shall pay a $5 fee to be used by the law enforcement agency for the cost of the notice required by this subchapter or other cost incurred in disposing of the vehicle. A fee paid to the Department of Public Safety shall be used to administer this chapter.

(d) The garagekeeper shall retain custody of an abandoned motor vehicle until the law enforcement agency takes the vehicle into custody under Section 683.034.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

§ 683.032. GARAGEKEEPER'S FEES AND CHARGES. (a) A garagekeeper who acquires custody of a motor vehicle for a purpose other than repair is entitled to towing, preservation, and notification charges and reasonable storage fees, in addition to storage fees earned under a contract, for each day:

(1) not to exceed five days, until the notice described by Section 683.031(a) is mailed; and

(2) after notice is mailed, until the vehicle is removed and all accrued charges are paid.

(b) A garagekeeper who fails to report an abandoned motor vehicle to a law enforcement agency within seven days after the date it is abandoned may not claim reimbursement for storage of the vehicle.

(c) This subchapter does not impair any lien that a garagekeeper has on a vehicle except for the termination or limitation of claim for storage for the failure to report the

vehicle to the law enforcement agency.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, § 30.158(a), eff. Sept. 1, 1997.

§ 683.033. UNAUTHORIZED STORAGE FEE; OFFENSE. (a) A person commits an offense if the person charges a storage fee for a period for which the fee is not authorized by Section 683.032.

(b) An offense under this subsection is a misdemeanor punishable by a fine of not less than $200 or more than $1,000.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

§ 683.034. DISPOSAL OF VEHICLE ABANDONED IN STORAGE FACILITY. (a) A law enforcement agency shall take into custody an abandoned vehicle left in a storage facility that has not been claimed in the period provided by the notice under Section 683.012.

(b) The law enforcement agency may use the vehicle as authorized by Section 683.016 or sell the vehicle at auction as provided by Section 683.014. If a vehicle is sold, the proceeds of the sale shall first be applied to a garagekeeper's charges for service, storage, and repair of the vehicle.

(c) As compensation for expenses incurred in taking the vehicle into custody and selling it, the law enforcement agency shall retain:

(1) two percent of the gross proceeds of the sale of the vehicle; or

(2) all the proceeds if the gross proceeds of the sale are less than $10.

(d) Surplus proceeds shall be distributed as provided by Section 683.015.

(e) If the law enforcement agency does not take the vehicle into custody before the 31st day after the date notice is sent under Section 683.012:

(1) the law enforcement agency may not take the vehicle into custody; and

(2) the storage facility may dispose of the vehicle under:

(A) Chapter 70, Property Code, except that notice under Section 683.012 satisfies the notice requirements of that chapter; or

(B) Chapter 2303, Occupations Code, if:

(i) the storage facility is a vehicle storage facility; and

(ii) the vehicle is an abandoned nuisance vehicle.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, § 30.158(b), eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 1034, § 16, eff. Sept. 1, 2003.

SUBCHAPTER D. DEMOLITION OF ABANDONED MOTOR VEHICLES

§ 683.051. APPLICATION FOR AUTHORIZATION TO DISPOSE OF CERTAIN MOTOR VEHICLES. A person may apply to the department for authority:

(1) to sell, give away, or dispose of a motor vehicle to a motor vehicle demolisher if:

(A) the person owns the motor vehicle and the certificate of title to the vehicle is lost, destroyed, or faulty; or

(B) the vehicle is an abandoned motor vehicle and is:

(i) in the possession of the person; or

(ii) located on property owned by the person; or

(2) to dispose of a motor vehicle to a motor vehicle demolisher for demolition, wrecking, or dismantling if:

(A) the abandoned motor vehicle:

(i) is in the possession of the person;

(ii) is more than eight years old;

(iii) either has no motor or is otherwise totally inoperable or does not comply with all applicable air pollution emissions control related requirements included in: (aa) the vehicle inspection requirements under Chapter 548, as evidenced by a current inspection certificate affixed to the vehicle windshield; or (bb) the vehicle emissions inspection and maintenance requirements contained in the Public Safety Commission's motor vehicle emissions inspection and maintenance program under Subchapter F, Chapter 548, or the state's air quality state implementation plan; and

(iv) was authorized to be towed by a law enforcement agency; and

(B) the law enforcement agency approves the application.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 612, § 1, eff. Sept. 1, 1999.

§ 683.052. CONTENTS OF APPLICATION; APPLICATION FEE. (a) An application under Section 683.051 must:

(1) contain the name and address of the applicant;

(2) state the year, make, model, and vehicle identification number of the vehicle, if ascertainable, and any

other identifying feature of the vehicle; and

(3) include:

(A) a concise statement of facts about the abandonment;

(B) a statement that the certificate of title is lost or destroyed; or

(C) a statement of the reasons for the defect in the owner's certificate of title for the vehicle.

(b) An application under Section 683.051(2) must also include an affidavit containing a statement of the facts that make that subdivision applicable.

(c) The applicant shall make an affidavit stating that:

(1) the facts stated in the application are true; and

(2) no material fact has been withheld.

(d) The application must be accompanied by a fee of $2, unless the application is made by a unit of government. Fees collected under this subsection shall be deposited to the credit of the state highway fund.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

§ 683.053. DEPARTMENT TO PROVIDE NOTICE. Except as provided by Section 683.054(b), the department shall give notice as provided by Section 683.012 if it determines that an application under Section 683.051 is:

(1) executed in proper form; and

(2) shows that:

(A) the abandoned motor vehicle is in the possession of the applicant or has been abandoned on the applicant's property; or

(B) the vehicle is not an abandoned motor vehicle and the applicant appears to be the owner of the vehicle.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

§ 683.054. CERTIFICATE OF AUTHORITY TO DISPOSE OF VEHICLE. (a) The department shall issue the applicant a certificate of authority to dispose of the vehicle to a motor vehicle demolisher for demolition, wrecking, or dismantling if notice under Section 683.053 was given and the vehicle was not claimed as provided by the notice.

(b) Without giving the notice required by Section 683.053, the department may issue to an applicant under Section 683.051(2) a certificate of authority to dispose of the motor vehicle to a demolisher if the vehicle meets the requirements of Sections 683.051(2)(A)(ii) and (iii).

(c) A motor vehicle demolisher shall accept the certificate of authority in lieu of a certificate of title for the vehicle.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 612, § 2, eff. Sept. 1, 1999.

§ 683.055. RULES AND FORMS. The department may adopt rules and prescribe forms to implement Sections 683.051-683.054.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

§ 683.056. DEMOLISHER'S DUTY. (a) A motor vehicle demolisher who acquires a motor vehicle for dismantling or demolishing shall obtain from the person delivering the vehicle:

(1) the motor vehicle's certificate of title;

(2) a sales receipt for the motor vehicle;

(3) a transfer document for the vehicle as provided by Subchapter B or Subchapter E; or

(4) a certificate of authority for the disposal of the motor vehicle.

(b) A demolisher is not required to obtain a certificate of title for the vehicle in the demolisher's name.

(c) On the department's demand, the demolisher shall surrender for cancellation the certificate of title or certificate of authority.

(d) The department shall adopt rules and forms necessary to regulate the surrender of auction sales receipts and certificates of title.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

§ 683.057. DEMOLISHER'S RECORDS; OFFENSE. (a) A motor vehicle demolisher shall keep a record of a motor vehicle that is acquired in the course of business.

(b) The record must contain:

(1) the name and address of the person from whom the vehicle was acquired; and

(2) the date of acquisition of the vehicle.

(c) The demolisher shall keep the record until the first anniversary of the date of acquisition of the vehicle.

(d) The record shall be open to inspection by the department or any law enforcement agency at any time during normal business hours.

(e) A motor vehicle demolisher commits an offense if the demolisher fails to keep a record as provided by this section.

(f) An offense under Subsection (e) is a misdemeanor punishable by:

(1) a fine of not less than $100 or more than $1,000;

(2) confinement in the county jail for a term of not

less than 10 days or more than six months; or
(3) both the fine and confinement.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

SUBCHAPTER E. JUNKED VEHICLES: PUBLIC NUISANCE; ABATEMENT

§ 683.071. DEFINITION. In this subchapter, "junked vehicle" means a vehicle that is self-propelled and:
(1) does not have lawfully attached to it:
(A) an unexpired license plate; or
(B) a valid motor vehicle inspection certificate; and
(2) is:
(A) wrecked, dismantled or partially dismantled, or discarded; or
(B) inoperable and has remained inoperable for more than:
(i) 72 consecutive hours, if the vehicle is on public property; or
(ii) 30 consecutive days, if the vehicle is on private property.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 746, § 1, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 798, § 1, eff. Sept. 1, 2001.

§ 683.0711. MUNICIPAL REQUIREMENTS. An ordinance adopted by a governing body of a municipality may provide for a more inclusive definition of a junked vehicle subject to regulation under this subchapter.

Added by Acts 2003, 78th Leg., ch. 1073, § 1.

§ 683.072. JUNKED VEHICLE DECLARED TO BE PUBLIC NUISANCE. A junked vehicle, including a part of a junked vehicle, that is visible at any time of the year from a public place or public right-of-way:
(1) is detrimental to the safety and welfare of the public;
(2) tends to reduce the value of private property;
(3) invites vandalism;
(4) creates a fire hazard;
(5) is an attractive nuisance creating a hazard to the health and safety of minors;
(6) produces urban blight adverse to the maintenance

and continuing development of municipalities; and

(7) is a public nuisance.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 2003, 78th Leg., ch. 1073, § 2.

§ 683.073. OFFENSE. (a) A person commits an offense if the person maintains a public nuisance described by Section 683.072.

(b) An offense under this section is a misdemeanor punishable by a fine not to exceed $200.

(c) The court shall order abatement and removal of the nuisance on conviction.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

§ 683.074. AUTHORITY TO ABATE NUISANCE; PROCEDURES. (a) A municipality or county may adopt procedures that conform to this subchapter for the abatement and removal from private or public property or a public right-of-way of a junked vehicle or part of a junked vehicle as a public nuisance.

(b) The procedures must:

(1) prohibit a vehicle from being reconstructed or made operable after removal;

(2) require a public hearing before removal of the public nuisance; and

(3) require that notice identifying the vehicle or part of the vehicle be given to the department not later than the fifth day after the date of removal.

(c) An appropriate court of the municipality or county may issue necessary orders to enforce the procedures.

(d) Procedures for abatement and removal of a public nuisance must be administered by regularly salaried, full-time employees of the municipality or county, except that any authorized person may remove the nuisance.

(e) A person authorized to administer the procedures may enter private property to examine a public nuisance, to obtain information to identify the nuisance, and to remove or direct the removal of the nuisance.

(f) On receipt of notice of removal under Subsection (b)(3), the department shall immediately cancel the certificate of title issued for the vehicle.

(g) The procedures may provide that the relocation of a junked vehicle that is a public nuisance to another location in the same municipality or county after a proceeding for the abatement and removal of the public nuisance has commenced has no effect on the proceeding if the junked vehicle constitutes a public nuisance at the new location.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 1226, § 1, eff. June 18, 1999.

§ 683.075. NOTICE. (a) The procedures for the abatement and removal of a public nuisance under this subchapter must provide not less than 10 days' notice of the nature of the nuisance. The notice must be personally delivered or sent by certified mail with a five-day return requested to:

(1) the last known registered owner of the nuisance;

(2) each lienholder of record of the nuisance; and

(3) the owner or occupant of:

(A) the property on which the nuisance is located; or

(B) if the nuisance is located on a public right-of-way, the property adjacent to the right-of-way.

(b) The notice must state that:

(1) the nuisance must be abated and removed not later than the 10th day after the date on which the notice was personally delivered or mailed; and

(2) any request for a hearing must be made before that 10-day period expires.

(c) If the post office address of the last known registered owner of the nuisance is unknown, notice may be placed on the nuisance or, if the owner is located, personally delivered.

(d) If notice is returned undelivered, action to abate the nuisance shall be continued to a date not earlier than the 11th day after the date of the return.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 2001, 77th Leg., ch. 413, § 13, eff. Sept. 1, 2001.

§ 683.076. HEARING. (a) The governing body of the municipality or county or a board, commission, or official designated by the governing body shall conduct hearings under the procedures adopted under this subchapter.

(b) If a hearing is requested by a person for whom notice is required under Section 683.075(a)(3), the hearing shall be held not earlier than the 11th day after the date of the service of notice.

(c) At the hearing, the junked motor vehicle is presumed, unless demonstrated otherwise by the owner, to be inoperable.

(d) If the information is available at the location of the nuisance, a resolution or order requiring removal of the nuisance must include the vehicle's:

(1) description;

(2) vehicle identification number; and

(3) license plate number.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

§ 683.0765. ALTERNATIVE PROCEDURE FOR ADMINISTRATIVE HEARING. A municipality by ordinance may provide for an administrative adjudication process under which an administrative penalty may be imposed for the enforcement of an ordinance adopted under this subchapter. If a municipality provides for an administrative adjudication process under this section, the municipality shall use the procedure described by Section 54.044, Local Government Code.

Added by Acts 2001, 77th Leg., ch. 413, § 14, eff. Sept. 1, 2001.

§ 683.077. INAPPLICABILITY OF SUBCHAPTER. (a) Procedures adopted under Section 683.074 or 683.0765 may not apply to a vehicle or vehicle part:

(1) that is completely enclosed in a building in a lawful manner and is not visible from the street or other public or private property; or

(2) that is stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or junkyard, or that is an antique or special interest vehicle stored by a motor vehicle collector on the collector's property, if the vehicle or part and the outdoor storage area, if any, are:

(A) maintained in an orderly manner;

(B) not a health hazard; and

(C) screened from ordinary public view by appropriate means, including a fence, rapidly growing trees, or shrubbery.

(b) In this section:

(1) "Antique vehicle" means a passenger car or truck that is at least 25 years old.

(2) "Motor vehicle collector" means a person who:

(A) owns one or more antique or special interest vehicles; and

(B) acquires, collects, or disposes of an antique or special interest vehicle or part of an antique or special interest vehicle for personal use to restore and preserve an antique or special interest vehicle for historic interest.

(3) "Special interest vehicle" means a motor vehicle of any age that has not been changed from original manufacturer's specifications and, because of its historic interest, is being preserved by a hobbyist.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 2001, 77th Leg., ch. 413, § 15, eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 1431, § 1, eff. Sept. 1, 2001.

§ 683.078. JUNKED VEHICLE DISPOSAL. (a) A junked vehicle, including a part of a junked vehicle, may be removed to a scrapyard, a motor vehicle demolisher, or a suitable site operated by a municipality or county.

(b) A municipality or county may operate a disposal site if its governing body determines that commercial disposition of junked vehicles is not available or is inadequate. A municipality or county may:

(1) finally dispose of a junked vehicle or vehicle part; or

(2) transfer it to another disposal site if the disposal is scrap or salvage only.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

711 F.2d 582
711 F.2d 582, 19 ERC 1693
(Cite as: 711 F.2d 582)

▷

United States Court of Appeals,
Fifth Circuit.

John Ed PRICE, et al., Plaintiffs-Appellants,
v.
CITY OF JUNCTION, TEXAS,
Defendant-Appellee.

No. 83-1097.

June 20, 1983.

Residents brought action against city, seeking declaration that city's "junk car" ordinance was unconstitutional. The United States District Court for the Western District of Texas, H.F. Garcia, J., upheld ordinance, and plaintiffs appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) ordinance was proper exercise of city's police powers; (2) notice and hearing provided by ordinance was constitutionally sufficient; (3) plaintiffs had failed to show that ordinance's restrictions were wholly arbitrary and therefore violative of equal protection; (4) plaintiffs had failed to carry burden of showing that ordinance was violative of takings clause under Federal Constitution or taking under State Constitution; and (5) where ordinance did not explicitly authorize warrantless entry, Court of Appeals had to read it, and local officials had to enforce it, consistent with Constitution.

Affirmed.

West Headnotes

[1] Municipal Corporations ⚿121
268k121 Most Cited Cases

In reviewing police powers of municipalities under Texas Constitution, Court of Appeals may not interfere unless challenged ordinance is unreasonable and arbitrary, i.e., a clear abuse of municipal discretion.

[2] Municipal Corporations ⚿122.1(2)
268k122.1(2) Most Cited Cases
(Formerly 268k122(2))

Under Texas law, party attacking ordinance enacted pursuant to municipality's police powers has extraordinary burden to show that no conclusive or even controversial or issuable fact or condition existed which would authorize passage or ordinance.

[3] Municipal Corporations ⚿111(1)
268k111(1) Most Cited Cases

Under Texas law, if reasonable minds may differ as to whether particular ordinance has substantial relationship to protection of general health, safety or welfare of public, there exists an issuable fact which would authorize passage of ordinance and ordinance must stand.

[4] Municipal Corporations ⚿589
268k589 Most Cited Cases

Under Texas law, aesthetics should not be ignored as basis for exercise of police powers, but may properly be considered by city as one of number of factors followed in exercise of police powers.

[5] Municipal Corporations ⚿614
268k614 Most Cited Cases

Where record indicated that city was concerned about junk cars being fire hazard and hindrance in fighting of fires, an attractive nuisance to children, an obstacle in luring professional persons to locate in city, a liability in encouraging tourist trade, and an eyesore, and contestants failed to show that there were no facts or conditions which would authorize passage of ordinance, city's "junk car" ordinance was proper exercise of city's police powers.

[6] Constitutional Law ⚿251.5
92k251.5 Most Cited Cases

Procedural due process does not require that impartial tribunal be judicial tribunal. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law ⚿255(1)
92k255(1) Most Cited Cases

[7] Constitutional Law ⚿278(1.1)
92k278(1.1) Most Cited Cases

Central theme of procedural due process under Federal Constitution is that parties whose liberty or property rights are affected by governmental action are entitled to notice and opportunity to be heard at meaningful time and in meaningful manner. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law ⚿254.1
92k254.1 Most Cited Cases

[8] Constitutional Law ⚿277(1)
92k277(1) Most Cited Cases

It is necessary that property or liberty interests within meaning of due process clause be involved before notice and hearing rights are created. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law ⚿277(1)
92k277(1) Most Cited Cases

Junk car is constitutionally protected "property" within contemplation of due process clause, whether it has little or great value. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law ⚿251.5
92k251.5 Most Cited Cases

Timing and nature of hearing required by right to procedural due process are determined by accommodation of competing interests, which include importance of private interest, finality of deprivation, likelihood of government error and magnitude of government interests. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law ⚿319.5(1)
92k319.5(1) Most Cited Cases

Government interest in junk cars, while sufficient to justify "junk car" ordinance, was not enough to warrant seizure prior to hearing and therefore procedural due process right existed to notice and hearing before governmental action was taken under ordinance. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law ⚿319.5(1)
92k319.5(1) Most Cited Cases

Notice and hearing provided by "junk car" ordinance was constitutionally sufficient under state and federal due process clauses where ordinance gave ten days' notice of pending action, there were indications that city council was willing to postpone hearing if notice proved insufficient, and there was no showing of actual unfairness or partiality on part of city council in conduct of hearings. U.S.C.A. Const.Amend. 14; Vernon's Ann.Texas Const. Art. 1, § 19.

[13] Constitutional Law ⚿278(1)
92k278(1) Most Cited Cases

State constitutional provision prohibiting deprivation of property except by due course of law of the land encompasses not only procedural but also substantive due process. Vernon's Ann.Texas Const. Art. 1, § 19.

[14] Constitutional Law ⚿278(1)
92k278(1) Most Cited Cases

Protection afforded under procedural due process rights granted by state constitutional provision prohibiting deprivation of property except by due course of law are congruent with those in Federal Constitution. Vernon's Ann.Texas Const. Art. 1, § 19.

[15] Constitutional Law ⚿278(1.1)
92k278(1.1) Most Cited Cases

Procedural due process right vouched safe by Texas Constitution to persons being deprived of property requires reasonable notice and meaningful opportunity to be heard. Vernon's Ann.Texas Const. Art. 1, § 19.

[16] Constitutional Law ⚿213.1(2)
92k213.1(2) Most Cited Cases

Equal protection claims, when not involving fundamental rights and suspect classes, are analyzed under mere rationality test. U.S.C.A. Const.Amend. 14.

[17] Constitutional Law ⚿213.1(2)
92k213.1(2) Most Cited Cases

Mere rationality test of equal protection claim requires that ordinance promote legitimate governmental interest. U.S.C.A. Const.Amend. 14.

[18] Constitutional Law ⚿48(4.1)
92k48(4.1) Most Cited Cases
(Formerly 92k48(4))

Under mere rationality test of equal protection claim, burden is upon challenger to show restriction is wholly arbitrary. U.S.C.A. Const.Amend. 14.

[19] Constitutional Law ⚿212
92k212 Most Cited Cases

Contestants failed to show that restrictions of "junk car" ordinance, which exempted from ordinance junk car dealers, persons who could afford to hide their vehicles from public view, and persons who could get extension period, were wholly arbitrary and therefore violative of equal protection under mere rationality test. U.S.C.A. Const.Amend. 14.

[20] Constitutional Law ⚿212
92k212 Most Cited Cases

Uniform grant of extension periods by "junk car" ordinance for removal of junk vehicle from public or private property did not create equal protection violation where it appeared that all who requested extension were given one, apparently as accommodation during initiation period of new ordinance. U.S.C.A. Const.Amend. 14.

[21] Municipal Corporations ⚿121
268k121 Most Cited Cases

Contestants' claim about possibility of arbitrary enforcement of "junk car" ordinance was properly raised in void-for-vagueness claim. U.S.C.A. Const.Amend. 14.

[22] Eminent Domain ⚿2.1
148k2.1 Most Cited Cases
(Formerly 148k2(1), 148k2, 149k2)

Under federal law, whether state law infringes property in violation of takings clause of Fifth Amendment requires examination of whether restriction forces some people alone to bear public burdens which, in all fairness and justice, should be borne by public as whole. U.S.C.A. Const.Amends. 5, 14.

[23] Eminent Domain ⚿295
148k295 Most Cited Cases

Burden in takings actions is upon plaintiff to show that ordinance attacked is confiscatory, inordinately burdensome or denies him economically viable use of his property. U.S.C.A. Const.Amends. 5, 14.

[24] Eminent Domain ⚿2.10(1)
148k2.10(1) Most Cited Cases
(Formerly 148k2(1.2))

[24] Eminent Domain ⚿2.26
148k2.26 Most Cited Cases
(Formerly 148k2(1.2))

[24] Eminent Domain ⚿2.42
148k2.42 Most Cited Cases
(Formerly 148k2(1.2))

"Junk car" ordinance was not confiscatory or inordinately burdensome and did not deny contestants economically viable use of property so as to violate takings clause of Fifth Amendment where ordinance was enacted to further significant and proper governmental interest in health, safety, and aesthetic ends, inoperable junk vehicles did not embody reasonable, investment-backed expectations, and therefore economic impact on contestants was insufficient to render ordinance improper. U.S.C.A. Const.Amends. 5, 14.

[25] Eminent Domain ⚿2.3
148k2.3 Most Cited Cases
(Formerly 148k2(1.1))

City's "junk car" ordinance did not constitute "taking," under State Constitution, for which compensation was required where there was benefit to general public and burden was not borne by

contestants alone but by all residents who would keep junked automobiles. Vernon's Ann.Texas Const. Art. 1, § 19.

[26] Searches and Seizures ⇐12
349k12 Most Cited Cases
(Formerly 349k2)

Where "junk car" ordinance, which provided that law enforcement officials could enter upon private property to enforce ordinance but further stated that municipal court would have authority to issue all orders necessary for such purpose, did not explicitly authorize warrantless entry, Court of Appeals had to read ordinance, and local officials had to enforce it, consistent with Constitution, and thus it would not be read as authorizing warrantless searches. U.S.C.A. Const.Amend. 4.

[27] Searches and Seizures ⇐60.1
349k60.1 Most Cited Cases
(Formerly 349k60, 349k7(10))

Where city's "junk car" ordinance was not invalid on its face, entries upon private property by police pursuant to ordinance to examine or remove vehicles had to be reviewed on case-by-case basis if entries occurred which were alleged to violate Fourth Amendment. U.S.C.A. Const.Amend. 4.
***585** Bradley C. Miles, San Angelo, Tex., for plaintiffs-appellants.

Graves, Dougherty, Hearon & Moody, David H. Donaldson, Jr., Austin, Tex., for defendant-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

CLARK, Chief Judge:

Six residents of Junction, Texas sued the city seeking a declaration that Junction's "junk car" ordinance was unconstitutional. The owners of cars subject to the ordinance also brought a section 1983 action against named city officials. After a number of pretrial stipulations and the dismissal of the section 1983 claim and the named defendants, the suit came before the district judge as a declaratory judgment action with the city as the sole defendant. The plaintiffs sought a declaration that the ordinance was an improper exercise of the city's police power; violated the plaintiffs' procedural due process rights; deprived them of equal protection of the laws; subjected their property to taking without just compensation, and subjected them to warrantless searches and seizures. The district court rejected all of the constitutional claims and upheld the statute. We affirm.

> The city of Junction, Texas, responding to what it characterized as "a long history of concern by [its] citizens ... about the junked, wrecked and abandoned vehicles that littered the city," began the process in May, 1979 of implementing a "junk car ordinance." The ordinance which was adopted [FN1] allowed the city to order the removal ***586** or to actually remove junked vehicles from public or private property. [FN2] A junked vehicle was defined as any inoperative motor vehicle which has both expired license ***587** plates and an invalid motor vehicle safety inspection certificate. The vehicle must be wrecked, dismantled, partially dismantled or discarded or it must remain inoperable for more than 120 days.

FN1. The text of the amended ordinance challenged in this case reads:

> SECTION I. DEFINITIONS.
> Whenever the following terms are used in this article they shall have the meaning respectively ascribed to them in this section:
> JUNKED VEHICLE. Means any motor vehicle as defined in Section 1 of Article 6701d-11, Vernon's Texas Civil Statutes, as amended, which:
> (a) is inoperative and which does not have lawfully affixed thereto both an unexpired license plate or plates and a valid motor vehicle safety inspection certificate and which is wrecked; dismantled; partially dismantled; or discarded; or

(b) remains inoperable for a continuous period of more than 120 days.

* * *

SECTION 2. LOCATION OR PRESENCE OF JUNKED VEHICLES WITHIN CITY DEEMED PUBLIC NUISANCE; EXCEPTIONS.

The location or presence of any junked vehicle or junked vehicles on any lot, tract, parcel of land or portion thereof, occupied or unoccupied, improved or unimproved, within the City of Junction shall be deemed a public nuisance and it shall be unlawful for any person or persons to cause or maintain such public nuisance by wrecking, dismantling, rendering inoperable, abandoning or discarding his or their vehicle or vehicles on the property of another or to suffer, permit or allow the same to be placed, located, maintained or exist upon his or their own real property; provided that this section shall not apply to (1) a vehicle or part thereof which is completely enclosed within a building in a lawful manner where it is not visible from the street or other public or private property; (2) a vehicle or part thereof which is stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or a junkyard; or (3) unlicensed inoperable vehicles stored on private property provided, however, that the vehicles and outdoor storage areas are maintained in such a manner that they do not constitute a health hazard and are screened from ordinary public view by means of a fence, rapidly growing trees, shrubbery, or other appropriate means.

SECTION 3. ABATEMENT OR REMOVAL ORDER: CONTENTS: SERVICE.

(a) Whenever such public nuisance exists in the city in violation hereof, the Chief of Police and/or his employees, who shall administer this ordinance, shall not give less than ten (10) days notice to the owner of the real property of the occupant, if any, of the premises whereon such public nuisance exists to abate or remove the same, stating the nature of the public nuisance of private property and that it must be removed and abated within ten (10) days and further that a request for a hearing must be made before expiration of said ten (10) day period by the aggrieved person, such notice to be mailed, by certified or registered mail with a 5- day return receipt requested, to the owner or the occupant of the private premises whereupon such public nuisance exists. If the notice is returned undelivered by the United States Post Office, official action to abate said nuisance shall be continued to a date not less than ten (10) days from the date of such return.

(b) Whenever such public nuisance exists in the city in violation hereof, the Chief of Police and/or his employees, shall give not less than a ten (10) day notice, stating the nature of the public nuisance on the public property or on a public right-of-way and that it must be removed and abated within ten (10) days and further that a request for a hearing must be made before expiration of said ten (10) day period, such notice to be mailed, by certified or registered mail with a 5-day return receipt requested, to the owner or the occupant of the public premises or to the owner or the occupant of the premises adjacent to the public right-of-way whereupon such public nuisance exists. If the notice is returned undelivered by the United States Post office, official action to abate said nuisance shall be continued to a date not less than ten (10) days from the date of such return.

(c) After a vehicle has been removed it shall not be reconstructed or made operable.

(d) A public hearing prior to the removal of the vehicle or part thereof as a public nuisance is to be held before the governing body of the City, or official of the City as designated by the governing body, when such a hearing is requested by the owner or occupant of the public or private premises or by the owner or occupant of the premises adjacent to the public

right-of-way on which said vehicle is located, within ten (10) days after service of notice to abate the nuisance. Any resolution or order requiring the removal of a vehicle or part thereof shall include a description of the vehicle, and the correct identification number and license number of the vehicle, if available at the site.

* * *

SECTION 4. REMOVAL WITH PERMISSION OF OWNER OR OCCUPANT

If within ten (10) days after receipt of notice from the Chief of Police and/or his employees, or his duly authorized agent, to abate the nuisance, as herein provided, the owner or occupant of the premises shall give his written permission the Chief of Police and/or his employees, or his duly authorized agent for removal of the junked motor vehicle from the premises, the giving of such permission shall be considered compliance with the provisions of Section 3.

SECTION 5. DISPOSAL OF JUNKED VEHICLES.

(a) If such public nuisance is not abated by said owner or occupant after notice is given in accordance with this ordinance, official action shall be taken by the City of Junction to abate such nuisance. Junked vehicles or parts thereof may be disposed of by removal to a scrapyard, demolishers, or any suitable site operated by the City of Junction for processing as scrap or salvage, which removal or process shall be considered with Section 5, Subdivision (b) of this ordinance. A junked vehicle disposed of to a demolisher, in accordance with this ordinance, must be transferred to such demolisher by a form acceptable to the Texas Department of Highways and Mass Transportation (Form # MVD 71-5).

* * *

SECTION 6. AUTHORITY TO ENFORCE.

The Chief of Police and/or his employees, or his agent, may enter upon private property for the purposes specified in this ordinance to examine vehicles or parts thereof, obtain information as to the identity of vehicles and to remove or cause the removal of a vehicle or parts thereof declared to be a nuisance pursuant to this ordinance. The Municipal Court of the City of Junction shall have authority to issue all orders necessary to enforce such ordinance. SECTION 7. APPLICATION.

Nothing in this Article shall effect ordinances that permit immediate removal of a vehicle left on public property which constitutes an obstruction to traffic.

SECTION 8. PENALTY.

Upon conviction for violation of any provisions of this article relating to the maintaining of a public nuisance as described herein or in permitting or allowing such public nuisance to exist, such violator shall be punished by a fine of not exceeding two hundred dollars ($200.00) and each day that such nuisance shall continue after the time for abatement as herein set out shall constitute a separate offense.

FN2. The city acted pursuant to state law. The state granted cities, towns and counties the authority to enact procedures for the abatement and removal of junked vehicles as public nuisances from private and public property, including public rights-of-way. Tex.Rev.Civ.Stat.Ann. art. 6687-9, *now codified at,* Tex.Health Code Ann. art. 4477-9a § 5.01 *et seq.*

The presence of a junked vehicle anywhere in the city constitutes a public nuisance. Exceptions to this were made for: (1) vehicles completely enclosed in buildings where not visible from public or private property; (2) vehicles on private property in connection with the operation of a vehicle dealer or junkyard; and (3) unlicensed antique or "special interest" vehicles stored by a collector on his property and screened from public view by a fence, trees or shrubbery. The ordinance provides for notice to the owner and a public hearing before the

city council or its designee before the vehicle may be seized.

The council amended the ordinance on May 12, 1980 to broaden the third exception to include all inoperable, unlicensed vehicles. The council then directed the new city attorney, Donnie J. Coleman, to enforce the ordinance. Ms. Coleman prepared a letter that was to be sent to all persons who were considered to be in violation of the ordinance as amended. Her letter ran in the Junction newspaper on Thursday, May 15, 1980. She waited approximately two weeks for voluntary compliance. During this period, she had the local police investigate reports of junked cars and conduct a survey of junked vehicles.

On May 28, 1980, Ms. Coleman sent out the same letter to sixteen people, including all of the people who later became plaintiffs. After receiving their letters, plaintiffs John Ed Price, Arthur D. Wallace, and C.W. Schaefer came into her office and obtained a copy of the ordinance. Ms. Coleman sent out four more groups of letters during June.

On June 2, ten persons, including all of the plaintiffs, requested a hearing before the council. Several of the plaintiffs appeared June 9 at the city council meeting which was attended by sixty to seventy people who supported the ordinance. The council decided to hold a special hearing on June 16. That announcement was made at the meeting and by a form letter mailed to all those who had requested a hearing.

At the hearing, police officer Freddy Gazaway testified that the plaintiffs (and others) were violating the ordinance. The owners did not cross-examine Gazaway. During the hearing, Ms. Coleman explained that the police would need either the owner's permission or a search warrant to examine a vehicle on private property.

The council, on June 23, agreed that nine of the ten owners were violating the ordinance and ordered Ms. Coleman to proceed with enforcement. The next day, Ms. Coleman mailed a letter to these persons notifying them that the council had made a preliminary finding that they were not in compliance with the junked car ordinance. As criminal prosecution began, the car owners filed their suit. Since the filing of this appeal, city officials proceeded with the impounding procedure and have enforced the ordinance against these plaintiffs.

POLICE POWER

The plaintiffs contend that the "junk car" ordinance might be a valid zoning ordinance, but that it cannot be a legitimate exercise of the city's general police powers because it is an unconstitutional restriction upon the plaintiffs' use of private property which serves no valid public interest. The plaintiffs' brief fails to make clear whether they raise this claim under the federal or state constitutions. Because the plaintiffs cite only Texas cases in this section of their brief, we assume that they are attacking the statute on state constitutional grounds. [FN3]

FN3. The district court addressed the issue under both federal and state constitutional law.

***588** The plaintiffs argue that the statute is invalid under *Spann v. Dallas,* 111 Tex. 350, 235 S.W. 513 (1921). *Spann* held that:

> Since the right of the citizen to use his property as he chooses so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked for the abridgment of a particular use of private property, unless such use reasonably endangers or threatens the public health, the public safety, the public comfort or welfare. A law which assumes to be a police regulation but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort or welfare, when it is manifest that such is not the real object and purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensating advantages.

235 S.W. at 515. *Spann* was decided, however, prior to the landmark Supreme Court holding in *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), and the 1927 passage of legislation by the Texas legislature giving cities the power to enact zoning laws.

[1][2][3] Subsequent Texas cases also distinguish *Spann.* In *City of Brookside Village v. Comeau,* 633 S.W.2d 790 (Tex.), *cert. denied,* 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982), the Texas Supreme Court upheld the village's ordinance regulating the location of mobile homes. The case is applicable here because while the Court found that the ordinance had the effect of a zoning ordinance, *id.* at 793, it considered the law as a land-use ordinance passed pursuant to the village's police powers. *Id.* at 793 n. 4. The Court directs us in reviewing the police powers of municipalities under the Texas Constitution to presume the ordinance is valid. *Id.* at 792. We may not interfere unless the ordinance is "unreasonable and arbitrary--a clear abuse of municipal discretion." *Id.* (quoting *Hunt v. City of San Antonio,* 462 S.W.2d 536, 539 (Tex.1971)). This places an "extraordinary burden" on the party attacking the ordinance to show that "no conclusive or even controversial or issuable fact or condition existed" which would authorize the passage of the ordinance. *Id.* at 792-93 (quoting *Thompson v. City of Palestine,* 510 S.W.2d 579 (Tex.1974)). If reasonable minds may differ as to whether a particular ordinance has a substantial relationship to the protection of the general health, safety or welfare of the public, then there exists an issuable fact and the ordinance must stand. *Id.* at 793. *See also City of Houston v. Johnny Frank's Auto Parts Co.,* 480 S.W.2d 774 (Tex.Civ.App.--Houston 1972, writ ref'd). [FN4]

> FN4. In *Johnny Frank's Auto Parts,* the Court of Civil Appeals upheld the constitutionality of a city ordinance that required that oil, gasoline and other flammable liquids be drained from wrecked vehicles in wrecking yards. The ordinance also required that wrecking yards be surrounded by solid fences or walls.
>
> The question remains whether the ordinance here involved was such an unreasonable exercise of police power as to be invalid. Even though an ordinance is passed to accomplish a purpose properly within the scope of a city's police power, it must not be wholly unreasonable nor unduly oppressive in its operation upon those affected by it. It must be reasonably necessary for the preservation of health, safety and welfare. 40 Tex.Jur.2d Municipal Corporations, sec. 327 (1962). However, when the validity of an ordinance is attacked on this basis there is a presumption of validity and the attacker, to prevail, must clearly show that it is arbitrary, unreasonable and an abuse of the police power. *City of Weslaco v. Meltor,* 158 Tex. 61, 308 S.W.2d 18 (1957). The question of its reasonableness is a question of law, not of fact. *City of Coleman v. Rhone,* 222 S.W.2d 646 (Tex.Civ.App.--Eastland 1949, writ ref'd). 480 S.W.2d at 779.

[4] The stipulated record in this case indicates that the city was concerned about junk cars being a fire hazard and a hinderance in the fighting of fires; an attractive nuisance to children; an obstacle in the luring of professional persons to locate in a city known as "Junky Junction"; a liability in encouraging tourist trade; and an eyesore. While *Spann* does say that purely aesthetic considerations are not a proper basis for the exercise of police powers, later cases indicate that aesthetics should not be ***589** ignored, but may properly be considered by a city as one of a number of factors followed in the exercise of police powers. *City of Houston v. Johnny Frank's Auto Parts Co.,* 480 S.W.2d at 780; *Connor v. City of University Park,* 142 S.W.2d 706, 712 (Tex.Civ.App.--Dallas 1940, writ ref'd).

[5] We presume this ordinance to be valid. The plaintiffs then must, under their "extraordinary burden," show us that there are no facts or conditions which would authorize the passage of the ordinance. They have failed to do that. The city on the other hand has shown that the ordinance not only furthers an aesthetic goal, but also serves the interests of the health, safety and welfare of the residents of Junction. We find the ordinance, therefore, to be a proper exercise of the city's police powers.

Finally, the plaintiffs argue that the ordinance establishes junked cars as a "nuisance *per se* " in violation of Texas law. We need only reply that

the Texas legislature has determined junk cars to be a public nuisance punishable under state law. Tex.Health Code Ann. art. 4477-9a, § 5.08(a)-(c).

PROCEDURAL DUE PROCESS

[6] The plaintiffs also complain that the ordinance deprives them of their procedural due process rights under both the federal and state constitutions because they are denied a meaningful hearing before an impartial tribunal. [FN5]

> FN5. The plaintiffs also argue that they are denied a hearing before an impartial "judicial" tribunal, that the ordinance violates the separation of powers, and that it shifts the burden of proof to the private landowner. These contentions border on the frivolous. There is no requirement that the impartial tribunal be a judicial tribunal. Moreover, in this case, after a hearing before the city council, the city must go to municipal court to enforce its findings thus implicitly granting the judicial hearing the residents say they are due. Additionally, there is no plausible separation of powers issue. To so rule would call into question the entire system of agency regulatory authority which resides in the executive level of government. Finally, there is no shift in the burden of proof. Before the city council and the municipal court, the city officials bear the burden of proving that the vehicles are inoperable and unlicensed, thus falling within the ordinance. The residents then may show that the vehicles in fact are operable.

The ordinance provides in section 3(d) that when the city believes that a vehicle is being maintained in violation of the ordinance, the owner shall receive ten days' notice to abate the violation or remove the vehicle. The owner also has ten days within which to request a hearing. Section 3(d) requires that, when requested, a public hearing must be held before the city council or a designated city official to determine if there is a violation. In this case, each of the plaintiffs received notice that they were maintaining vehicles in violation of the ordinance. Each requested a hearing, and a hearing was held at which the city presented evidence that they were in violation of the ordinance. The plaintiffs offered no defenses.

[7][8][9] The central theme of procedural due process under the federal constitution is that parties whose liberty or property rights are affected by governmental action are entitled to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 901-02, 47 L.Ed.2d 18 (1976). It is necessary that property or liberty interests within the meaning of the due process clause be involved before the notice and hearing rights are created. Whether a junk car has little or great value, it is constitutionally protected property. The plaintiffs here clearly have a property interest within the contemplation of the due process clause.

[10][11] The timing and nature of the hearing, therefore, is determined by an accommodation of the competing interests which include the importance of the private interest, the finality of the deprivation, the likelihood of government error and the magnitude of government interests. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265 (1982). The ordinance deals with the seizure (or re-arranging) of private property. If the property ***590** is seized, the deprivation would be final. There is some chance of government error given the fact that old damaged cars may still be operable. On the other hand, while the government interest is enough to justify the ordinance, it is certainly not enough to warrant seizure prior to hearing. There is a right, therefore, to notice and hearing before governmental action is taken under this statute.

[12] We hold that the notice and hearing provided by this ordinance is constitutionally sufficient. The ordinance gives ten days' notice of the pending action. Ten days is certainly enough time to clear the junk vehicles, cover them from view or secure license plates. It is also time enough to prepare for the hearing. Moreover, there are indications in this case that the council is willing to postpone the hearing if notice proves insufficient.

The plaintiffs complain, though, that the hearing is

not impartial because it may be before the same group that passed the ordinance. We will not presume that the publicly elected council members would not act impartially in such a hearing. In the setting of teacher disciplinary hearings arising from a strike, the Supreme Court refused to hold that a school board would act unfairly. *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1982). The Court required a showing of actual unfairness or partiality, such as some personal or financial stake amounting to a conflict of interest, to justify the disqualification of the board. 426 U.S. at 491-93, 96 S.Ct. at 2313-14. There is no showing here of any actual unfairness or partiality.

[13][14][15] The analysis under the state constitution merits the same result. The Texas constitution provides that "[n]o citizen of this State shall be deprived of ... property ... except by due course of the law of the land." Tex. Const. art. I, § 19. This provision encompasses not only procedural, but also substantive due process. *Aladdin's Castle, Inc. v. City of Mesquite,* 701 F.2d 524, 531 (5th Cir.1983). It is clear that the protection afforded under the procedural due process rights granted by article I, section 19, are congruent with those in the Federal Constitution.

> The Federal Constitution, in the fifth and fourteenth amendments, also provides against deprivation of life, liberty or property without due processes of law, the fourteenth amendment by its language being applicable to prevent the states from carrying out such a deprivation. It has been held by Texas courts that the clause of the Texas Constitution, to the extent that it is identical with the fourteenth amendment, has placed upon the powers of the state legislature the same restrictions as those which have been held to be imposed by the language of that amendment of the Federal Constitution. *Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249 (1887).

Tex. Const. Ann. art. 1, § 19 (Vernon 1955) (Interpretive Commentary) at 448-49. The procedural due process rights vouched safe by the Texas constitution to persons being deprived of property requires reasonable notice and meaningful opportunity to be heard. *Id.* at 447; *In re B-- M-- N--,* 570 S.W.2d 493, 502 (Tex.Civ.App.--Texarkana 1978). The same analysis is therefore required and the ordinance is constitutional under state law.

EQUAL PROTECTION

The plaintiffs' next argument is that the ordinance violates the equal protection clause of the federal constitution because it makes an irrational classification in exempting from the ordinance junk car dealers, persons who can afford to hide their vehicles from public view, and persons who can get an extension period. In addition, they argue that the ordinance does not limit the discretion of local officials thus engendering the possibility of arbitrary and discriminatory enforcement.

[16][17][18][19] Equal protection claims, when not involving fundamental rights and suspect classes, are analyzed under the mere rationality test. ***591** *Seoane v. Ortho Pharmaceuticals, Inc.,* 660 F.2d 146, 150 (5th Cir. 1981). This test requires that the ordinance promote a legitimate governmental interest. *Id.* We have already found such an interest. In addition, the burden is upon the challenger to show the restriction is wholly arbitrary. *Id.* The plaintiffs have failed to show this. [FN6]

> FN6. The plaintiffs appear to be suggesting that the ordinance discriminates against the poor. The ordinance, however, does not make any such distinction. It is to be applied regardless of wealth. Even were we to determine that the ordinance singled out the poor for different treatment, it would not trigger the higher standard of review--strict scrutiny--under the equal protection clause since the Supreme Court has refused to find the poor to be a suspect class. *San Antonio Indep. School Dist. v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 1291, 1294, 36 L.Ed.2d 16 (1973).

[20] The uniform grant of such extension periods does not create an equal protection violation. It appears that all who requested an extension were given one, apparently as an accommodation during the initiation period of the new ordinance.

[21] Finally, the plaintiffs' claim about the possibility of arbitrary enforcement is properly raised in a void-for-vagueness claim. *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972). The plaintiffs conceded during trial that the ordinance is not vague. The issue therefore must be resolved against them.

TAKING WITHOUT JUST COMPENSATION

The plaintiffs contend that the ordinance requires them to spend money to make their cars operative, screen them or license them. This they contend is confiscatory, therefore, it amounts to a taking of property without just compensation in violation of the federal and state constitutions. The plaintiffs also contend that if this is not a physical taking, it places a restriction or servitude upon private property without compensation in violation of Texas law.

[22] Under federal law, whether a state law infringes property in violation of the takings clause of the fifth amendment requires examination of whether the restriction forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Armstrong v. United States,* 364 U.S. 40, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). But the Court has acknowledged that this presents a question which is not susceptible to solution by a set formula and which invariably must be solved upon the particular circumstances in each case. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). We look for guidance to other decisions of the Court. It is clear that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Armstrong,* 80 S.Ct. at 1568. When analyzing a governmental action to determine if a taking has occurred, we are directed to inquire into "the character of the governmental action, its economic impact and its interference with reasonable investment-backed expectations." *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035, 2042, 64 L.Ed.2d 741 (1980) (quoting *Kaiser Aetna v. United States,* 444 U.S. 164, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979)).

[23][24] The burden in such cases is upon the plaintiff to show that the ordinance attacked is confiscatory, inordinately burdensome or denies him an economically viable use of his property. *National Western Life Insurance v. Commodore Cove,* 678 F.2d 24, 29 (5th Cir.1982). The plaintiffs here have failed to carry this burden. The ordinance was enacted to further health, safety and aesthetic ends and therefore furthers a significant and proper governmental interest. The ordinance also requires the plaintiffs to license or hide their inoperable junk vehicles if they do not want them to be seized. By their very nature such inoperable junk vehicles do not embody reasonable, investment-backed expectations. The economic impact on the plaintiffs is insufficient to render the ordinance improper under the takings clause.

***592** The analysis under the state constitution reaches the same conclusion. The plaintiffs argue that the ordinance amounts to either a physical taking of or a restriction or servitude upon private property and, therefore, compensation must be paid. For this proposition they cite *City of Austin v. Teague,* 570 S.W.2d 389 (Tex.1978); *DuPuy v. City of Waco,* 396 S.W.2d 103 (Tex.1965); and *Southern National Bank of Houston v. Austin,* 582 S.W.2d 229 (Tex.Civ.App.--Tyler 1979). The *Teague* and *DuPuy* cases are instructive. The Texas Supreme Court in *Teague* discusses at some length the near imponderable distinction between the exercise of police power and eminent domain. The Court in that case contends there is no one sentence test to allay the problem, but finds in that case that a city's denial of a permit application for an owner's use of property imposed a compensable servitude upon the property. The servitude resulted because the governmental action "singled out plaintiffs to bear all of the cost for the community benefit without distributing any cost among the members of the community." 570 S.W.2d at 394. In *DuPuy,* the Court held that the government's correction of something that is a detriment to the public indicates that the action is a regulation and not a taking and therefore compensation should not be allowed. 396 S.W.2d at 107 n. 3.

[25] Despite the Texas court's position that mere categorization of cases as police power or eminent domain cases is not dispositive, we have already determined that the ordinance here is a proper

exercise of the city's police power. Other Texas cases tell us that a reasonable exercise of the police power does not effect a taking. *City of Waco v. Archenhold Automobile Supply Co.,* 386 S.W.2d 174, 179 (Tex.Civ.App.--Waco 1964), *aff'd,* 396 S.W.2d 111 (Tex.1965). Even under the rationale of *Teague* and *DuPuy,* though, we find that compensation is not required here. The ordinance is more a regulation than a taking. There is benefit to the general public and the burden is not borne by these plaintiffs alone, but by all Junction residents who would keep junked automobiles. This action does not constitute a taking for which compensation is required.

WARRANTLESS ENTRY

The plaintiffs argue that the ordinance allows the police to enter upon private property to examine or remove vehicles without first obtaining a search warrant. This violates their fourth amendment protection against unreasonable searches and seizures.

[26][27] We agree with the district court's interpretation that the ordinance does not authorize warrantless searches. Section six of the ordinance provides that law enforcement officials may enter upon private property to enforce the ordinance. It further states however that the municipal court of Junction shall have the authority to issue all orders necessary for this purpose. This requires warrants prior to entry upon private property. Since the ordinance does not explicitly authorize warrantless entry, we must read it, and local officials must enforce it, consistent with the Constitution. If entries occur which appear to violate the Constitution, the entries must be reviewed on a case-by-case basis since the ordinance is not invalid on its face.

The decision of the district court is

AFFIRMED.

711 F.2d 582, 19 ERC 1693

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ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 13, 2003

The Honorable Dib Waldrip Comal County Criminal District Attorney 150 North Seguin, Suite 307 New Braunfels, Texas 78130	Opinion No. GA-0034 Re: Whether a county may require the owner of a "junked vehicle" to erect a fence or other screening objects in order to shield the vehicle from public view (RQ-0605-JC)

Dear Mr. Waldrip:

You ask whether a county may require the owner of a "junked vehicle" to erect a fence or other screening objects in order to shield the vehicle from public view.

Subchapter E, chapter 683 of the Transportation Code addresses the abatement of junked vehicles as a public nuisance. Section 683.072 provides, in relevant part, that "[a] junked vehicle, including part of a junked vehicle, that is *visible from a public place or public right-of-way* . . . is a public nuisance." Tex. Transp. Code Ann. § 683.072(7) (Vernon 1999) (emphasis added). Section 683.071 of the Transportation Code defines "junked vehicle":

In this subchapter, "junked vehicle" means a vehicle that is self-propelled and:

(1) does not have lawfully attached to it:

(A) an unexpired license plate; or

(B) a valid motor vehicle inspection certificate; and

(2) is:

(A) wrecked, dismantled or partially dismantled, or discarded; or

(B) inoperable and has remained inoperable for more than:

(i) 72 consecutive hours, if the vehicle is on public property; or

(ii) 30 consecutive days, if the vehicle is on private property.

Id. § 683.071 (Vernon Supp. 2003). Under section 683.073 of the Transportation Code, the offense of maintaining "a public nuisance described by section 683.072" is "a misdemeanor punishable by a fine not to exceed $200." *Id.* § 683.073(a)-(b) (Vernon 1999). Upon

conviction, the court must "order abatement and removal of the nuisance." *Id.* § 683.073(c). Additionally, pursuant to section 683.074, a municipality or county is empowered to "adopt procedures that conform to this subchapter for the abatement and removal from private or public property or a public right-of-way of a junked vehicle or part of a junked vehicle as a public nuisance." *Id.* § 683.074(a) (Vernon Supp. 2003). Sections 683.074, 683.075, and 683.076 describe the procedures a county must follow in order to abate and remove the nuisance, including notice, public hearing, judicial orders, and cancellation of the vehicle's certificate of title. Section 683.078 governs removal of a junked vehicle to "a scrapyard, a motor vehicle demolisher, or a suitable site operated by a municipality or county." *Id.* § 683.078(a) (Vernon 1999). You ask whether a county, pursuant to its authority to abate and remove a "junked vehicle" as a nuisance, may impose fencing and screening requirements.

A junked vehicle may be classified as a "public nuisance" subject to abatement and removal under subchapter E, chapter 683 of the Transportation Code, *only* if it "is visible from a public place or public right-of-way." *Id.* § 683.072. We must therefore consider the meaning of the term "visible." The term is not defined by statute or Texas case law. According to its common usage, "visible" means "capable of being seen; that by its nature is an object of sight; perceptible by the sense of sight." XIX Oxford English Dictionary 687 (2d ed. 1989). *See* Tex. Gov't Code Ann. § 311.011(a) (Vernon 1998) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."). The few out-of-state judicial decisions that have considered the meaning of "visible" accord with this definition. *See, e.g.*, *Striefel v. Charles-Keyt-Leaman P'ship*, 733 A.2d 984, 990 (Me. 1999) ("'Visible' means capable of being seen by persons who may view the premises."); *Colonial Trust v. Breuer*, 69 A.2d 126, 129 (Pa. 1949) ("'Visible' means perceivable by the eye . . . ."); *Tritt v. Judd's Moving & Storage, Inc.*, 574 N.E.2d 1178, 1185 (Ohio App. 3d 1990) ("Visible means perceivable by the eye.").

Thus, in order to avoid classification as a "public nuisance" under section 683.072 of the Transportation Code, a junked vehicle or a part thereof, need only be *non-visible* from a public place or public right-of-way. No particular kind of camouflage is required by the statute to render the vehicle non-visible. Consequently, a county may not compel the owner of a junked vehicle to erect fencing, trees, shrubbery, or any other specific kind of screening. In order to abate and remove the nuisance, the county must demonstrate that a junked vehicle "is visible from a public place or public right-of-way," *i.e.*, capable of being seen from such location. Whether any particular form of camouflage is sufficient in a given instance to render a junked vehicle non-visible is of course a question of fact for the county to determine in the first instance.

You also ask whether a county may import the fencing and screening requirements applicable to automotive salvage yards and junkyards to vehicles parked on other private property. Section 396.021(b) of the Transportation Code provides, in relevant part:

(b) A person who operates a junkyard or an automotive wrecking and salvage yard shall screen the junkyard or automotive wrecking and salvage yard with a solid barrier fence at least eight feet high. The fence must be painted a natural earth tone color and may not have any sign appear on its surface other than a sign indicating the business name.

(c) A person who operates a junkyard or an automotive wrecking and salvage yard in a county with a population of 200,000 or less shall screen the junkyard or automotive wrecking and salvage yard to at least six feet in height along the portion of the junkyard or

automotive wrecking and salvage yard that faces a public road or residence. The person may screen the yard by any appropriate means, including:

(1) a fence;

(2) natural objects; or

(3) plants.[1]

Tex. Transp. Code Ann. § 396.021(b)-(c) (Vernon 1999).

The fencing and screening standards applicable to junked vehicles in the possession of licensed automotive salvage yards and junkyards under chapter 396 are not applicable to junked vehicles maintained by individuals or businesses that do not fall within that category. In addition, subchapter E, chapter 683 of the Transportation Code, which, as previously discussed, addresses the abatement of junked vehicles as a public nuisance, is specifically inapplicable to a vehicle or vehicle part "that is stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or junkyard," provided that the vehicle or vehicle part is, *inter alia*, "screened from ordinary public view by appropriate means, including a fence, rapidly growing trees, or shrubbery." *Id.* § 683.077 (a)(2)(C) (Vernon Supp. 2003). Licensed automotive salvage yards and junkyards must follow the fencing and screening requirements of section 396.012(b). Individuals not embraced within the ambit of chapter 396 need only render a junked vehicle non-visible from a public place or public right-of-way.

SUMMARY

A county may abate and remove as a "public nuisance" any "junked vehicle" that is visible from public or private property or a public right-of-way. A county may not require a particular kind of camouflage to render the vehicle non-visible. The fencing and screening standards applicable to licensed automotive salvage yards and junkyards under chapter 396 of the Transportation Code do not apply to junked vehicles parked on other private property.

Very truly yours,

GREG ABBOTT
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First Assistant Attorney General

DON R. WILLETT
Deputy Attorney General - General Counsel

NANCY S. FULLER

Chair, Opinion Committee

Rick Gilpin
Assistant Attorney General, Opinion Committee

Footnotes

1. Section 396.021 does not apply to automotive wrecking and salvage yards covered by chapter 397 of the Transportation Code, *i.e.*, those in a county with a population of 3.3 million or more, not located in a municipality in that county, and established on or after September, 1983. *See* Tex. Transp. Code Ann. ch. 397 (Vernon 1999 & Supp. 2003).

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RQ-0605-GC

September 9, 2002

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I.D. # 42783

RECEIVED
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OPINION COMMITTEE

Honorable John Cornyn
Office of the Attorney General
Opinions Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Attorney General Opinion

To Whom It May Concern:

To what extent does a county have the authority to enforce "fencing" standards, as applied to automotive wrecking, salvage, and junkyards, to the determination of whether a junked vehicle is "visible" from a public place or public right-of-way?

A "junked vehicle" is, as defined in §683.071 Texas Transportation Code:

"A vehicle that is self-propelled and:

(1) does not have lawfully attached to it:

(A) an unexpired license plate; or
(B) a valid motor vehicle inspection certificate; and

(2) is:

A) wrecked, dismantled or partially dismantled, or discarded; or
B) inoperable and has remained inoperable for more than:
(i) 72 consecutive hours, if the vehicle is on public property; or
(ii) 30 consecutive days, if the vehicle is on private property.

A "junked vehicle" or part thereof becomes a public nuisance subject to abatement if, among other things, the junked vehicle "is visible from a public place or public right of way." Tex.Trans.Code §683.072.

No where do the statutes further define "visible". Thus, the term should be given its ordinary meaning. Is a sheet thrown over the junked vehicle ample to make it not visible? What of a tarp? Maybe a make-shift fence out of used wooden pallets or used roofing tin?

The screening requirements for a junkyard, automotive wrecking and salvage yard are described in §396.021(c)(1)(2)(3) Texas Transportation Code.

"A person who operates a junkyard or an automotive wrecking and salvage yard in a county with a population of 200,000 or less *(Comal County has population of 78,000)* shall screen the junkyard or automotive wrecking and salvage yard to at least six feet in height along the portion of the junkyard or automotive wrecking and salvage yard that faces a public road or residence. The person may *screen the yard by any appropriate means*, including:

(1) a fence;
(2) natural objects; or
(3) plants." [emphasis added]

After the owner of a junked vehicle attempts make it not-so-visible, complaints are often lodged about the quality of the materials being used to screen or fence the vehicles from view. Other examples of materials that are frequently used to screen the junked vehicle from view are as follows:

(1) Tongue and groove flooring;
(2) Garage Doors;
(3) Shipping crates;
(4) Cardboard or other paper products; and
(5) Salvage building materials.

Can the county require an owner of a junked vehicle to make it non-visible by using a fence, natural objects, or plants as would be required of a junkyard or automotive wrecking and salvage yard owner or operator? To what extent does a county have the authority to implement and enforce regulations defining "appropriate fencing"?

Thank you for the assistance in this matter.

Sincerely,

Dib Waldrip
Criminal District Attorney

CODE OF ORDINANCES
City of
LUBBOCK, TEXAS

Codified through
Ord. No. 2004-O0041, adopted April 6, 2004.
(Supplement No. 62)

Preliminaries

OFFICIALS
of the
CITY OF LUBBOCK, TEXAS
AT THE TIME OF THIS CODIFICATION

Bill McAlister
Mayor

Alan Henry
E. Jack Brown
M. J. "Bud" Aderton
Joan Baker
City Council

Larry J. Cunningham
City Manager

John C. Ross, Jr.
City Attorney

Evelyn Gaffga
Secretary

OFFICIALS
of the
CITY OF LUBBOCK, TEXAS
AS OF AUGUST 31, 1995

David R. Langston
Mayor

JUNKED
ARTICLE XIII. JUNKED VEHICLES*

***Editor's note:** Ord. No. 6561, printed in this article, repealed an earlier form of this article derived from Ord. No. 4376, § 1, enacted on April 23, 1964.

Charter references: Power of city to regulate obstructions, encroachments and encumbrances on streets, Ch. 1, Art. II, § 20.

Cross references: Wrecking yards and junkyards, § 14-66 et seq.; stolen, abandoned or recovered property, § 18-66 et seq.; disposition of discarded automobile bodies, § 23-9.

State law references: Texas Litter Abatement Act, VTCS Art. 6687-9.

Sec. 16-368. Definitions.

As used in this article:

Antique auto means passenger cars or trucks that were manufactured in 1925 or before, or which become thirty-five (35) or more years old.

Junked vehicle means any motor vehicle as defined in Chapter 683 of the Transportation Code, Subchapter E, Article 683.071, Vernon's Texas Civil Statutes, as amended:

A vehicle that is self-propelled and:

(1) Does not have lawfully attached to it:

a. An unexpired license plate; or

b. A valid motor vehicle inspection certificate;

(2) Is wrecked, dismantled or discarded; or

(3) Is inoperable and has remained inoperable for more than:

a. Seventy-two (72) consecutive hours, if the vehicle is on public property; or

b. Thirty (30) consecutive days, if the vehicle is on private property

Motor vehicle collector means a person who owns one or more antique or special interest vehicles; and acquires, collects, or disposes of an antique or special interest vehicle or part of an antique or special interest vehicle for personal use to restore and preserve an antique or special interest vehicle for historic interest.

Special interest vehicle means a motor vehicle of any age which has not been altered or modified from original manufacturer's specifications and, because of its historic interest, is being preserved by hobbyists.

(Ord. No. 7874, § 1, 6-28-79; Ord. No. 8819-A, § 1, 10-10-85; Ord. No. 2002-O0044, § 1, 5-9-02; Code 1959, § 15-34.1)

Sec. 16-369. Penalty.

Any person violating any of the provisions of this article relating to the maintaining of a public nuisance as described herein or in permitting or allowing such public nuisance to exist, shall be deemed guilty of a misdemeanor and conviction thereof shall be punishable by a fine not to exceed two hundred dollars ($200.00) and each day that such nuisance shall continue after the time for abatement as herein set out shall constitute a separate offense. On conviction, the court shall order removal and abatement of the nuisance.

(Ord. No. 6561, § 2, 2-22-73; Ord. No. 7874, §§ 2, 5, 6-28-79; Ord. No. 8605, § 3, 5-25-84; Code 1959, § 15-34.10)

Sec. 16-370. Exceptions--Lawfully parked vehicles.

This article shall not apply to:

(1) A vehicle or part thereof which is completely enclosed within a building in a lawful manner where it is not visible from the street or other public or private property;

(2) A vehicle or part thereof which is stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or a junkyard; or

(3) Unlicensed, operable or inoperable antique or special interest vehicles stored by a collector on his property, provided that the vehicles and the outdoor storage areas are maintained in such manner that they do not constitute a health hazard and are screened from ordinary public view by means of a fence, rapidly growing trees, shrubbery or other appropriate means.

(Ord. No. 7874, § 4, 6-28-79; Code 1959, § 15-34.3)

Sec. 16-371. Same--Vehicles obstructing traffic.

Nothing in this article shall affect ordinances or state statutes that permit immediate removal of a vehicle left on public property which constitutes an obstruction to traffic.

(Ord. No. 6561, § 2, 2-22-73; Ord. No. 7874, § 2, 6-28-79; Code 1959, § 15-34.9)

State law references: Removal of unauthorized vehicles parked in fire lanes, VTCS Art. 6701g-1; removal of unauthorized vehicles from parking facilities or public highways, VTCS Art. 6701g-2.

Sec. 16-372. Administration.

The administration and enforcement of this article shall be the responsibility of the zoning and environmental control director, his assistants or designated city employees and such persons shall have the powers stated in the "Texas Litter Abatement Act."

(Ord. No. 6561, § 2, 2-22-73; Ord. No. 7874, § 2, 6-28-79; Ord. No. 8605, § 2, 5-25-84; Code 1959, § 15-34.8)

State law references: Litter Abatement Act, VTCS Art. 6687-9.

Sec. 16-373. Unlawful to keep.

It shall be unlawful for any person to leave or permit to remain upon any public property, public right-of-way, or upon any lot or tract of land within the city any junked vehicle as defined in section 16-368 above.

(Ord. No. 6561, § 2, 2-22-73; Ord. No. 7874, § 2, 6-28-79; Code 1959, § 15-34.4)

Sec. 16-374. Public nuisance--Declared.

Any junked vehicle located in the city in any place where it is visible from a public place or public right-of-way is detrimental to the safety and welfare of the general public, tending to reduce the value of private property, to invite vandalism, to create fire hazards, and to constitute an attractive nuisance creating a hazard to the health and safety of minors and is detrimental to the economic welfare of the city, by producing urban blight which is adverse to the maintenance and continuing development of the city; and such vehicle is, therefore, declared to be a public nuisance.

(Ord. No. 6561, § 2, 2-22-73; Ord. No. 7874, § 3, 6-28-79; Code 1959, § 15-34.2)

Charter references: Powers of city as to nuisances, Ch. 1, Art. II, §§ 2, 23.

Cross references: Nuisances, § 12-101 et seq.

State law references: General powers of city as to nuisances, VTCS Art. 1175(19); abatement of health nuisances, VTCS Art. 4477-1, §§ 2, 3.

Sec. 16-375. Same--Notice of, and order to abate.

Whenever any public nuisance, as declared in section 16-374, exists in the city, the zoning and environmental control administrator shall send written notice, by certified mail with a five-day return requested, to the last known registered owner of the junked motor vehicle, every lien holder of record, and to the owner or the occupant of the premises whereupon such nuisance exists, or abuts the public property whereupon such nuisance exists, to abate or remove such public nuisance. Such notice shall state the nature of the public nuisance and specify that the nuisance must be abated and removed within ten (10) days after the delivery date of the notice, and further state that such person receiving the notice, if a hearing is desired, must request such hearing before the expiration date of said ten-day period. If any notice is returned undelivered by the United States post office, official action by the city to abate said nuisance shall be continued to a date not less than ten (10) days from the date of such return.

(Ord. No. 6561, § 2, 2-22-73; Ord. No. 7874, § 2, 6-28-79; Ord. No. 8605, § 1, 5-25-84; Code 1959, § 15-34.5)

Sec. 16-376. Public hearing prior to removal.

(a) A public hearing, prior to the removal of a junk vehicle or part thereof under this article as a public nuisance, shall be held before the zoning board of adjustment, or any other board or commission designated by the City Council, when such a hearing is requested by the owner or occupant of the public or private premises on which said vehicle is located, or by the owner or occupant of the premises adjacent to the public right-of-way, within ten (10) days after service of notice to abate the nuisance. Any order

of such board or commission requiring removal of a vehicle or part thereof shall include a description of the vehicle and the correct identification number and license number of the vehicle, if available at the site.

(b) A public hearing, prior to the removal of a junk vehicle or part thereof under this article as a public nuisance, shall be held before the zoning board of adjustment, or any other board or commission designated by the City Council, when a hearing is requested by the zoning and environmental control administrator of the City of Lubbock. Ten (10) days written notice of such hearing shall be mailed by certified mail with a five (5) day return receipt requested to the last known owner of the junk vehicle, any lien holder of record, and the owner or occupant of any private residence upon which the junk vehicle is stored or located informing such persons of the date and time of the public hearing and that the zoning and environmental control officer of the City of Lubbock will seek an order from such board requiring the removal of such junk vehicle. In every case where the junk vehicle is located upon public property such ten-day notice as above required shall be mailed as above set forth to the last known registered owner of the junk vehicle, any lien holder of record and the owner or occupant of the public premises or owner or occupant of the premises adjacent to public right-of-way where such junk vehicle is located.

(c) At every public hearing held by the zoning board of adjustment or any other board designated by the City Council to hold such hearing said board shall in each case determine the following:

(1) Whether or not the vehicle in question is a junk vehicle as defined in section 16-368 of the Code of Ordinances of the City of Lubbock.

(2) That the vehicle in question is not excepted from the provisions of this article by section 16-370 of the Code of Ordinances of the City of Lubbock.

(3) That the vehicle constitutes a public nuisance as set forth in section 16-374 of the Code of Ordinances of the City of Lubbock and should be abated.

(d) In every case where the board holding the public hearing as hereinabove provided finds that the factors set forth in subsection (c) of this section exist, the board shall issue its order authorizing and requiring the zoning and environmental control administrator of the city to remove the vehicle in question. Every such order shall include a description of the vehicle and the correct identification number and license number of the vehicle if such information is available at the site where such vehicle is located.

(e) In any public hearing held by the zoning board of adjustment or other designated board pursuant to the provisions of subsection (a) of this section the board shall as to such hearing follow the procedures set forth in subsections (b) through (d) of this section.

(Ord. No. 6561, § 2, 2-22-73; Ord. No. 7874, § 2, 6-28-79; Ord. No. 8819-A, § 2, 10-10-85; Code 1959, § 15-34.6)

Sec. 16-376.1. Relocation of public nuisance to another location.

The relocation of a junked vehicle that is a public nuisance to another location within the city limits of the City of Lubbock after a proceeding for the abatement and removal of the public nuisance has commenced has no effect on the proceeding if the junked vehicle constitutes a public nuisance at the new location.

(Ord. No. 2002-O0044, § 2, 5-9-02)

Sec. 16-377. Disposition.

(a) Junked vehicles which have been removed pursuant to this article shall not be reconstructed or made operable.

(b) In the event such junk vehicle has not been removed and the public nuisance abated after due notice as set forth in section 16-375 of this article, then in such event the zoning and environmental control officer of the city shall undertake the following action:

(1) In the case of a public hearing requested pursuant to the terms of section 16-376(a) of this article he shall on behalf of the city request that the board conducting the hearing enter an order requiring the owner or other responsible person for such junk vehicle to remove said vehicle and further ordering and authorizing the City of Lubbock to remove said vehicle in the event said vehicle is not removed by the owner or other responsible person within five (5) days from the date of said order.

(2) Where no public hearing has been requested pursuant to the terms of section 16-376(a) of this article said zoning and environmental control officer shall request a hearing pursuant to the terms of section 16-376(b) of this article seeking an order to remove the junk vehicle in question.

(c) Notice shall be given by the city to the Texas Highway Department within five (5) days after the removal of such junked vehicle, identifying the vehicle or part thereof.

(d) Junked vehicles or parts thereof may be disposed of by removal to a scrapyard, demolishers or any suitable site operated by the city for processing as scrap or salvage in accordance with the "Texas Litter Abatement Act."

(Ord. No. 6561, § 2, 2-22-73; Ord. No. 7874, § 2, 6-28-79; Ord. No. 8605, § 2, 5-25-84; Ord. No. 8819-A, § 3, 10-10-85; Code 1959, § 15-34.7)

Sec. 16-378. Same--Removal with permission.

If within ten (10) days after receipt of notice from the zoning and environmental control administrator and/or his employees, or his duly authorized agent, to abate the nuisance, as herein provided, the owner or occupant of the premises shall give his written permission to the zoning and environmental control administrator and/or his employees, or his duly authorized agent for removal of the junked motor vehicle from the premises, the giving of such permission shall be considered compliance with the provisions of Article XIII of Chapter 16.

(Ord. No. 8605, § 4, 5-25-84)

Sec. 16-379. Same--Presumption.

The person in whose name a junked vehicle is last registered shall be presumed to be the owner and person in control of such vehicle for purposes of prosecution under Article XIII of Chapter 16. Proof of ownership may be made by production of a copy or facsimile of the registration of a vehicle with the State Department of Highways and Public Transportation or the county motor vehicle licensing department or any other licensing authority showing the name of the person to whom the license plates for the vehicle were issued. This proof shall constitute prima facie evidence of the fact that the person to whom such certificate of registration was issued was the owner and person in control of the junked motor vehicle determined to be a

public nuisance. This presumption may be rebutted by competent evidence.

(Ord. No. 8605, § 5, 5-25-84)

Sec. 16-380. Rules governing procedures for conduct of hearing.

The zoning board of adjustment or other board designated by the City Council may adopt such rules governing the procedures for the conduct of hearing undertaken by said board not inconsistent with the terms of this article.

(Ord. No. 8819-A, § 4, 10-10-85)

MUNICIPAL CODE
City of
AMARILLO, TEXAS

Codified through
Ord. No. 6719, enacted March 9, 2004.
(Supplement No. 34)

Preliminaries

CODE OF ORDINANCES
CITY OF
AMARILLO, TEXAS

GENERAL ORDINANCES OF THE CITY

Adopted September 27, 1988

Published by Order of the City Commission

Published by Municipal Code Corporation
Tallahassee, Florida 1988

OFFICIALS

of the

CITY OF AMARILLO, TEXAS

AT THE TIME OF THIS CODIFICATION

Glen Parkey

Mayor

John Chandler

Don Chrysler
Dave Taylor
Keith Adams
City Commission

JUNKED
CHAPTER 8-4. IMPOUNDMENT OF MOTOR VEHICLES AND OTHER PROPERTY; JUNKED VEHICLES*

***State law references:** Home rule powers, V.T.C.A., Local Government Code § 51.071 et seq.

ARTICLE I. IN GENERAL

Sec. 8-4-1. Impounding property generally.

Members of the Police Department are hereby authorized to remove property of any description from a Street or highway to a place designated or maintained by the Police Department when:

(1) Such property is left unattended upon any Public Right-of-way and constitutes an obstruction to traffic;

(2) Such property upon a Street or highway is disabled so as to constitute an obstruction to traffic and the person in charge of it by reason of physical injury or illness incapacitated to such an extent as to be unable to provide for its custody or removal;

(3) Such property is left unattended on a Street either in a place at which parking is prohibited or beyond the legal limit of parking time;

(4) Such property is declared a nuisance per se as provided in this Code;

(5) Such property is left unattended in a clearly marked fire lane.

(Code 1960, § 12-5; Ord. No. 5646, § 1, 10-28-86)

Sec. 8-4-2. Vehicles.

(a) Whenever any police officer finds a vehicle standing upon a Street or highway in violation of any provision of a statute or ordinance, such officer is authorized to move such vehicle, or require the driver or other person in charge of the vehicle to move the same to a position off the paved or main-traveled part of such highway or Street.

(b) Any police officer is authorized to remove a vehicle from a highway to the nearest garage or other place of safety, or to a storage place designated or maintained by the City, under the following circumstances:

(1) When any vehicle is left unattended upon any bridge, viaduct or causeway or in any tube or tunnel where such vehicle constitutes an obstruction to traffic;

(2) When any vehicle is illegally parked so as to block the entrance to any

private Driveway and it is impracticable to move such vehicle from in front of the Driveway to another point on the highway;

(3) When any vehicle is found upon a highway and report has previously been made that such vehicle has been stolen or complaint has been filed and a warrant thereon issued charging that such vehicle has been embezzled;

(4) When any such officer has reasonable grounds to believe that any vehicle has been abandoned;

(5) After a vehicle that does not have lawfully affixed to it either an unexpired license plate or a valid motor vehicle safety inspection certificate or is so disabled that its normal operation is impossible or impractical has been parked on any public highway, and after the owner has been given at least forty-eight (48) hours' notice either in person or in writing attached to the windshield at the beginning of the forty-eight-hour period that the vehicle will be removed after the expiration of such period;

(6) When an officer arrests any person driving or in control of a vehicle for an alleged offense and such officer is authorized by this Code or other law to take the person arrested into custody or to take the person immediately before a magistrate.

(c) Any vehicle standing unattended may be moved by any member of the Police or Fire Department and any police officer or firefighter may require the moving of any such vehicle if it obstructs the free movements of such persons in the actual discharge of their duties.

(d) Any member of the Police Department is hereby authorized to remove any vehicle parked or standing in or on any portion of a highway when, in the opinion of the member of the Police Department, the vehicle constitutes a hazard, or interferes with a normal function of a governmental agency, or by reason of any catastrophe, emergency or unusual circumstance the safety of the vehicle is imperiled.

(Code 1960, § 12-6; Ord. No. 5646, § 1, 10-28-86)

Sec. 8-4-3. Notice requirements.

(a) If the property removed from the Street, as authorized in sections 8-4-1 and 8-4-2, is a motor vehicle and the officer knows or is able to ascertain from motor vehicle registration records the name and address of the owner thereof, such officer shall as soon as practicable give or cause to be given notice in writing to such owner of the fact of such removal, the reasons therefor and of the place to which such vehicle has been removed.

(b) If the property removed from the Street, as authorized in sections 12-4-1 and 12-4-2, is a motor vehicle and the officer does not know and is not able to ascertain the name of the owner, or for any other reason is unable to give the notice to the owner as provided in subsection (a) of this section, and if the vehicle is not returned to the owner as provided in section 8-4-4, notice shall be given as provided in V.A.C.S. art. 4477-9a.

(Code 1960, § 12-7; Ord. No. 5646, § 1, 10-28-86)

State law references: Removal of illegally stopped vehicles, V.A.C.S. art. 6701d, § 94.

Sec. 8-4-4. Redemption procedure; fees.

(a) Property removed under the provisions of this chapter shall be kept at such place designated by the Chief of Police and kept there until application for its redemption shall be made by the owner or his authorized agent, who shall be entitled to the possession thereof upon payment of fines and costs of removal and storage that may have accrued thereon.

(b) A reasonable fee for removing the vehicle or other property and for storage shall be charged against the vehicle or other property.

(Code 1960, § 12-8; Ord. No. 5646, § 1, 10-28-86)

Sec. 8-4-5. Disposition of unredeemed property.

If the property impounded pursuant to this chapter shall not be redeemed by the owner or his authorized agent within the time provided by law, it shall be disposed of in the manner prescribed by law.

(Code 1960, § 12-9; Ord. No. 5646, § 1, 10-28-86)

Secs. 8-4-6--8-4-20. Reserved.

JUNKED
ARTICLE II. JUNKED VEHICLES*

***Cross references:** Health nuisances, § 8-5-51 et seq.

State law references: Authority to define and prohibit nuisances, V.T.C.A., Local Government Code § 217.042.

Sec. 8-4-21. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Antique auto means a passenger car or truck that is at least twenty-five (25) years old.

Collector means a motor vehicle collector as defined in Texas Transportation Code section 683.077, as amended, or in a successor statute.

Junked vehicle means any motor vehicle which does not have lawfully affixed to it either an unexpired license plate or motor vehicle inspection certificate and either:

(1) Is wrecked, dismantled or partially dismantled, or discarded; or

(2) Is and has remained inoperable for more than, seventy-two (72) hours if the vehicle is on public property or thirty (30) consecutive days if it is on private property.

Special interest vehicle means a motor vehicle as described by or defined in Texas Transportation Code section 683.077, as amended, or in a successor statute.

(Code 1960, § 12-1; Ord. No. 5646, § 1, 10-28-86; Ord. No. 6561, § 1, 10-16-2001)

Cross references: Definitions to apply throughout Code, § 1-2-1.

State law references: Similar provisions, V.A.C.S. art. 4477-9a, § 5.01.

Sec. 8-4-22. Exemptions.

This article shall not apply to:

(1) A vehicle or part thereof which is completely enclosed within a Building in a lawful manner such that it is not visible from the Street or other public or private property;

(2) A vehicle or part thereof which is stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or a junkyard;

(3) An antique or special interest vehicle stored by a collector on his property, provided that any vehicles stored in an outdoor storage area are maintained in an orderly manner, do not constitute a health hazard, and are screened from ordinary public view by means of a fence, trees, shrubbery or other allowed screening device.

(Code 1960, § 12-2; Ord. No. 5646, § 1, 10-28-86; Ord. No. 6561, § 1, 10-16-2001)

State law references: Similar provisions, V.A.C.S. art. 4477-9a, § 5.09(g).

Sec. 8-4-23. Abatement, removal.

The procedure for abatement and removal of junked vehicles or parts thereof, as public nuisances, as defined in Texas Transportation Code §§ 683.071 to 683.078, as amended or in a successor statute, and for abatement and removal of antique or special interest vehicles stored in violation of this ordinance and otherwise meeting the definition of a junked vehicle, from private property, public property or public rights-of-way shall be as follows:

(1) For a junked vehicle on private property, written notice of not less than ten (10) days must be given stating the nature of the public nuisance on private property and that it must be removed and abated within ten (10) days and further that a request for a hearing must be made before the expiration of the ten-day period. Such written notice shall be mailed, by certified or registered mail with a five-day return requested, to the last registered owner of the junked motor vehicle and any lienholder of record and to the owner or the occupant of the private Premises whereupon such public nuisance exists. If the notice is returned undelivered by the United States Post Office, official action to abate the nuisance shall be continued to a date not less than ten (10) days from the date of such return.

(2) For a junked vehicle on public property, written notice of not less than ten (10) days must be given stating the nature of the public nuisance on public property or on a Public Right-of-way and that it must be removed and abated within ten (10) days and further that a request for a hearing must be made before expiration of the ten-day period. Such notice shall be mailed, by certified or registered mail with a five-day return requested, to the last registered owner of the junked motor vehicle and any lien-holder of record and to the owner or the occupant of the public premises or to the owner or the occupant of the premises

adjacent to the Public Right-of-way whereupon such public nuisance exists. If the notice is returned undelivered by the United States Post Office, official action to abate the nuisance shall be continued to a date not less than ten (10) days from the date of such return.

(3) For a nuisance on private or public property, if the post office address of the last known registered owner of the motor vehicle is unknown, notice to the last known registered owner may be placed on the motor vehicle, or, if the last known registered owner has been found, the notice may be hand delivered. The location where inhand delivery of notice has been made shall be described on a duplicate copy of the notice along with the date and time by the person making such delivery.

(4) A request for a hearing in either (1) or (2) above shall be made in writing and delivered to the Clerk of the Municipal Court.

(5) A public hearing must be held prior to the removal of the vehicle or part thereof as a public nuisance, to be held before the Judge of the Municipal Court, when such a hearing is requested by the owner or occupant of the public or private Premises or by the owner or occupant of the Premises adjacent to the Public Right-of-way on which the vehicle is located, within ten (10) days after service of notice to abate the nuisance. Any order requiring the removal of a vehicle or part thereof shall include a description of the vehicle, and the correct identification number and license number of the vehicle, if available at the site.

(6) At the hearing before the Municipal Court, it shall be presumed, unless demonstrated otherwise by the owner, that the vehicle is inoperable.

(7) Written notice must be given to the Texas Highway Department within five (5) days after the date of removal identifying the vehicle or part thereof.

(8) After a vehicle has been removed, it shall not be reconstructed or made operable.

(9) The procedure for abatement and removal of a public nuisance shall be accomplished by the regularly salaried, full-time employees of the City, except that the removal of a vehicle or parts thereof from private property, public property or Public Rights-of-way may be by any other duly authorized person under direction of the City.

(Code 1960, § 12-3; Ord. No. 5646, § 1, 10-28-86; Ord. No. 5930, § 1, 10-15-91; Ord. No. 6561, § 1, 10-16-2001)

State law references: Similar provisions, V.A.C.S. art. 4477-9a, § 5.09.

CODE OF ORDINANCES
City of
CONROE, TEXAS

Codified through
Ord. No. 1661-04, adopted March 25, 2004.
(Recodification)

Preliminaries

CODE OF ORDINANCES
CITY OF
CONROE, TEXAS

Published by Order of the City Council

Published by Municipal Code Corporation

Tallahassee, Florida 2004

OFFICIALS

of the

CITY OF

CONROE, TEXAS

AT THE TIME OF THIS RECODIFICATION

Carter Moore

Mayor

Sec. 26-53. Continuing notice to abate.

Each written notice issued under this article shall inform the owner of the real property that if the owner commits another violation of the same kind or nature that poses a danger to the public health and safety on or before the first anniversary of the date of the notice, the city may, without further notice, correct the violation at the owner's expense and assess the expense against the property.
(Code 1966, § 9½-5)

State law reference—Similar provisions, V.T.C.A., Health and Safety Code § 342.006(d).

Sec. 26-54. Assessment of expenses; lien.

(a) The code enforcement officer on behalf of the city council shall assess a lien against any real property upon which a nuisance shall have been abated by the city under section 26-51(a).

(b) To obtain a lien against the property, the code enforcement officer must file a statement of expenses in the real property records of the county. In addition to the cost of abating the nuisance, such notice shall include an administrative fee equal to the cost of legal notification and any required title opinion, but in no event shall such administrative fee be less than the amount set forth in appendix A.

(c) The lien obtained by the city council is security for the expenditures made and interest accruing at the rate of ten percent on the amount due from the date of filing of the statement of expenses in the real property records.

(d) The lien is inferior only to:

(1) Tax liens; and

(2) Liens for street improvements.

(e) The city council may bring a suit for foreclosure in the name of the city to recover the expenditures and interest due.

(f) The statement of expenses or a certified copy of the statement is prima facie proof of the expenses incurred by the city in doing the work or making the improvements.

(g) The director of finance is authorized to execute and deliver a release of the lien upon full payment of the assessment together with interest thereon as provided by this section. Any compromise resulting in release for less than full payment together with accumulated interest shall be first approved by the city council prior to execution and delivery of any release by the director of finance.
(Code 1966, § 9½-6)

State law reference—Similar provisions, V.T.C.A., Health and Safety Code § 342.007.

Secs. 26-55—26-80. Reserved.

ARTICLE III. JUNKED VEHICLES*

Sec. 26-81. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Junked vehicle means a motor vehicle that is inoperable and does not have lawfully affixed to it either an unexpired license plate or a valid motor vehicle safety inspection certificate and:

(1) Is wrecked, dismantled, partially dismantled, or discarded; or

(2) Remains inoperable for a continuous period of more than 30 consecutive days, if the vehicle is on private property; or

(3) Remains inoperable for 72 consecutive hours if the vehicle is on public property.

Motor vehicle means a vehicle that is self-propelled.
(Code 1966, § 9½-10)

Cross reference—Definitions generally, § 1-2.

State law reference—Similar provisions, V.T.C.A., Transportation Code § 683.071.

*__Cross reference__—Traffic and vehicles, ch. 66.

State law reference—Junked vehicles, V.T.C.A., Transportation Code § 683.071 et seq.

Sec. 26-85. Removal hearing.

(a) If requested by the owner or lien holder of the motor vehicle, or by the owner or occupant of the premises upon which the motor vehicle is located, or if located upon a public right-of-way by the owner or occupant of the adjacent premises, a public hearing shall be held before the municipal judge to determine if the motor vehicle constitutes a pubic nuisance as provided by this article. At the hearing it is presumed, unless otherwise demonstrated by the owner, that the vehicle is inoperable. If, at the conclusion of such hearing the municipal judge shall find and determine that the motor vehicle constitutes a public nuisance as provided by this article, he shall order the immediate removal of such vehicle by the police department.

(b) Where actual notice of certified mail shall be received by all persons entitled thereto pursuant to this division, the public hearing may be waived in the event of the failure of such persons to make timely request for hearing. If actual notice by certified mail shall not be received by any such party, such public hearing shall be conducted before the municipal judge prior to ordering the removal of the motor vehicle.

(c) Each order of removal shall include a description of the vehicle and the correct identification number and license number if the information is available at the site. In addition, such order shall require the demolition of the junked vehicle and shall prohibit it from being reconstructed or made operable following its removal. (Code 1966, § 9½-13)

Sec. 26-86. Enforcement authority.

(a) The code enforcement officer shall be authorized to administer the procedures authorized by this article and may enter upon private property for the purposes of examining a motor vehicle or vehicle part for the purposes of determining whether or not any such vehicle constitutes a public nuisance as provided by this article, or for the purposes of obtaining information relevant to the identity of the vehicle or to place any notice upon such vehicle authorized by this article.

(b) Removal of any such motor vehicle shall be supervised by the police department, whose officers may enter upon private property for the purposes of such removal and which may employ the service of private wreckers or towing equipment to effect such removal.

(c) Not later than the fifth day following removal of the motor vehicle, the police department shall give notice of such removal to the state department of highways and public transportation and shall request the immediate cancellation of the certificate of title to the vehicle. (Code 1966, § 9½-14)

Secs. 26-87—26-120. Reserved.

ARTICLE IV. NOISE

Sec. 26-121. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Central business district means the area bordered by Phillips Street, Pacific Street, Santa Fe Railroad and Frazier Street.

Commercial property means real property which is not within the definition of residential property as defined by this section.

dB(A) means the intensity of a sound expressed in decibels read from a calibrated sound level meter utilizing the A-level weighting scale and the slow meter response, as specified by the American National Standards Institute.

Large event venues means the central business district, Carl Barton Park and Candy Cane Park.

Residential property means real property which is dedicated or restricted to use for single-family or multifamily residential purposes and which is not actually used for another purpose, or real property upon which there exists a single-family residence or multifamily residential purposes and which is not actually used for another purpose, or real property upon which there exists a single-family residence or multifamily residence. In the case of an apartment building or other multifam-

ily residential structure, each unit of occupancy may be considered a separate residential property. The term residential property does not include a hotel, motel or other similar accommodations not intended or generally utilized for long-term occupancy.

Sound amplification device means the speaker or mechanism from which amplified sound emanates.

Sound nuisance means any sound which unreasonably annoys, disturbs, injures or endangers the peace, comfort, repose, health or safety of a reasonable person of ordinary tastes and sensitivities.
(Code 1966, § 10-1)
Cross reference—Definitions generally, § 1-2.

Sec. 26-122. General prohibition.

(a) It shall be unlawful for any person to make, cause, allow, or permit a sound nuisance.

(b) The acts enumerated in the following sections of this article, among others, are declared to be sound nuisances in violation of this article, but such enumeration shall not be deemed to be exclusive.
(Code 1966, § 10-2)

Sec. 26-123. Prima facie evidence of sound nuisance.

(a) Nothing in this article shall be deemed to require the use of noise decibel (dB(A)) evidence in any prosecution instituted under this article, provided, however, evidence that an activity or sound source produces a sound that exceeds the following dB(A) levels when measured upon a receiving property shall be prima facie evidence of a sound nuisance:

(1) Upon a receiving residential property:

a. 65 dB(A) between 7:00 a.m. and 10:00 p.m. of the same day; and

b. 58 dB(A) between 10:00 p.m. of one day and 7:00 a.m. of the next.

(2) 68 dB(A) upon a receiving commercial property.

(b) Unless a differing point of reception is specified, all measurements shall be taken at or near the nearest property line of the property where the sound is being received.
(Code 1966, § 10-3)

Sec. 26-124. Noisy vehicles.

The use of any automobile, motorcycle, or other vehicle so out of repair or loaded in such a manner so as to create loud and unreasonable grating, grinding, rattling noise, or any other loud and unreasonable sound is hereby prohibited and declared to be unlawful.
(Code 1966, § 10-4)
Cross reference—Traffic and vehicles, ch. 66.

Sec. 26-125. Noise from motor vehicle radio, tape player or other devices.

(a) It shall be unlawful for any person to make, cause, allow or permit a sound nuisance through operation of any radio, tape player or other device for producing, reproducing, amplifying or broadcasting sound, which is mounted or contained in or on a motor vehicle.

(b) Evidence that a motor vehicle sound source produces a sound that exceeds the dB(A) levels established by section 26-123 when measured at or near 15 feet from the nearest external point on the vehicle shall be prima facie evidence of a sound nuisance.
(Code 1966, § 10-5)
Cross reference—Traffic and vehicles, ch. 66.

Sec. 26-126. Noisy animals and birds.

The keeping of any animal or bird which causes or makes frequent or long and continued sound which unreasonably annoys, disturbs, injures or endangers the peace, comfort, repose, health or safety of a reasonable person of ordinary tests and sensitivities is hereby prohibited and declared to be unlawful.
(Code 1966, § 10-6)
Cross reference—Animals, ch. 10.

Sec. 26-127. Defenses.

The following defenses shall apply to any offense established in this article:

(1) The emission of any sound was for the purpose of alerting persons to the existence of an emergency, danger or attempted crime.

Sec. 26-82. Junked vehicles declared as public nuisances; authority to remove; exceptions.

(a) The city council finds and determines that a junked vehicle that is located in a place where it is visible from a public place or public right-of-way is detrimental to the safety and welfare of the general public, tends to reduce the value of private property, invites vandalism, creates fire hazards, constitutes an attractive nuisance creating a hazard to the health and safety of minors, and is detrimental to the economic welfare of the city by producing urban blight adverse to the maintenance and continuing development of the city. Junked vehicles are hereby found and declared to be a public nuisance.

(b) Pursuant to the terms of this article and in accordance with the procedures established in this article, the police department is hereby authorized to remove and take into custody any junked vehicle constituting a public nuisance and which is located on a public right-of-way, or public or private property.

(Code 1966, § 9½-11(a), (b))

Cross reference—Nuisances, § 26-31 et seq.

State law reference—Similar provisions, V.T.C.A., Transportation Code § 683.072.

Sec. 26-83. Application of article to certain vehicles and storage facilities.

This article shall not apply to a vehicle or vehicle part that is completely enclosed within a building in a lawful manner where it is not visible from the street or other public property, a vehicle or vehicle part that is stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or junkyard, or an unlicensed, operable or inoperable antique or special interest vehicle stored by a collector on the collectors property, if the vehicle and the outdoor storage area are maintained in a manner so that they do not constitute a public health hazard and are screened from ordinary public view by means of a fence, rapidly growing trees, shrubbery, or other appropriate means.

(Code 1966, § 9½-11(c))

State law reference—Similar provisions, V.T.C.A., Transportation Code § 683.077.

Sec. 26-84. Procedures for removal.

(a) No junked vehicle constituting a public nuisance may be removed except upon the order of the municipal judge of the city following written notice. The notice must state the nature of the public nuisance, that it must be removed and abated before the expiration of the tenth day following receipt of such notice, and that a request for a hearing must be made before the expiration of the ten-day period. The notice must be mailed, by certified mail with a five-day return receipt requested, to the last known registered owner of the junked vehicle and any lien holder of record. If the post office address of the last known registered owner of the junked vehicle is unknown, notice to the last known registered owner may be placed on the junked vehicle.

(b) In addition to the notice required by subsection (a) of this section, for a nuisance located upon private property, like notice shall be sent to the owner or occupant of the private premises upon which the junked vehicle is located.

(c) In addition to the notice required by subsection (a) of this section, for a nuisance located upon public property or upon a public right-of-way, like notice shall be sent to the owner or occupant of the public premises upon which the junked vehicle is located, or to the owner or occupant of the private premises adjacent to the public right-of-way upon which the junked vehicle is located.

(d) In addition to the required contents, the notice may set forth the time, date and location at which the public hearing shall be conducted if requested. If so included, notice of the public hearing shall be deemed given.

(e) If any notice required by this section is returned undelivered by the United States post office, or if the notice shall be given by placement on the junked vehicle, official action to abate the nuisance shall be continued to the tenth day following the date of the return. Notice given by placement on the junked vehicle shall be deemed returned on the tenth day following the date upon which such notice was placed upon the junked vehicle.

(Code 1966, § 9½-12)

CODE OF ORDINANCES
City of
McALLEN, TEXAS

Codified through
Ord. No. 2004-51, enacted June 28, 2004.
(Supplement No. 25)

Preliminaries

CODE OF ORDINANCES
CITY OF
McALLEN, TEXAS

Published by Order of the Board of Commissioners

Adopted February 28, 1994

Effective February 28, 1994

Published by Municipal Code Corporation

Tallahassee, Florida 1994

JUNKED
ARTICLE IV. JUNKED, WRECKED, ABANDONED PROPERTY*

***Cross references:** Substantial evidence rule in effect in appeals from decisions or orders of city officers or employees, § 2-196; abandoned aircraft, § 18-101 et seq.

State law references: Litter abatement, Vernon's Ann. Civ. St. art. 4477-9a.

DIVISION 1. GENERALLY

Secs. 46-86--46-95. Reserved.

JUNKED
DIVISION 2. JUNKED VEHICLES*

***State law references:** Junked vehicles, Vernon's Ann. Civ. St. art. 4477-9a, § 5.01 et seq.

Sec. 46-96. Definitions.

The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Antique auto means a passenger car or truck that was manufactured in 1925 or before, or which is 35 or more years old.

Collector means the owner of one or more antique or special interest vehicles who collects, purchases, acquires, trades or disposes of special interest or antique vehicles or parts of them for his own use in order to restore, preserve and maintain an antique or special interest vehicle for historic interest.

Demolisher means any person whose business is to convert a motor vehicle into processed scrap or scrap metal or otherwise to wreck or dismantle motor vehicles.

Junked vehicle means a motor vehicle as defined in Texas Transportation Code Ann. Sec. 683.071 as amended:

(1) That does not have lawfully affixed to it either an unexpired license plate or a valid motor vehicle safety inspection certificate;

(2) That is wrecked, dismantled, partially dismantled or discarded; or that remains inoperable for a continuous period of more than 72 hours on public property or more than 30 days if on private property.

Special interest vehicle means a motor vehicle of any age which has not been altered or modified from original manufacturer's specifications and, because of its historic interest, is being preserved by hobbyists.

(Code 1966, § 17 1/4-2; Ord. No. 2003-57, § 1, 8-11-03)

Cross references: Definitions and rules of construction generally, § 1-2.

State law references: Similar provision, Vernon's Ann. Civ. St. art. 4477-9a, § 5.01.

Junked

Sec. 46-97. Junked vehicles as public nuisance.

(a) A junked vehicle that is located where it is visible from a public place or public right-of-way is detrimental to the safety and welfare of the general public, tends to reduce the value of private property, invites vandalism, creates fire hazards, constitutes an attractive nuisance creating a hazard to the health and safety of minors, and is detrimental to the economic welfare of the city by producing urban blight, adverse to the maintenance and continuing development of the city and is a public nuisance.

(b) A person commits an offense if that person creates or maintains a public nuisance as determined under this section.

(c) A person who commits an offense under this section is, upon conviction, subject to a fine not to exceed $200.00. On conviction, the court shall order removal and abatement of the nuisance.

(Code 1966, § 17 1/4-3)

State law references: Similar provision, Vernon's Ann. Civ. St. art. 4477-9a, § 5.08.

Sec. 46-98. Notice by chief of police.

Whenever it is brought to the attention of the chief of police that a public nuisance, as defined in this division, exists on private property or on a public right-of-way or public property in the city, the chief of police shall give or cause to be given to the last known registered owner of the junked motor vehicle, each lienholder of record, and the owner or occupants of the private premises or owner or occupant of private property adjacent to the public right-of-way on which the public nuisance exists in writing, a notice, stating:

(1) The nature of the public nuisance;

(2) That it must be removed and abated within ten days; and

(3) That a request for a hearing must be made before the expiration of the ten-day period.

The notice shall be personally delivered or sent by certified mail with a five-day return requested. If the notice is returned undelivered by the United States Post Office, official action to abate such nuisance shall be continued to a date not less than ten days from the date of such return. If the post office address of the last known registered owner of the vehicle is unknown, notice may be placed on the nuisance or, if the owner is located, personally delivered.

(Code 1966, § 17 1/4-4; Ord. No. 2003-57, § 2, 8-11-03)

State law references: Similar provision, Vernon's Ann. Civ. St. art. 4477-9a, § 5.09.

Sec. 46-99. Right of entry.

The chief of police, or his duly authorized agent, may enter upon private property for the purposes specified in this division and to examine vehicles or parts thereof, obtain information as to the identity of vehicles and to remove or cause the removal of a vehicle or parts thereof declared to be a nuisance, in accordance with this division. The municipal court shall have authority to issue all orders necessary to enforce this division.

(Code 1966, § 17 1/4-15)

Sec. 46-100. Public hearing.

A public hearing shall be held prior to the removal of any vehicle or part thereof as a public nuisance. Such hearing shall be held before a municipal judge of the city. Failure of any party notified under section 46-98 to request a hearing within ten days after service of notice or return of such notice undelivered by the United States Post Office shall be deemed a waiver of that party's attendance at such public hearing. If, at such hearing the municipal court finds that the vehicle in question is a public nuisance, the court may issue orders necessary to enforce the provisions of this division.

(Code 1966, § 17 1/4-5)

State law references: Similar provision, Vernon's Ann. Civ. St. art. 4477-9a, § 5.09.

Sec. 46-101. Exceptions.

This division shall not apply to:

(1) A vehicle or part thereof which is completely enclosed within a building in a lawful manner where it is not visible from the street or other public or private property;

(2) A vehicle or part thereof which is stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or junkyard; or

(3) Unlicensed, operable or inoperable antique and special interest vehicles stored by a collector on his property, provided that the vehicle and the outdoor storage areas are maintained in such a manner that they do not constitute a health hazard and are screened from ordinary public view by means of a fence, rapidly growing trees, shrubbery, or other appropriate means.

(Code 1966, § 17 1/4-6)

State law references: Similar provision, Vernon's Ann. Civ. St. art. 4477-9a, § 5.09.

Sec. 46-102. Administration of division.

The administration of this division shall be by regularly salaried, full-time employees of the city, except that the removal of vehicles or parts thereof from property may be by any other duly authorized person.

(Code 1966, § 17 1/4-7)

State law references: Similar provision, Vernon's Ann. Civ. St. art. 4477-9a, § 5.09.

Sec. 46-103. Removal of vehicle.

Upon the issuance of an order by the municipal court requiring the removal of a junked vehicle or part thereof, the chief of police, or any person acting under the direction of the chief of police, may, if such nuisance has not been abated, remove or cause to be removed the vehicle or part thereof which was the subject of such order.

(Code 1966, § 17 1/4-8)

Sec. 46-104. Vehicles not to be made operable.

(1) After a vehicle has been removed in accordance with or under the terms and provisions of this division, it shall not be reconstructed or made operable.

(2) The relocation of a junked vehicle that is a public nuisance to another location in the city after a proceeding for the abatement and removal of the vehicle has commenced has no effect on the proceeding if the junked vehicle constitutes a public nuisance at the new location.

(Code 1966, § 17 1/4-9; Ord. No. 2003-57, § 3, 8-11-03)

State law references: Similar provision, Vernon's Ann. Civ. St. art. 4477-9a, § 5.09.

Sec. 46-105. Notice to state highway department.

Notice shall be given to the state department of highways and public transportation within five days after the date of removal identifying the vehicle or part thereof removed under this division.

(Code 1966, § 17 1/4-10)

State law references: Similar provision, Vernon's Ann. Civ. St. art. 4477-9a, § 5.09.

Sec. 46-106. Sale or disposal of vehicles.

When any junked vehicle has been removed as provided in section 46-103, it shall be the duty of the chief of police to dispose of such vehicle by removal to a scrap yard or by sale to a demolisher for the highest bid or offer received therefor, or to remove such vehicle to any suitable site operated by the city for processing as scrap or salvage.

(Code 1966, § 17 1/4-11)

State law references: Similar provision, Vernon's Ann. Civ. St. art. 4477-9a, § 5.10.

Sec. 46-107. Chief of police may delegate authority.

Wherever the chief of police is charged with the enforcement of this division, he may delegate such authority to any regularly salaried employee of the police department, except that he may authorize the removal of vehicles or parts thereof from public or private property by any person.

(Code 1966, § 17 1/4-13)

Secs. 46-108--46-120. Reserved.

DIVISION 3. ABANDONED VEHICLES

Sec. 46-121. Adoption of state abandoned motor vehicle act.

In addition to the provisions of division 2 of this article, the city hereby adopts and makes applicable to the city the state abandoned motor vehicle act, Texas Transportation Code Ann. Chapter 683, as amended, and hereby grants and gives to its duly authorized agents the authority, right and privilege to do and perform all the necessary acts under such abandoned motor vehicle act to fully carry out and implement the purpose and intentions of such act.

(Code 1966, § 17 1/4-14; Ord. No. 2003-57, § 4, 8-11-03)

Sec. 46-122. Penalty for violation.

A violation of any of the provisions of Ordinance No. 2003-57 shall, upon conviction thereof, be punishable by a fine of not to exceed $1,000.00.

(Ord. No. 2003-57, § 5, 8-11-03)

Editor's note: Ord. No. 2003-57, § 5, adopted Aug. 11, 2003, did not specifically amend the Code; hence, inclusion herein as § 46-122 was at the discretion of the editor.

Secs. 46-123--46-140. Reserved.

THE CODE OF CIVIL AND CRIMINAL ORDINANCES City of IRVING, TEXAS

Codified through Ord. No. 8298, enacted Feb. 19, 2004. (Supplement No. 26)

Preliminaries

THE CODE OF CIVIL AND CRIMINAL ORDINANCES OF THE CITY OF IRVING, TEXAS

The Charter
and
The General Ordinance

PUBLISHED BY ORDER OF THE CITY COUNCIL

Originally published by
MICHIE CITY PUBLICATIONS COMPANY
CHARLOTTESVILLE, VIRGINIA
1970

Republished by

Published by Municipal Code Corporation

Tallahassee, Florida 1996

PREFACE

This volume is a republication of the 1970 Code of the City of Irving, Texas. The original arrangment and the original numbering system have been retained.

Page Numbering System

The page numbering system used in this Code is a prefix system. The letters to the left of the colon are an abbreviation which represents a certain portion of the volume. The number to the right of the colon represents the number of the page in that portion. In the case of a chapter of the Code, the number to the left of the colon indicates the number of the chapter. In the case of an appendix to the Code, the letter immediately to the left of the colon indicates the letter of the appendix. The following are typical parts of codes of ordinances, which may or may not appear in this Code at this time, and their corresponding prefixes:

TABLE INSET:

CHARTER	CHT:1
CHARTER COMPARATIVE TABLE	CHTCT:1
CODE	CD1:1
CODE COMPARATIVE TABLE	CCT:1
CHARTER INDEX	CHTi:1
CODE INDEX	CDi:1

The following paragraphs are reprinted from the preface of the 1970 Code:

This volume, as originally published, constituted the first revision and codification of the general ordinances of the City of Irving, Texas. It contained the Charter and such of the ordinances of a general and permanent nature passed on or before March 20, 1969, as were found desirable for retention, except those expressly saved from repeal by the Adopting Ordinance.

The Code, as now supplemented, contains ordinances through the date shown on the instruction sheet for the supplemental pages.

The ordinances in the initial codification were edited and indexed by the Editorial Staff or Michie City Publications Company under the supervision of Chas. W. Sublett, Stephen C. Willard and John K. Haley. Particular acknowledgment is due Mr. Don J. Rorschach, City Attorney, and Mrs. Mary Gilliland, City Secretary, for their assistance during the progress of the work.

A feature to which the attention of the user is directed is the analysis preceding each chapter which, in many instances will serve as an index within itself. The general index, carried at the end of the Code, has been carefully prepared and should serve as an accurate medium for locating the individual sections of law within the Code. In the footnotes appearing throughout the Code will be found references to the Charter and the applicable and related provisions of the state law. These notes also contain cross references to other and related provisions in the City Code. By reference to the historical citations, appearing at the end of each section, the user will be able to ascertain the ordinance from which the present section has been derived.

Upon passage of ordinances amending the Code or pertaining to the City, which are of a general and permanent nature, the material can be edited and the page or pages affected, reprinted for insertion in the Code. In such event the new or reprinted pages shall then be distributed to the holders of the Codes with instruction for the manner of inserting the new pages and removing the obsolete pages.

Successful maintenance of this Code up-to-date at all times depends largely upon the holder of the volume. As revised sheets are received it shall become the responsibility of the holder to insert such sheets in accordance with the accompanying instructions. It is earnestly recommended that all revised sheets be inserted immediately upon receipt, in order to avoid misplacement, and that all deleted pages be saved and filed for historical reference.

MICHIE CITY PUBLICATIONS COMPANY
Charlottesville, Virginia

MUNICIPAL CODE CORPORATION

Tallahassee, Florida

ORDINANCE NO. 4347

An Ordinance Adopting Supplements 1 through 26 to the Code of the City of Irving, Texas; Providing a Penalty; Providing a Severability Clause and Declaring an Emergency.

WHEREAS, the Code of the City of Irving, Texas, as adopted in Ordinance No. 1952 on June 11, 1970, has been supplemented 26 separate times, and

WHEREAS, each supplement has amended said Code and prior supplements to accurately reflect certain ordinances of a general concern to the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF IRVING, TEXAS:

Section 1. That Supplement Nos. 1 through 26 to "The Code of the City of Irving, Texas," which Code was adopted by Ordinance No. 1952 on June 11, 1970, are hereby adopted and incorporated within said Code of the City of Irving, Texas.

Section 2. Whenever in Supplements 1 through 26 to the Code of the City of Irving, Texas, any act is prohibited or is made or declared to be unlawful or an offense or a misdemeanor, or whenever in such Code or ordinance the doing of any act is required or the failure to do any act is declared to be unlawful, where no specified penalty is provided therefor, the violation of any such provisions of such Code or ordinance shall be punishable by a fine not exceeding two hundred dollars ($200.00), and each day any violation of such Code or other ordinance of the city shall continue shall constitute a separate offense, unless otherwise provided.

Section 3. If any phrase, clause, sentence, paragraph or section of this ordinance or Supplements 1 to 26 to the Code of the City of Irving, Texas, hereby adopted shall be declared unconstitutional or otherwise invalid by any court of competent jurisdiction, such unconstitutionality or invalidity shall not affect the remaining portions of this ordinance or Supplements 1 through 26 to such Code.

Section 4. The fact that Supplements 1 through 26 to the Code have not been adopted creates an emergency in the interest of public health, safety and welfare and necessitates that this ordinance shall take effect immediately from and after its passage and the publication of the caption of said ordinance as the law and Charter in such cases provide.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF IRVING, TEXAS, this the 16th day of February, A.D., 1984.

_____
Bobby Joe Raper
Mayor

ATTEST:

_____
Lester G. Ford
City Secretary

APPROVED AS TO FORM

_____
Don J. Rorschach

City Attorney

ORDINANCE NO. 4713

An Ordinance Adopting Supplements 27 through 29 to the Code of the City of Irving, Texas; Providing a Penalty; Providing a Severability Clause and Declaring an Emergency.

WHEREAS, the Code of the City of Irving, Texas, as adopted by Ordinance No. 1952 on June 11, 1970, and as supplemented by Ordinance No. 4347, has been supplemented three (3) additional times; and

WHEREAS, each supplement has amended said Code and prior supplements to accurately reflect certain ordinances of a general concern to the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF IRVING, TEXAS:

Section 1. That Supplement Nos. 27 through 29 to "The Code of the City of Irving, Texas," which Code was adopted by Ordinance No. 1952 on June 11, 1970, and previously supplemented by Ordinance No. 4347 (adopting supplements 1 through 26), are hereby adopted and incorporated within said Code of the City of Irving, Texas.

Section 2. Whenever in Supplements 27 through 29 to the Code of the City of Irving, Texas, any act is prohibited or is made or declared to be unlawful or an offense or a misdemeanor, or whenever in such Code or ordinance the doing of any act is required or the failure to do any act is declared to be unlawful, where no specified penalty is provided therefor, the violation of any such provisions of such Code or ordinance shall be punishable by a fine not exceeding two hundred dollars ($200.00), and each day any violation of such Code or other ordinance of the city shall continue shall constitute a separate offense, unless otherwise provided.

Section 3. If any phrase, clause, sentence, paragraph or section of this ordinance or Supplements 27 to 29 to the Code of the City of Irving, Texas, hereby adopted shall be declared unconstitutional or otherwise invalid by any court of competent jurisdiction, such unconstitutionality or invalidity shall not affect the remaining portions of this ordinance or Supplements 27 through 29 to such Code.

Section 4. The fact that Supplements 27 through 29 to the Code have not been adopted creates an emergency in the interest of public health, safety and welfare and necessitates that this ordinance shall take effect immediately from and after its passage and the publication of the caption of said ordinance as the law and Charter in such cases provide.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF IRVING, TEXAS, this the 27th day of June, A.D., 1985.

_____

Bobby Joe Raper
Mayor

ATTEST:

_____

Lester G. Ford
City Secretary

APPROVED AS TO FORM

Don J. Rorschach
City Attorney

JUNKED
ARTICLE III. JUNKED MOTOR VEHICLES*

***Editor's note:** Ord. No. 3089, § 16, adopted April 20, 1978, repealed Ord. No. 2196, adopted Oct. 21, 1971, formerly codified herein as Art. III of Ch. 19, §§ 19-17--19-31; §§ 1--15 of said Ord. No. 3089 amended the Code by adding a new Art. III, §§ 19-15--19-31, pertaining to the same subject matter.

Sec. 19-17. Definitions.

(a) *Antique vehicle* means passenger cars or trucks that were manufactured in 1925 or before, or which become thirty-five (35) or more years old.

(b) *Demolisher* means any person whose business is to convert a motor vehicle into processed scrap or scrap metal, or otherwise to wreck or dismantle motor vehicles.

(c) *Junked vehicles* means any motor vehicle as defined in Section 1 of Article 6701d-11, Vernon's Texas Civil Statutes, as amended, which is inoperative, and which:

(1) Does not have lawfully affixed to it either an unexpired license plate or a valid motor vehicle safety inspection certificate and that is wrecked, dismantled, partially dismantled, or discarded; or

(2) Remains inoperable for a continuous period of more than forty-five (45) days.

(d) *Motor vehicle* means any motor vehicle subject to registration pursuant to the Texas Certificate of Title Act.

(e) *Special interest vehicle* means:

(1) A motor vehicle of any age which has not been altered or modified from original manufacturer's specifications and, because of its historic interest, is being preserved by hobbyists; or

(2) Any motor vehicle in operable condition specifically constructed for racing or operation on privately owned drag strips or race strips; or

(3) Any motor vehicle stored as property of a member of the armed forces of the United States while on active duty assignment.

(Ord. No. 3089, § 1, 4-20-78; Ord. No. 4731, § 1, 7-18-85)

Junked
Sec. 19-18. Junked vehicles declared a public nuisance.

Junked vehicles which are located in any place where they are visible from a public place or public right-of-way are detrimental to the safety and welfare of the general public, tending to reduce the value of private property, to invite vandalism, to create fire hazards, to constitute an attractive nuisance creating a hazard to the health and safety of minors, and are detrimental to the economic welfare of the City of Irving, by producing urban blight which is adverse to the maintenance and continuing development of the neighborhoods in the City of

Irving, and such vehicles are, therefore, declared to be a public nuisance and to maintain such a public nuisance on any premises or any public right-of-way is unlawful.

(Ord. No. 3089, § 2, 4-20-78)

Sec. 19-19. Exceptions to nuisance provisions.

This article shall not apply to:

(a) A vehicle or part thereof which is completely enclosed within a building in a lawful manner where it is not visible from a street or other public or private property;

(b) A vehicle or a part thereof which is stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or a junkyard;

(c) Unlicensed, operable or inoperable antique and special interest vehicles stored by a collector on his property, provided that the vehicles and the outdoor storage areas are maintained in such a manner that they do not constitute a health hazard and are screened from ordinary public view by means of a fence, rapidly growing trees, shrubbery, or other appropriate means.

(Ord. No. 3089, § 3, 4-20-78)

Sec. 19-20. Notice to the owner-occupant to abate the nuisance.

Whenever any such public nuisance on private property or on public property or on a public right-of-way within the city limits in violation of section 19-18 hereof exists, the chief of police or his duly authorized agent shall send notice to the owner or occupant of the [franchise private premises, or to the owner or occupant of the] public premises, or to the owner or occupant of the premises adjacent to the public right-of-way whereupon such public nuisance exists, to abate or remove the same. Such notice shall:

(a) Be in writing;

(b) Specify the public nuisance and its location;

(c) Specify the corrective measures required;

(d) Provide for compliance within ten (10) days from the date of receipt of said notice; and

(e) Provide for hearing before the director of the city's department of health, or his designate, when such a hearing is requested by the owner or occupant of the premises on which the same vehicle is located within ten (10) days after service of notice to abate the nuisance.

Said notice shall be served upon the owner or the occupant of the premises whereupon such public nuisance exists by certified or registered mail with a five-day return requested. If the notice is returned undelivered by the United States Post Office, official action to abate the nuisance shall be continued to a date not less than ten (10) days from the date of such return.

(Ord. No. 3089, § 4, 4-20-78; Ord. No. 3403, § 1, 12-6-79)

Sec. 19-21. Request for a hearing.

There shall be a public hearing prior to the removal of the vehicle or part thereof if the owner or occupant of the said property within the said ten-day period after service of the notice to abate the nuisance, requests of the health department of city, without the requirement of a bond, that a date and time be set when he may appear before the director of the health department or his designate for a hearing to determine whether or not he is in violation of this article. Upon a determination that the owner or the occupant of the property is in violation of this article, the director of the health department or his designate shall order removal and abatement of the nuisance. Any order requiring the removal of a vehicle or part thereof shall include a description of the vehicle, and the correct identification number and license number of the vehicle, if available at the site.

(Ord. No. 3089, § 5, 4-20-78; Ord. No. 3403, § 2, 12-6-79)

Sec. 19-22. Preliminaries to a hearing before the director of the department of health or his designate.

Upon receiving a request for a hearing made pursuant to section 19-21 hereof, the health department shall set a date and time for such hearing before the director of the health department or his designate. The health department shall notify the city attorney and the police department of the date and time of such hearing.

(Ord. No. 3089, § 6, 4-20-78; Ord. No. 3403, § 3, 12-6-79)

Sec. 19-23. Trial in municipal court.

If the nuisance is not removed and abated and a hearing is not requested within the ten-day period as provided in sections 19-20 and 19-21, or if the nuisance is not abated in accordance with the order of the director of health or his designate, then the chief of police or his designated agent may file a complaint in the municipal court for maintaining the public nuisance of a junked motor vehicle upon the owner or the occupant of the premises whereupon such nuisance exists or on the owner or occupant of the premises adjacent to the public right-of-way whereupon such nuisance exists.

If a person is found guilty of maintaining a public nuisance as defined in section 19-17, the person shall be punished by a fine not to exceed five hundred dollars ($500.00) and the municipal court shall order removal and abatement of the nuisance.

(Ord. No. 3089, § 7, 4-20-78; Ord. No. 3403, § 4, 12-6-79; Ord. No. 5853, § 15, 9-6-90)

junk
Sec. 19-24. Removal of junk motor vehicle with permission of owner or occupant of property.

If the owner or occupant of said premises, within ten (10) days after receipt of notice to abate the nuisance as herein provided, shall give his written permission to the chief of police or his duly authorized agent to remove the junk motor vehicle from the premises, the giving of such permission shall be considered compliance with the provisions of this article.

(Ord. No. 3089, § 8, 4-20-78)

Junk
Sec. 19-25. Junk motor vehicles not to be reconstructed or made operable.

Any junk motor vehicle taken into custody in accordance with the provisions of this

article shall not be reconstructed or made operable.

(Ord. No. 3089, § 9, 4-20-78)

Sec. 19-26. Notice to Texas Highway Department.

Within five (5) days after the date of removal of the junk motor vehicle from the premises, notice thereof shall be given to the Texas Highway Department. Said notice shall include a description of the vehicle, and the correct identification number and license number of the vehicle, if available.

(Ord. No. 3089, § 10, 4-20-78)

Sec. 19-27. Administration of article by city employees.

The provisions of this article shall be administered by regularly salaried, full-time employees of the City of Irving, except that the removal of vehicles or parts therefrom may be made by any other duly authorized agent.

(Ord. No. 3089, § 11, 4-20-78)

junk
Sec. 19-28. Disposal of junk motor vehicles.

Junk motor vehicles or parts thereof shall be disposed of by removal to the scrap yard, demolisher, or any other suitable site for processing as scrap or salvage, which process shall be consistent with section 19-24 of this article.

(Ord. No. 3089, § 12, 4-20-78)

Sec. 19-29. Authority to enforce.

The chief of police or his designated agent may enter upon any private property for the purposes specified in this article, to examine vehicles or parts thereof, obtain information as to the identity of vehicles, and to remove or cause the removal of a vehicle or parts thereof declared to be a nuisance pursuant to this article. The municipal judge and the municipal court of the City of Irving shall have authority to issue all orders necessary to enforce such procedures.

(Ord. No. 3089, § 13, 4-20-78)

Sec. 19-30. Exceptions and exemptions not required to be negated.

In any complaint and in any action or proceedings brought for the enforcement of any provision of this article, it shall not be necessary to negate any exception, excuse, proviso or exemption contained in this article. The burden of proof of any such exception, excuse, proviso or exemption shall be upon the defendant.

(Ord. No. 3089, § 14, 4-20-78)

Sec. 19-31. Penalty.

Every person convicted of a violation of any of the provisions of this chapter shall be punished by a fine of not less than one dollar ($1.00) nor more than five hundred dollars ($500.00).

(Ord. No. 3089, § 15, 4-20-78; Ord. No. 5853, § 16, 9-6-90)

FUNDED BY A GRANT FROM THE
TEXAS COURT OF CRIMINAL APPEALS

TEXAS MUNICIPAL COURTS EDUCATION CENTER

1609 SHOAL CREEK BLVD., SUITE 302 AUSTIN, TEXAS 78701
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Ethics of Fine Collection

OBJECTIVES

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

1. Identify the Judge's role in fine enforcement as it relates to court collections.
2. Discuss Judicial Canons which apply to fine enforcement and court collections.
3. Define the laws governing public and private sector debt collections practices and their impact.
4. Compare and contrast effective fine enforcement techniques and poor collections practices.

Ethics of Fine Enforcement

Program facilitators:
Collections Team
Office of Court Administration

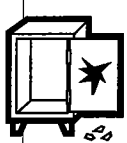
Texas Office of Court Administration

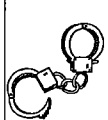
- State Agency
- Created in 1977
- Chief Justice - Texas Supreme Court
- Provides Administrative & Technical Support
- Serves Approximately 2,600 Courts in the State
- (512) 463-1625

Five-Part Presentation

- The Importance of Fine Enforcement
- Images & Attitudes of Court Collections
- Collections Ethics & Fine Enforcement
- Debt Collection Laws & Fine Enforcement
- Impact on the Court, Criminal, & Community

How Important Is Fine Enforcement?

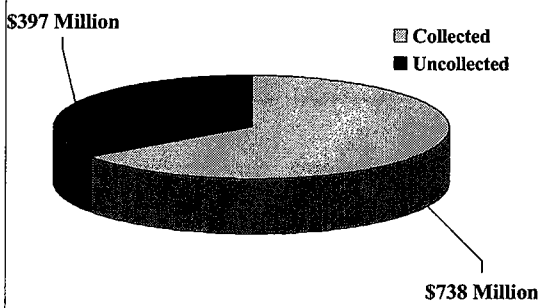


The Issue

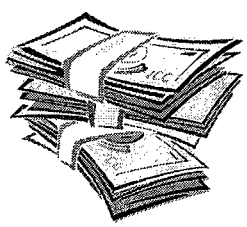
"Lack of compliance in paying court fines and fees denies a jurisdiction revenue and, more important, calls into question the authority and effectiveness of the court and the justice system."

Criminal Court Cost, Fees, & Fines FY 2003

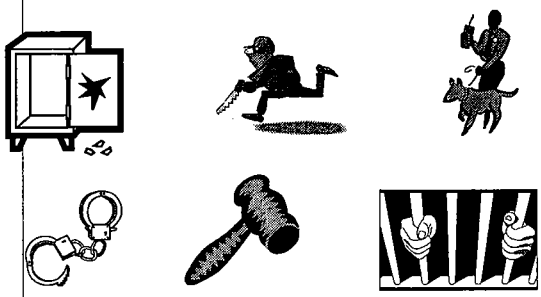


Based on 65% Collections Rate

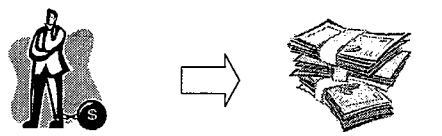
But Is It Just About The Money?



How Important Is Fine Enforcement?



THE CONVERSION



Punishment → Debt

The Image of Collectors

True or False-
"Collectors continually hassle people who cannot pay."

True or False-
"All collectors are the same."

True or False-
"Tough, threatening collectors are the most effective."

THE CODE Of JUDICIAL CONDUCT

- Canons 3B3 states:

"A judge shall require order and decorum in proceedings before the judge."

THE CODE Of JUDICIAL CONDUCT (Continued)

- Canons 3B4 states:

"A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others...and should require similar conduct of lawyers, staff, court officials and others subject to the judge's direction and control."

Debt Collection Laws

- What are they?
- To whom do they apply?
- Are governments exempt?
- What is the Federal Fair Debt Collections Practices Act?
- Are there other collections laws?

Highlights of FDCP Act

- Acquisition of location information
- Debt Collection Communication
- Harassment or abuse
- False or misleading representation

Acquisition

- Identify, state purpose (confirm location), state employer (only if requested).
- Not state party owes a debt.
- Not contact the same party more than once unless certain conditions exist.
- Not communicate by post card.
- Not use any language or symbols sent by mail or telegram indicating the collector, debt collection business, or the communication is about a debt.
- Contact only the debtors attorney if the debtors has one.

Communication

- Any unusual time or place.
- If represented by an attorney.
- At place of business if asked not to or if has reason to believe not convenient.
- Via third party.
- If asked to cease except to notify of termination, invocation of certain remedies, or invocation of a specific remedy.

Harassment or Abuse

- Threat of violence against, person, property, or reputation
- Use of obscene or profane language to provoke.
- Publication of bad debts (except through credit reporting agencies).
- Advertisement for sale of any debt to coerce payment.
- Causing a phone to ring continuously with intent to annoy, abuse, or harass the caller.
- Except as noted placing a call without full disclosure of identity.

False Representation

- Falsely representing official authority, federal, state, or local government (uniforms, badges, etc.)
- Falsely representing the character, amount, or legal status of any debt, or services rendered or compensations due.
- False representation of being an attorney or that a communication is from an attorney.
- Falsely representing that non-payment in debt will result in incarceration, garnishment or attachment of wages, seizure and/or sale of property
- Threatening to take any action not intended or that cannot be legally taken.

False Representation

- Falsely representing that a sale, referral, or transfer of any interest in the debt will cause debtor to lose legal rights or claims.
- Falsely representing debtor has committed a crime in order to cause embarrassment.
- Reporting or threatening to report false credit information.
- The use and/or distribution of any communication which simulates court, official, or agency of the U.S. or a State.
- Use of any false representation or deception to collect or attempt to collect or to obtain information about a debtor.

False Representation

- Failure to disclose in initial contact written or oral that contact is an attempt to collect a debt.
- Falsely representing or implying that debt has been turned over to innocent purchaser for value.
- Falsely representing or implying that legal documents are in process.
- The use of any business or company name other than that of the true name of the collection business or company.
- Falsely representing or implying that debt collector operates or is employed by a consumer reporting agency.

Case Study 1

Your team of Marshals leave neon green warrant notices in the form of door-hangers on the front door knobs of several delinquent offenders. One is seen by an offender's mother who collapses had has to be hospitalized from the shock. Is the City liable for damages?

Case Study 2

A collections officer, employed by the city, routinely comes in early and places phone calls to delinquent offenders before 8 A.M. The officer has a great deal of success reaching people at that hour, but are any laws being violated and is the city at risk?

Case Study 3

A third party collector under contact to the county locates a delinquent offender by telling the offender's 12 year old daughter "daddy could go to jail if I don't speak with him". Could the county be sued for damages because of the actions of the collector?

Case Study 4

A court clerk tires of attempting to contact a delinquent offender by phone and faxes a warrant notice to the offender at her place of employment. The offender is subsequently fired. Is the city liable?

Causes of Delinquency

1) **Circumstantial-defendants unable to handle their fines and fees, due to life issues such as recent loss of job, natural disaster, sickness, or personal injury.**

2) **Emotional-these defendants usually live above their means and income. I want it – I deserve it on my terms.**

Delinquency Causes cont.

3) Intellectual-defendants have the means to pay, but aren't good with finances/records. They may have no idea about their financial situation.

4) Criminal Intent-these defendants use fraud and deceit...never intending to pay. This group represents about 5-10 percent of your total caseload.

Who is your Defendant?

- Most defendants are like you and me. Average consumer highlights:
  - Average age is 35
  - 49% male and 51% female
  - 25% single, 52% married, and 23% are separated, divorced, or widowed.
  - $1680.00 is average monthly income. They also hold credit card debt of $5,800 owing an average of 11 creditors.
  - Source: NFCC-1998-2001

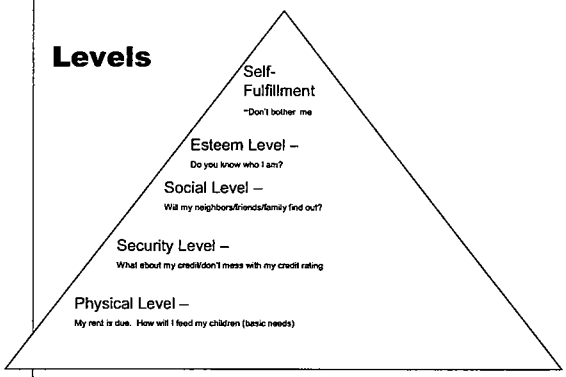
Offender/Defendant Characteristics

- Approx. 68% Under Age 35
- Approx. 45% single, separated, or divorced
- Approx. 23% are female
- Approx. 40% racial minorities
- Approx. 4% are not U.S. citizens

National Bureau of Justice Statistics

The Maslow Model

Levels



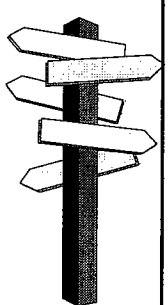
Front Counter Etiquette

- **Positive greeting and smile.**
- **Collection opportunities exist with each defendant, and each situation is unique.**
- **Ask and EXPECT payment in full.**
- **"How much are you short?"**
- **Thank defendant for payment, remind verbally when next payment is due, and give receipt.**
- **"Is there anything else I can help you with?" AND wish him/her a good day (afternoon or evening).**

The Need to Change

National Collection Rate Averages

- **ACA 90%**
- **D&B 85%**
- **MED 70-80%**
- **US 30-60% (Texas 61%)**



The Court Collectors

Court Administrators
Court Clerks
Probation Officers
Pre-trial Staff
Marshals
Sheriffs
Constables
Warrant Officers
Bailiffs
Whoever

The Problem

Embedded Barriers

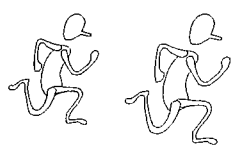
- **Denial of the Issue**
- **Denial of Responsibility/Ownership**
- **Belief that There is No Solution**

Practical Diagnosis

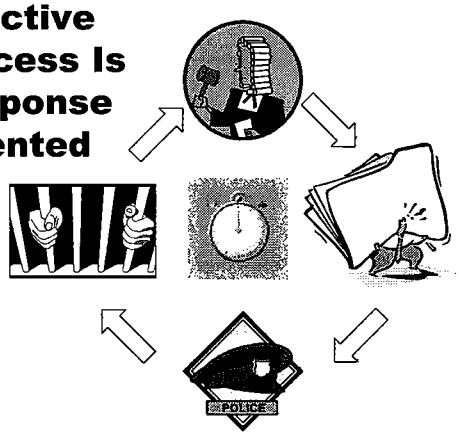
"Historically there has never been an accounts receivable mechanism in place in the judicial process."

Reactive

- **Responsive - action occurs after default**
- **Recovery - damage control**
- **Timely follow-up & enforcement**
- **Reduced effectiveness**
- **Passive perception**
- **Pros & cons**



Reactive Process Is Response Oriented



The Impact of Unpaid Fines

- Loss of Public Revenues
- Decrease In Services
- Increase Taxes
- Weaker Government

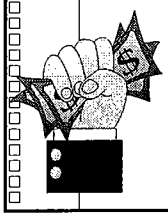
Principals of Understanding

- A fine is punishment and not a "BILL".
- The payment is the defendants responsibility.
- It is expected that the defendant must sacrifice to pay.
- The defendant must give payment the highest priority.
- The defendant must expect consequences if payment is not made.
- The defendant needs to understand the consequences.
- The payment is a Court Order, a sentence which may not be convenient.
- A court is not where people prefer to spend money. But, many people come to court with money.

Is There a Better Mouse Trap?

PRIVATE SECTOR CHARACTERISTICS:

- ✓ Purpose Well-Defined
- ✓ Clear Line of Responsibility/Accountability
- ✓ Significant Investment in Quality Staff
- ✓ Significant Investment in Strategy/Planning
- ✓ Creativity Encouraged



PROACTIVE:

- ✓ Preventive - Action Taken to Deter Default
- ✓ Pre-qualifying - Financial Ability Evaluated
- ✓ Clarification - Clear & Precise Dissemination of Info
- ✓ Swift Enforcement - Immediate Response to Default
- ✓ Aggressive Perception - Payment/Compliance Expected

A Solution

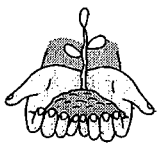
"A Proactive, Private Sector Approach."

- **Proper Prioritization of Court Costs, Fees, & Fines**
- **Uniform Collection Policy**
- **Clear Line of Responsibility**
- **Firm Realistic Goals & Targets**
- **Immediate Response to Default**
- **Severe & Timely Sanctions for Default**
- **Realistic Enforcement Options**

Proactive Process Is Results Oriented

Benefits and Community Impact

- Enforces Compliance
- Increases Respect for Judicial System
- Increases Revenue
- Promotes Efficiency



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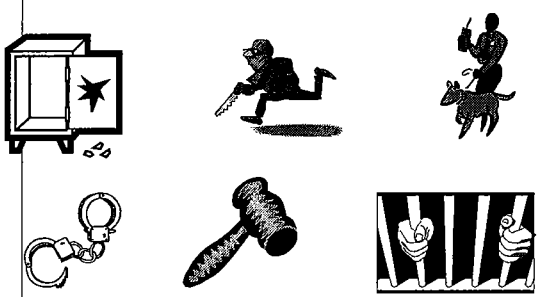


"A fine is punishment for a crime only if it is collected"

Jim Lehman, Russ Duncan, Don McKinley

Office of Court Administration

205 West 14th Street, Suite 600

Austin, Texas 78701

Telephone: (512) 463-1625

Fax: (512) 463-1648

HEY, ARE YOU A COLLECTOR?

For years collection agencies and collection departments suffered from revolving door syndrome because they thought anyone could be a collector. The result was high burn out rates and even higher turn over of employees. The top agencies now focus on and recruit individuals who are not only skilled and talented, but equipped with the proper attitude to deal daily with delinquency. This brief exercise examines your view and attitude towards collecting.

Circle the extent you agree or disagree with the following statements.

	Agree				Disagree
1. I really enjoy problem solving.	**5**	**4**	**3**	**2**	**1**
2. There is nothing demeaning about asking people to pay.	**5**	**4**	**3**	**2**	**1**
3. I consider myself a people person.	**5**	**4**	**3**	**2**	**1**
4. Even on bad days, I always keep my composure.	**5**	**4**	**3**	**2**	**1**
5. I insist on doing the job correctly.	**5**	**4**	**3**	**2**	**1**
6. I insist on finishing the job.	**5**	**4**	**3**	**2**	**1**
7. Usually, I can hold my own in a confrontation.	**5**	**4**	**3**	**2**	**1**
8. I enjoy working with the public.	**5**	**4**	**3**	**2**	**1**
9. I am not influenced by the appearance or age of offenders.	**5**	**4**	**3**	**2**	**1**
10. I remain calm in tense situations.	**5**	**4**	**3**	**2**	**1**

TOTAL SCORE _____

If you scored above 40, you have an excellent attitude and aptitude toward collections. If you scored between 25 and 40, you have some reservations about collections and/or the collection process. A score below 25 indicates you would rather be suited for a position not associated with collections.

Texas Code of Judicial Conduct

As amended August 2002

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Canon 1

Upholding the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 2

Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

Canon 3

Performing the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an ex parte communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for public office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

Canon 4

Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or

(2) interfere with the proper performance of judicial duties.

B. Activities to Improve the Law. A judge may:

(1) speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code; and,

(2) serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

C. Civic or Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the profit of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly or frequently engaged in adversary proceedings in any court.

(2) A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, but may be listed as an officer, director, delegate, or trustee of such an organization, and may be a speaker or a guest of honor at an organization's fund raising events.

(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

D. Financial Activities.

(1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. This limitation does not prohibit either a judge or candidate from soliciting funds for appropriate campaign or officeholder expenses as permitted by state law.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business. A judge shall not be an officer, director or manager of a publicly owned business. For purposes of this Canon, a "publicly owned business" is a business having more than ten owners who are not related to the judge by consanguinity or affinity within the third degree of relationship.

(3) A judge should manage any investments and other economic interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other economic interests that might require frequent disqualification. A judge shall be informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to be informed about the personal economic interests of any family member residing in the judge's household.

(4) Neither a judge nor a family member residing in the judge's household shall accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to the judge; books and other resource materials supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a gift from a friend for a special occasion such as a wedding, engagement, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or person whose interests have come or are likely to come before the judge;

(d) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator. An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties.

G. Practice of Law. A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

H. Extra-Judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

I. Compensation, Reimbursement and Reporting.

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's family. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall file financial and other reports as required by law.

Canon 5

Refraining from Inappropriate Political Activity

(1) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predispoded to a probable decision in cases within the scope of the pledge;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or make a statement that would violate Canon 3B(10).

(2) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).

(3) A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.

(4) A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code §253.151, et seq. (the "Act"), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

Comment

A statement made during a campaign for a judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal.

Canon 6

Compliance with the Code of Judicial Conduct

A. The following persons shall comply with all provisions of this Code:

(1) An active, full-time justice or judge of one of the following courts:

(a) the Supreme Court,

(b) the Court of Criminal Appeals,

(c) courts of appeals,

(d) district courts,

(e) criminal district courts, and

(f) statutory county courts.

(2) A full-time commissioner, master, magistrate, or referee of a court listed in (1) above.

B. A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:

(1) when engaged in duties which relate to the judge's role in the administration of the county;

(2) with Canons 4D(2), 4D(3), or 4H;

(3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(4) with Canon 5(3).

C. Justices of the Peace and Municipal Court Judges.

(1) A justice of the peace or municipal court judge shall comply with all provisions of this Code, except the judge is not required to comply:

(a) with Canon 3B(8) pertaining to ex parte communications; in lieu thereof a justice of the peace or municipal court judge shall comply with 6C(2) below;

(b) with Canons 4D(2), 4D(3), 4E, or 4H;

(c) with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation; or

(d) if an attorney, with Canon 4G, except practicing law in the court on which he or she serves, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(e) with Canons 5(3).

(2) A justice of the peace or a municipal court judge, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider ex parte or other communications concerning the merits of a pending judicial proceeding. This subsection does not prohibit communications concerning:

(a) uncontested administrative matters,

(b) uncontested procedural matters,

(c) magistrate duties and functions,

(d) determining where jurisdiction of an impending claim or dispute may lie,

(e) determining whether a claim or dispute might more appropriately be resolved in some other judicial or non-judicial forum,

(f) mitigating circumstances following a plea of nolo contendere or guilty for a fine-only offense, or

(g) any other matters where ex parte communications are contemplated or authorized by law.

D. A Part-time commissioner, master, magistrate, or referee of a court listed in Canon 6A(1) above:

(1) shall comply with all provisions of this Code, except he or she is not required to comply with Canons 4D(2), 4E, 4F, 4G or 4H, and

(2) should not practice law in the court which he or she serves or in any court subject to the appellate jurisdiction of the court which he or she serves, or act as a lawyer in a proceeding in which he or she has served as a commissioner, master, magistrate, or referee, or in any other proceeding related thereto.

E. A Judge Pro Tempore, while acting as such:

(1) shall comply with all provisions of this Code applicable to the court on which he or she is serving, except he or she is not required to comply with Canons 4D(2), 4D(3), 4E, 4F, 4G or 4H, and

(2) after serving as a judge pro tempore, should not act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto.

F. Any Senior Judge, or a former appellate or district judge, or a retired or former statutory county court judge who has consented to be subject to assignment as a judicial officer:

(1) shall comply with all the provisions of this Code except he or she is not required to comply with Canon 4D(2), 4E, 4F, 4G, or 4H, but

(2) should refrain from judicial service during the period of an extra-judicial appointment permitted by Canon 4H.

G. Candidates for Judicial Office.

(1) Any person seeking elective judicial office listed in Canon 6A(1) shall be subject to the same standards of Canon 5 that are required of members of the judiciary.

(2) Any judge who violates this Code shall be subject to sanctions by the State Commission on Judicial Conduct.

(3) Any lawyer who is a candidate seeking judicial office who violates Canon 5 or other relevant provisions of this Code is subject to disciplinary action by the State Bar of Texas.

(4) The conduct of any other candidate for elective judicial office, not subject to paragraphs (2) and (3) of this section, who violates Canon 5 or other relevant provisions of the Code is subject to review by the Secretary of State, the Attorney General, or the local District Attorney for appropriate action.

H. Attorneys.

Any lawyer who contributes to the violation of Canons 3B(7), 3B(10), 4D(4), 5, or 6C(2), or other relevant provisions of this Code, is subject to disciplinary action by the State Bar of Texas.

Canon 7

Effective Date of Compliance

A person to whom this Code becomes applicable should arrange his or her affairs as soon as reasonably possible to comply with it.

Canon 8

Construction and Terminology of the Code

A. Construction.

The Code of Judicial Conduct is intended to establish basic standards for ethical conduct of judges. It consists of specific rules set forth in Sections under broad captions called Canons.

The Sections are rules of reason, which should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through the State Commission on Judicial Conduct. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

B. Terminology.

(1) "Shall" or "shall not" denotes binding obligations the violation of which can result in disciplinary action.

(2) "Should" or "should not" relates to aspirational goals and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

(3) "May" denotes permissible discretion or, depending on the context, refers to action that is not covered by specific proscriptions.

(4) "De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality.

(5) "Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant, in an educational, religious, charitable, fraternal, or civic organization or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest; and

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

(6) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

(7) "Knowingly," "knowledge," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(8) "Law" denotes court rules as well as statutes, constitutional provisions and decisional law.

(9) "Member of the judge's (or the candidate's) family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(10) "Family member residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides at the judge's household.

(11) "Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(12) "Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

(13) "Retired Judge" means a person who receives from the Texas Judicial Retirement System, Plan One or Plan Two, an annuity based on service that was credited to the system. (Secs. 831.001 and 836.001, V.T.C.A. Government Code [Ch. 179, Sec. 1, 71st Legislature (1989)]

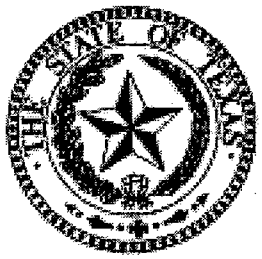
(14) "Senior Judge" means a retired appellate or district judge who has consented to be subject to assignment pursuant to Section 75.001, Government Code. [Ch. 359, 69th Legislature, Reg. Session (1985)]

(15) "Statutory County Court Judge" means the judge of a county court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, statutory probate courts, county criminal courts, county criminal courts of appeals, and county civil courts at law. (Sec. 21.009, V.T.C.A. Government Code [Ch. 2, Sec. 16.01(18), 71st Legislature (1989)])

(16) "County Judge" means the judge of the county court created in each county by Article V, Section 15, of the Texas Constitution. (Sec. 21.009, V.T.C.A. Government Code [Ch. 2, Sec. 16.01(18), 71st Legislature (1989)])

(17) "Part-time" means service on a continuing or periodic basis, but with permission by law to devote time to some other profession or occupation and for which the compensation for that reason is less than that for full-time service.

(18) "Judge Pro Tempore" means a person who is appointed to act temporarily as a judge.



TEXAS JUDICIAL SERVICE HANDBOOK

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CODE OF JUDICIAL CONDUCT
JUDICIAL ETHICS OPINIONS
PUBLIC ACCESS TO JUDICIAL RECORDS

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GENERAL INDEX TO ETHICS OPINIONS

COLLECTION OF COURT FEES

Opinion No. 105 (1987)

QUESTION: May a County Court at Law Judge participate in the collection of court fees and other fees owed to the County Clerk's Office by writing letters to or personally contacting the persons who owe the fees?

ANSWER: No. A judge should uphold the integrity and independence of the judiciary (Canon 1), and should avoid impropriety and the appearance of impropriety in all his activities (Canon 2). The collecting of the past due debts of the County by a judge constitutes the practice of law. A judge should not practice law (Canon 5F)* and should not have ex parte communications concerning the merits of impending litigation. [Canon 3A(5)].**

The collecting of past due debts of a county is the duty of an authorized agency, i.e. County Attorney, District Attorney, or retained private practicing attorney.

**Now see Canon 4G.*

*** Now see Canon 3B(8).*

LETTER TO COLLECT COURT FEES

Opinion No. 126 (1989)*

QUESTION: If a parent incurs fees charged by a Juvenile Board's Court Services Department for receiving and disbursing child support or for social studies, and if the applicable statute provides that payment of such fees may be enforced in district court, may a District Judge sign a letter to such parent, or authorize a letter from the court to such parent, to collect such fees?

ANSWER: There are no specific Code of Judicial Conduct provisions that guide a judge in avoiding conflicts between adjudicative and administrative responsibilities, but the Committee is of the opinion that a judge should not personally participate in attempting to collect such fees. If a judge may be required to preside at a hearing concerning the payment of fees, a judge should not write a letter for the purpose of collecting those fees. Such a letter would give the appearance of being inconsistent with the Canon 3A(4)* provision that a judge shall afford to every party the full right to be heard according to law, and the Canon 3A(5)* provision that a judge shall not initiate or permit ex parte communications concerning an impending proceeding.

The committee is also of the opinion that such letters should not appear to be from the "court", that is, from the judicial entity of which the judge is the principal officer. As the authority to determine disputed law and fact issues concerning the fees is actually delegated by law to that entity, it should not send collection letters.

**Now see Canon 3B(8).*

J.P. RUNNING COLLECTION AGENCY

Ethics Opinion No. 211 (1997)

QUESTION: May a Justice of the Peace make telephone calls and send letters to debtors on behalf of a collection agency? The judge's communications would not mention her judicial

status, she would do the work at home and not at the court offices, and any suits to collect the debts would be heard by a different judge.

ANSWER: No. Such activity would violate Canon 4D(l), which provides that "A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves."

Canon 2B also contains this general prohibition: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or other." Direct debt collection activities by the judge would inevitably cause some litigants and others in the community to question her impartiality in debt collection cases, or to perceive that she is exploiting her office or lending its prestige to the private interests of the collection agency and the creditors it represents.

For similar reasons, previous opinions have forbidden judges to own an interest in a title insurance company (Opinion 23), to serve as directors of banks or related corporate entities (Opinions 37, 38, 42, 61, and 89), or to serve on a downtown development committee (Opinion 141).

JUDICIAL NEUTRALITY PROHIBITS J.P. "WAR ON HOT CHECKS"

Ethics Opinion No. 225 (1998)

QUESTION NO. 1: May a county-wide decal issued as a part of a "declared war on hot checks" that includes the names of the district attorney, sheriff and constable and contains a generic warning against passing hot checks also include the justice of the peace's name?

ANSWER: No. Canon 3A provides that a judge must act at all times in a manner that promotes impartiality of the judiciary. If a justice of the peace allows his or her name to appear on a decal, along with the names of the prosecutor and law enforcement officials, the clear implication is that the judge is acting in conjunction with these entities to prevent and prosecute issuance of hot checks. This violates Canon 3A by implying that the judge is partial to law enforcement, the judge will assume the accused is guilty, and that the judge is indeed assisting law enforcement in hot check prosecution efforts. Thus, a judge should not permit use of his or her name in a general law enforcement program.

QUESTION NO. 2: Justices of the peace across Texas "in reality . . . conduct an executive branch prosecutorial function in hot check cases." The victim files the complaint and all relevant evidence in the justice of the peace office, the J.P. office then investigates and prosecutes the case by interviewing potential witnesses and contacting the accused "to pay restitution . . . ." Is this appropriate judicial conduct?

ANSWER: Canon 1 of the Code of Judicial Conduct states that a judge should observe standards to preserve the independence of the judiciary. When Canon 1 speaks of independence, it refers to the judicial branch of government that must remain separate from the other two branches under Article II, Sec. 1, of the Texas Constitution. The executive branch includes prosecutors, sheriffs and constables; therefore, a judge cannot at any time act as a prosecutor in any capacity.

If the inquiring justice of the peace, or any judge, is prosecuting cases within its jurisdiction, especially contacting the accused for guilty plea arrangements, then the judge is absolutely, unequivocally, and indefensibly violating both the Code of Judicial Conduct and the Texas Constitution. Further activity in this vein must immediately cease.

MAY A JUDGE BROKER THE SALE OF FINAL JUDGMENT, CASH STREAMS OR ACCOUNTS RECEIVABLE ?

Ethics Opinion 271 (2001)

Question: May a sitting district judge broker the purchase and sale of final judgments, cash streams or accounts receivable? None of the brokered transactions involve any pre-judgement matters in any Texas court. The judgments could issue from any Texas court with the exception of the court over which the judge presides.

Answer: No. The Canons allow a judge to engage in financial and business matters with the limitation that such activity not exploit his or her judicial position or advance his private interest. The Committee believes that the nature of this business is such that it would be very difficult to conduct it without exploiting the judge's official position to advance the judge's private interests. Since the sale of judgments is inextricably intertwined with the judicial function there is at least an appearance of impropriety.

The Texas Constitution

Article 5 - JUDICIAL DEPARTMENT

Section 1-a - RETIREMENT, CENSURE, REMOVAL, AND COMPENSATION OF JUSTICES AND JUDGES; STATE COMMISSION ON JUDICIAL CONDUCT; PROCEDURE

(1) Subject to the further provisions of this Section, the Legislature shall provide for the retirement and compensation of Justices and Judges of the Appellate Courts and District and Criminal District Courts on account of length of service, age and disability, and for their reassignment to active duty where and when needed. The office of every such Justice and Judge shall become vacant when the incumbent reaches the age of seventy-five (75) years or such earlier age, not less than seventy (70) years, as the Legislature may prescribe.

(2) The State Commission on Judicial Conduct consists of eleven (11) members, to wit: (i) one (1) Justice of a Court of Appeals; (ii) one (1) District Judge; (iii) two (2) members of the State Bar, who have respectively practiced as such for over ten (10) consecutive years next preceding their selection; (iiii) four (4) citizens, at least thirty (30) years of age, not licensed to practice law nor holding any salaried public office or employment; (v) one (1) Justice of the Peace; (vi) one (1) Judge of a Municipal Court; and, (vii) one (1) Judge of a County Court at Law; provided that no person shall be or remain a member of the Commission, who does not maintain physical residence within this State, or who resides in, or holds a judgeship within or for, the same Supreme Judicial District as another member of the Commission, or who shall have ceased to retain the qualifications above specified for his respective class of membership, except that the Justice of the Peace and the Judges of a Municipal Court and or a County Court at Law shall be selected at large without regard to whether they reside or hold a judgeship in the same Supreme Judicial District as another member of the Commission. Commissioners of classes (i), (ii), and (vii) above shall be chosen by the Supreme Court with advice and consent of the Senate, those of class (iii) by the Board of Directors of the State Bar under regulations to be prescribed by the Supreme Court with advice and consent of the Senate, those of class (iiii) by appointment of the Governor with advice and consent of the Senate, and the commissioners of classes (v) and (vi) by appointment of the Supreme Court as provided by law, with the advice and consent of the Senate.

(3) The regular term of office of Commissioners shall be six (6) years; but the initial members of each of classes (i), (ii) and (iii) shall respectively be chosen for terms of four (4) and six (6) years, and the initial members of class (iiii) for respective terms of two (2), four (4) and six (6) years. Interim vacancies shall be filled in the same manner as vacancies due to expiration of a full term, but only for the unexpired portion of the term in question. Commissioners may succeed themselves in office only if having served less than three (3) consecutive years. (4) Commissioners shall receive no compensation for their services as such. The Legislature shall provide for the payment of the necessary expense for the operation of the Commission. (5) The Commission may hold its meetings, hearings and other proceedings at such times and places as it shall determine but shall meet at Austin at least once each year. It shall annually select one of its members as Chairman. A quorum shall consist of six (6) members. Proceedings

shall be by majority vote of those present, except that recommendations for retirement, censure, suspension, or removal of any person holding an office named in Paragraph A of Subsection (6) of this Section shall be by affirmative vote of at least six (6) members.
(6) A. Any Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice. Any person holding such office may be disciplined or censured, in lieu of removal from office, as provided by this section. Any person holding an office specified in this subsection may be suspended from office with or without pay by the Commission immediately on being indicted by a State or Federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct. On the filing of a sworn complaint charging a person holding such office with willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit on the judiciary or on the administration of justice, the Commission, after giving the person notice and an opportunity to appear and be heard before the Commission, may recommend to the Supreme Court the suspension of such person from office. The Supreme Court, after considering the record of such appearance and the recommendation of the Commission, may suspend the person from office with or without pay, pending final disposition of the charge.

B. Any person holding an office named in Paragraph A of this subsection who is eligible for retirement benefits under the laws of this state providing for judicial retirement may be involuntarily retired, and any person holding an office named in that paragraph who is not eligible for retirement benefits under such laws may be removed from office, for disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature.

C. The law relating to the removal, discipline, suspension, or censure of a Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in this Constitution applies to a master or magistrate appointed as provided by law to serve a trial court of this State and to a retired or former Judge who continues as a judicial officer subject to an assignment to sit on a court of this State. Under the law relating to the removal of an active Justice or Judge, the Commission and the review tribunal may prohibit a retired or former Judge from holding judicial office in the future or from sitting on a court of this State by assignment.

(7) The Commission shall keep itself informed as fully as may be of circumstances relating to the misconduct or disability of particular persons holding an office named in Paragraph A of Subsection (6) of this Section, receive complaints or reports, formal or informal, from any source in this behalf and make such preliminary investigations as it may determine. Its orders for the attendance or testimony of witnesses or for the production of documents at any hearing or investigation shall be enforceable by contempt proceedings in the District Court or by a Master.

(8) After such investigation as it deems necessary, the Commission may in its discretion issue a private or public admonition, warning, reprimand, or requirement that the person obtain additional training or education, or if the Commission determines that the situation merits such

action, it may institute formal proceedings and order a formal hearing to be held before it concerning the public censure, removal, or retirement of a person holding an office or position specified in Subsection (6) of this Section, or it may in its discretion request the Supreme Court to appoint an active or retired District Judge or Justice of a Court of Appeals, or retired Judge or Justice of the Court of Criminal Appeals or the Supreme Court, as a Master to hear and take evidence in any such matter, and to report thereon to the Commission. The Master shall have all the power of a District Judge in the enforcement of orders pertaining to witnesses, evidence, and procedure. If, after formal hearing, or after considering the record and report of a Master, the Commission finds good cause therefor, it shall issue an order of public censure or it shall recommend to a review tribunal the removal or retirement, as the case may be, of the person in question holding an office or position specified in Subsection (6) of this Section and shall thereupon file with the tribunal the entire record before the Commission.

(9) A tribunal to review the Commission's recommendation for the removal or retirement of a person holding an office or position specified in Subsection (6) of this Section is composed of seven (7) Justices or Judges of the Courts of Appeals who are selected by lot by the Chief Justice of the Supreme Court. Each Court of Appeals shall designate one of its members for inclusion in the list from which the selection is made. Service on the tribunal shall be considered part of the official duties of a judge, and no additional compensation may be paid for such service. The review tribunal shall review the record of the proceedings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence. Within 90 days after the date on which the record is filed with the review tribunal, it shall order public censure, retirement or removal, as it finds just and proper, or wholly reject the recommendation. A Justice, Judge, Master, or Magistrate may appeal a decision of the review tribunal to the Supreme Court under the substantial evidence rule. Upon an order for involuntary retirement for disability or an order for removal, the office in question shall become vacant. The review tribunal, in an order for involuntary retirement for disability or an order for removal, may prohibit such person from holding judicial office in the future. The rights of an incumbent so retired to retirement benefits shall be the same as if his retirement had been voluntary.

(10) All papers filed with and proceedings before the Commission or a Master shall be confidential, unless otherwise provided by law, and the filing of papers with, and the giving of testimony before the Commission or a Master shall be privileged, unless otherwise provided by law. However, the Commission may issue a public statement through its executive director or its Chairman at any time during any of its proceedings under this Section when sources other than the Commission cause notoriety concerning a Judge or the Commission itself and the Commission determines that the best interests of a Judge or of the public will be served by issuing the statement.

(11) The Supreme Court shall by rule provide for the procedure before the Commission, Masters, review tribunal, and the Supreme Court. Such rule shall provide the right of discovery of evidence to a Justice, Judge, Master, or Magistrate after formal proceedings are instituted and shall afford to any person holding an office or position specified in Subsection (6) of this Section, against whom a proceeding is instituted to cause his retirement or removal, due process of law for the procedure before the Commission, Masters, review tribunal, and the Supreme Court in the same manner that any person whose property rights are in jeopardy in an adjudicatory proceeding is entitled to due process of law, regardless of whether or not the interest of the person holding an office or position specified in Subsection (6) of this Section in remaining in active status is considered to be a right or a privilege. Due process shall include the

right to notice, counsel, hearing, confrontation of his accusers, and all such other incidents of due process as are ordinarily available in proceedings whether or not misfeasance is charged, upon proof of which a penalty may be imposed.

(12) No person holding an office specified in Subsection (6) of this Section shall sit as a member of the Commission in any proceeding involving his own suspension, discipline, censure, retirement or removal.

(13) This Section 1-a is alternative to and cumulative of, the methods of removal of persons holding an office named in Paragraph A of Subsection (6) of this Section provided elsewhere in this Constitution.

(14) The Legislature may promulgate laws in furtherance of this Section that are not inconsistent with its provisions. (Added Nov. 2, 1948; Subsecs. (1)-(13) amended Nov. 2, 1965; Subsecs. (5)-(9) and (11)-(13) amended Nov. 3, 1970; Subsecs. (2), (5)-(10), and (12) amended Nov. 8, 1977; Subsecs. (2), (6), and (8)-(12) amended and (14) added Nov. 6, 1984; Subsecs. (1) and (2) amended Nov. 6, 2001.)

Texas Government Code, Chapter 33

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 33.001. DEFINITIONS. (a) In this chapter:

(1) "Censure" means an order of denunciation issued by the commission under Section 1-a(8), Article V, Texas Constitution, or an order issued by a review tribunal under Section 1-a(9), Article V, Texas Constitution.

(2) "Chairperson" means the member of the commission selected by the members of the commission to serve as its presiding officer.

(3) "Clerk" means the individual designated by the commission to assist in:

(A) formal proceedings before the commission or a special master; or

(B) proceedings before a special court of review.

(4) "Commission" means the State Commission on Judicial Conduct.

(5) "Examiner" means an individual, including an employee or special counsel of the commission, appointed by the commission to gather and present evidence before a special master, the commission, a special court of review, or a review tribunal.

(6) "Formal hearing" means the public evidentiary phase of formal proceedings conducted before the commission or a special master.

(7) "Formal proceedings" means the proceedings ordered by the commission concerning the public censure, removal, or retirement of a judge.

(8) "Judge" means a justice, judge, master, magistrate, or retired or former judge as described by Section 1-a, Article V, Texas Constitution, or other person who performs the functions of the justice, judge, master, magistrate, or retired or former judge.

(9) "Review tribunal" means a panel of seven justices of the courts of appeal selected by lot by the chief justice of the supreme court to review a recommendation of the commission for the removal or retirement of a judge under Section 1-a(9), Article V, Texas Constitution.

(10) "Sanction" means an order issued by the commission under Section 1-a(8), Article V, Texas Constitution, providing for a private or public admonition, warning, or reprimand or requiring that a person obtain additional training or education.

(11) "Special court of review" means a panel of three justices of the courts of appeal selected by lot by the chief justice of the supreme court on petition to review a sanction issued by the commission.

(12) "Special master" means a master appointed by the supreme court under Section 1-a, Article V, Texas Constitution.

(b) For purposes of Section 1-a, Article V, Texas Constitution, "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" includes:

(1) wilful, persistent, and unjustifiable failure to timely execute the business of the court, considering the quantity and complexity of the business;

(2) wilful violation of a provision of the Texas penal statutes or the Code of Judicial Conduct;

(3) persistent or wilful violation of the rules promulgated by the supreme court;

(4) incompetence in the performance of the duties of the office;

(5) failure to cooperate with the commission; or

(6) violation of any provision of a voluntary agreement to resign from judicial office in lieu of disciplinary action by the commission.

(c) The definitions provided by Subsections (b) and (d) are not exclusive.

(d) For purposes of Subdivision (6), Section 1-a, Article V, Texas Constitution, a misdemeanor involving official misconduct includes a misdemeanor involving an act relating to a judicial office or a misdemeanor involving an act involving moral turpitude.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 1, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 1, eff. Sept. 1, 2001.

Sec. 33.002. COMMISSION. (a) The State Commission on Judicial Conduct is established under Section 1-a, Article V, Texas Constitution, and has the powers provided by that section.

(b) A constitutional or statutory reference to the State Judicial Qualifications Commission means the State Commission on Judicial Conduct.

(c) Appointments to the commission shall be made without regard to the race, color, disability, sex, religion, age, or national origin of the appointees.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 2, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 2, eff. Sept. 1, 2001.

Sec. 33.003. SUNSET PROVISION. The State Commission on Judicial Conduct is subject to review under Chapter 325 (Texas Sunset Act), but is not abolished under that chapter. The commission shall be reviewed during the period in which state agencies abolished in 2001 and every 12th year after 2001 are reviewed.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1985, 69th Leg., ch. 480, Sec. 21, eff. Sept. 1, 1985; Acts 1987, 70th Leg., ch. 148, Sec. 2.47(a), eff. Sept. 1, 1987; Acts 1991, 72nd Leg., 1st C.S., ch. 17, Sec. 5.13, eff. Nov. 12, 1991.

Sec. 33.0032. CONFLICT OF INTEREST. (a) In this section, "Texas trade association" means a cooperative and voluntarily joined association of business or professional competitors in this state designed to assist its members and its industry or profession in dealing with mutual business or professional problems and in promoting their common interest.

(b) A person may not be a commission employee employed in a "bona fide executive, administrative, or professional capacity," as that phrase is used for purposes of establishing an exemption to the overtime provisions of the federal Fair Labor Standards Act of 1938 (29 U.S.C. Section 201 et seq.), and its subsequent amendments, if:

(1) the person is an officer, employee, or paid consultant of a Texas trade association the members of which are subject to regulation by the commission; or

(2) the person's spouse is an officer, manager, or paid consultant of a Texas trade association the members of which are subject to regulation by the commission.

(c) A person may not act as the general counsel to the commission if the person is required to register as a lobbyist under Chapter 305 because of the person's activities for compensation on behalf of a profession related to the operation of the commission.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 3, eff. Sept. 1, 2001.

Sec. 33.004. COMPENSATION AND EXPENSES OF COMMISSION MEMBERS AND SPECIAL MASTERS. (a) A member of the commission serves without compensation for services, but is entitled to reimbursement for expenses as provided by this section.

(b) A special master who is an active district judge or justice of the court of appeals is entitled to a per diem of $25 for each day or part of a day that the person spends in the performance of the duties of special master. The per diem is in addition to other compensation and expenses authorized by law.

(c) A special master who is a retired judge of a district court or the court of criminal appeals or a retired justice of a court of appeals or the supreme court is entitled to compensation in the same manner as provided by Section 74.061. For purposes of this subsection, the term "court" in Section 74.061(c) means the district court in the county in which formal proceedings are heard by the special master.

(d) A member or employee of the commission or a special master is entitled to necessary expenses for travel, board, and lodging incurred in the performance of official duties.

(e) Payment shall be made under this section on certificates of approval by the commission.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 2001, 77th Leg., ch. 917, Sec. 4, eff. Sept. 1, 2001.

Sec. 33.0041. REMOVAL OF COMMISSION MEMBER; NOTIFICATION PROCEDURES. If the executive director has knowledge that a potential ground for removal of a commission member exists, the executive director shall notify the presiding officer of the commission of the potential ground. The presiding officer shall then notify the governor, the supreme court, the state bar, and the attorney general that a potential ground for removal exists. If the potential ground for removal involves the presiding officer, the executive director shall notify the next highest ranking officer of the commission, who shall then notify the governor, the supreme court, the state bar, and the attorney general that a potential ground for removal exists.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 5, eff. Sept. 1, 2001.

Sec. 33.0042. REQUIREMENTS FOR OFFICE OR EMPLOYMENT: INFORMATION. The executive director or the executive director's designee shall provide to members of the commission and to agency employees, as often as necessary, information regarding the requirements for office or employment under this chapter and Section 1-a, Article V, Texas Constitution, including information regarding a person's responsibilities under applicable laws relating to standards of conduct for state officers or employees.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 5, eff. Sept. 1, 2001.

Sec. 33.0043. COMMISSION MEMBER TRAINING. (a) A person who is appointed to and qualifies for office as a member of the commission shall complete a training program that complies with this section.

(b) The training program must provide the person with information regarding:

(1) the legislation that created the commission;

(2) the programs operated by the commission;

(3) the role and functions of the commission;

(4) the rules of the commission with an emphasis on the rules that relate to disciplinary and investigatory authority;

(5) the current budget for the commission;

(6) the results of the most recent formal audit of the commission;

(7) the requirements of laws relating to public officials, including conflict-of-interest laws; and

(8) any applicable ethics policies adopted by the commission or the Texas Ethics Commission.

(c) A person appointed to the commission is entitled to reimbursement, as provided by the General Appropriations Act, for the travel expenses incurred in attending the training program regardless of whether the attendance at the program occurs before or after the person qualifies for office.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 5, eff. Sept. 1, 2001.

Sec. 33.0044. DIVISION OF RESPONSIBILITY. The commission shall develop and implement policies that clearly separate the policy-making responsibilities of the commission and the management responsibilities of the executive director and staff of the commission.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 5, eff. Sept. 1, 2001.

Sec. 33.0045. EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT. (a) The executive director or the executive director's designee shall prepare and maintain a

written policy statement that implements a program of equal employment opportunity to ensure that all personnel decisions are made without regard to race, color, disability, sex, religion, age, or national origin.

(b) The policy statement must include:

(1) personnel policies, including policies relating to recruitment, evaluation, selection, training, and promotion of personnel, that show the intent of the commission to avoid the unlawful employment practices described by Chapter 21, Labor Code; and

(2) an analysis of the extent to which the composition of the commission's personnel is in accordance with state and federal law and a description of reasonable methods to achieve compliance with state and federal law.

(c) The policy statement must:

(1) be updated annually;

(2) be reviewed by the state Commission on Human Rights for compliance with Subsection (b)(1); and

(3) be filed with the governor's office.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 5, eff. Sept. 1, 2001.

Sec. 33.0046. STATE EMPLOYEE INCENTIVE PROGRAM: INFORMATION AND TRAINING. The executive director or the executive director's designee shall provide to agency employees information and training on the benefits and methods of participation in the state employee incentive program.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 5, eff. Sept. 1, 2001.

Sec. 33.005. ANNUAL REPORT. (a) Not later than December 1 of each year, the commission shall submit to the legislature a report for the preceding fiscal year ending August 31.

(b) The report must include:

(1) an explanation of the role of the commission;

(2) annual statistical information and examples of improper judicial conduct;

(3) an explanation of the commission's processes; and

(4) changes the commission considers necessary in its rules or the applicable statutes or constitutional provisions.

(c) The commission shall distribute the report to the governor, lieutenant governor, speaker of the house of representatives, and editor of the Texas Bar Journal.

(d) The legislature shall appropriate funds for the preparation and distribution of the report.

(e) The Texas Bar Journal shall periodically publish public statements, sanctions, and orders of additional education issued by the commission.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 646, Sec. 3, eff. Aug. 28, 1989; Acts 1999, 76th Leg., ch. 462, Sec. 3, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 6, eff. Sept. 1, 2001.

Sec. 33.006. IMMUNITY FROM LIABILITY. (a) This section applies to:

(1) the commission;

(2) a member of the commission;

(3) the executive director of the commission;

(4) an employee of the commission;

(5) a special master appointed under Section 1-a(8), Article V, Texas Constitution;

(6) special counsel for the commission and any person employed by the special counsel; and

(7) any other person appointed by the commission to assist the commission in performing its duties.

(b) A person to which this section applies is not liable for an act or omission committed by the person within the scope of the person's official duties.

(c) The immunity from liability provided by this section is absolute and unqualified and extends to any action at law or in equity.

Added by Acts 1999, 76th Leg., ch. 462, Sec. 4, eff. June 18, 1999. Amended by Acts 2001, 77th Leg., ch. 917, Sec. 7, eff. Sept. 1, 2001.

Sec. 33.007. DISTRIBUTION OF MATERIALS TO JUDGES AND THE PUBLIC. (a) The commission shall develop and distribute plain-language materials as described by this section to judges and the public.

(b) The materials must include a description of:

(1) the commission's responsibilities;

(2) the types of conduct that constitute judicial misconduct;

(3) the types of sanctions issued by the commission, including orders of additional education; and

(4) the commission's policies and procedures relating to complaint investigation and resolution.

(c) The materials shall be provided in English and Spanish.

(d) The commission shall provide to each person filing a complaint with the commission the materials described by this section.

(e) The commission shall adopt a policy to effectively distribute materials as required by this section.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 8, eff. Sept. 1, 2001.

Sec. 33.008. JUDICIAL MISCONDUCT INFORMATION. The commission shall routinely provide to entities that provide education to judges information relating to judicial misconduct resulting in sanctions or orders of additional education issued by the commission. The commission shall categorize the information by level of judge and type of misconduct.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 8, eff. Sept. 1, 2001.

SUBCHAPTER B. POWERS AND DUTIES

Sec. 33.021. GENERAL POWERS OF COMMISSION. The commission may:

(1) design and use a seal;

(2) employ persons that it considers necessary to carry out the duties and powers of the commission;

(3) employ special counsel as it considers necessary;

(4) arrange for attendance of witnesses;

(5) arrange for and compensate expert witnesses and reporters; and

(6) pay from its available funds the reasonably necessary expenses of carrying out its duties under the constitution, including providing compensation to special masters.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 5, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 10, eff. Sept. 1, 2001.

Sec. 33.0211. COMPLAINTS. (a) The commission shall maintain a file on each written complaint filed with the commission. The file must include:

(1) the name of the person who filed the complaint;

(2) the date the complaint is received by the commission;

(3) the subject matter of the complaint;

(4) the name of each person contacted in relation to the complaint;

(5) a summary of the results of the review or investigation of the complaint; and

(6) an explanation of the reason the file was closed, if the commission closed the file without taking action other than to investigate the complaint.

(b) The commission, at least quarterly until final disposition of the complaint, shall notify the person filing the complaint of the status of the investigation unless the notice would jeopardize an undercover investigation.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 11, eff. Sept. 1, 2001.

Sec. 33.022. INVESTIGATIONS AND FORMAL PROCEEDINGS. (a) The commission may conduct a preliminary investigation of the circumstances surrounding an allegation or appearance of misconduct or disability of a judge to determine if the allegation or appearance is unfounded or frivolous.

(b) If, after conducting a preliminary investigation under this section, the commission determines that an allegation or appearance of misconduct or disability is unfounded or frivolous, the commission shall terminate the investigation.

(c) If, after conducting a preliminary investigation under this section, the commission does not determine that an allegation or appearance of misconduct or disability is unfounded or frivolous, the commission:

(1) shall:

(A) conduct a full investigation of the circumstances surrounding the allegation or appearance of misconduct or disability; and

(B) notify the judge in writing of:

(i) the commencement of the investigation; and

(ii) the nature of the allegation or appearance of misconduct or disability being investigated; and

(2) may:

(A) order the judge to:

(i) submit a written response to the allegation or appearance of misconduct or disability; or

(ii) appear informally before the commission;

(B) order the deposition of any person; or

(C) request the complainant to appear informally before the commission.

(d) The commission shall serve an order issued by the commission under Subsection (c)(2)(B) on the person who is the subject of the deposition and the judge who is the subject of the investigation. The order must be served within a reasonable time before the date of the deposition.

(e) The commission may file an application in a district court to enforce an order issued by the commission under Subsection (c)(2)(B).

(f) The commission shall notify the judge in writing of the disposition of a full investigation conducted by the commission under this section.

(g) If after the investigation has been completed the commission concludes that formal proceedings will be instituted, the matter shall be entered in a docket to be kept for that purpose and written notice of the institution of formal proceedings shall be served on the judge without delay. The proceedings shall be entitled:

"Before the State Commission on Judicial Conduct Inquiry Concerning a Judge, No. ___"

(h) The notice shall specify in ordinary and concise language the charges against the judge and the alleged facts on which the charges are based and the specific standards contended to have been violated. The judge is entitled to file a written answer to the charges against the judge not later than the 15th day after the notice is served on the judge, and the notice shall so advise the judge.

(i) The notice shall be served on the judge or the judge's attorney of record by personal service of a copy of the notice by a person designated by the chairperson. The person serving the notice shall promptly notify the clerk in writing of the date on which the notice was served. If it appears to the chairperson on affidavit that, after reasonable effort during a period of 10 days, personal service could not be had, service may be made by mailing by registered or certified mail copies of the notice addressed to the judge at the judge's chambers or at the judge's last known residence in an envelope marked "personal and confidential." The date of mailing shall be entered in the docket.

(j) A judge at the judge's request may elect to have any hearing open to the public or to persons designated by the judge. The right of a judge to an open hearing does not preclude placing witnesses under the rule as provided by the Texas Rules of Civil Procedure.

(k) A judge is not entitled to a jury trial in formal proceedings before a special master or the commission.

(l) The commission shall adopt procedures for hearing from judges and complainants appearing before the commission. The procedures shall ensure the confidentiality of a complainant's identity as provided under Section 33.0321.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 486, Sec. 1, eff. Aug. 31, 1987; Acts 1993, 73rd Leg., ch. 596, Sec. 1, 2, eff. Sept. 1, 1993; Acts 1999, 76th Leg., ch. 462, Sec. 6, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 12, eff. Sept. 1, 2001.

Sec. 33.023. PHYSICAL OR MENTAL INCAPACITY OF JUDGE. (a) In any investigation or proceeding that involves the physical or mental incapacity of a judge, the commission may order the judge to submit to a physical or mental examination by one or more qualified physicians or a mental examination by one or more qualified psychologists selected and paid for by the commission.

(b) The commission shall give the judge written notice of the examination not later than 10 days before the date of the examination. The notice must include the physician's name and the date, time, and place of the examination.

(c) Each examining physician shall file a written report of the examination with the commission and the report shall be received as evidence without further formality. On request of the judge or the judge's attorney, the commission shall give the judge a copy of the report. The physician's oral or deposition testimony concerning the report may be required by the commission or by written demand of the judge.

(d) If a judge refuses to submit to a physical or mental examination ordered by the commission under this section, the commission may petition a district court for an order compelling the judge to submit to the physical or mental examination.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 7, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 13, eff. Sept. 1, 2001.

Sec. 33.024. OATHS AND SUBPOENAS. In conducting an investigation, formal proceedings, or proceedings before a special court of review, a commission member, special master, or member of a special court of review may:

(1) administer oaths;

(2) order and provide for inspection of books and records; and

(3) issue a subpoena for attendance of a witness or production of papers, books, accounts, documents, and testimony relevant to the investigation or proceeding.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 8, eff. June 18, 1999.

Sec. 33.025. ENFORCEMENT OF SUBPOENA. (a) The commission may file an application in a district court or, if appropriate, with a special master or special court of review, to enforce a subpoena issued by the commission under this chapter.

(b) A special master or special court of review may enforce by contempt a subpoena issued by the commission, the special master, or the special court of review.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 9, eff. June 18, 1999.

Sec. 33.026. WITNESS IMMUNITY. (a) In a proceeding or deposition related to a proceeding before the commission, a special master, or a special court of review, the commission, special master, or special court of review may compel a person other than the judge to testify or produce evidence over the person's claim of privilege against self-incrimination.

(b) A person compelled to testify over a proper claim of privilege against self-incrimination is not subject to indictment or prosecution for a matter or transaction about which the person truthfully testifies or produces evidence.

(c) A special master has the same powers as a district judge in matters of contempt and granting immunity.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 10, eff. June 18, 1999.

Sec. 33.027. DISCOVERY. (a) In formal proceedings or in a proceeding before a special court of review, discovery shall be conducted, to the extent practicable, in the manner provided by the rules applicable to civil cases generally.

(b) On request, a special master, the commission, or a special court of review shall expedite the discovery in formal proceedings or in a proceeding before a special court of review.

(c) The following may not be the subject of a discovery request in formal proceedings or in a proceeding before a special court of review:

(1) the discussions, thought processes, or individual votes of members of the commission;

(2) the discussions or thought processes of employees of the commission, including special counsel for the commission; or

(3) the identity of a complainant or informant if the person requests that the person's identity be kept confidential.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 11, eff. June 18, 1999.

Sec. 33.028. PROCESS AND ORDERS. (a) Process issued under this chapter is valid anywhere in the state.

(b) A peace officer, an employee of the commission, or any other person whom the commission, a special master, or a special court of review designates may serve process or execute a lawful order of the commission, the special master, or the special court of review.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 12, eff. June 18, 1999.

Sec. 33.029. WITNESSES' EXPENSES. A witness called to testify by the commission other than an officer or employee of the state or a political subdivision or court of the state is entitled to the same mileage expenses and per diem as a witness before a state grand jury. The commission shall pay these amounts from its appropriated funds.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 13, eff. June 18, 1999.

Sec. 33.030. ASSISTANCE TO COMMISSION, SPECIAL MASTER, OR SPECIAL COURT OF REVIEW. (a) On request of the commission, the attorney general shall act as its counsel generally or in a particular investigation or proceeding.

(b) A state or local government body or department, an officer or employee of a state or local government body, or an official or agent of a state court shall cooperate with and give reasonable assistance and information to the commission, an authorized representative of the commission, a special master, or a special court of review concerning an investigation or proceeding before the commission, special master, or special court of review.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 14, eff. June 18, 1999.

Sec. 33.031. NO AWARD OF COSTS. Court costs or attorney's fees may not be awarded in a proceeding under this chapter.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 15, eff. June 18, 1999.

Sec. 33.032. CONFIDENTIALITY OF PAPERS, RECORDS, AND PROCEEDINGS. (a) Except as otherwise provided by this section and Section 33.034, the papers filed with and proceedings before the commission are confidential prior to the filing of formal charges.

(b) The formal hearing and any evidence introduced during the formal hearing, including papers, records, documents, and pleadings filed with the clerk, shall be public.

(c) On issuance of a public admonition, warning, reprimand, or public requirement that a person obtain additional training or education by the commission, the record of the informal appearance and the documents presented to the commission during the informal appearance that are not protected by attorney-client or work product privilege shall be public.

(d) The disciplinary record of a judge, including any private sanctions, is admissible in a subsequent proceeding before the commission, a special master, a special court of review, or a review tribunal.

(e) On the filing of a written request by a judge, the commission may release to the person designated in the request, including the judge, the number, nature, and disposition of a complaint filed against the judge with the commission, except that the commission may refuse to release the identity of a complainant.

(f) The commission may release to the Office of the Chief Disciplinary Counsel of the State Bar of Texas information indicating that an attorney, including a judge who is acting in the judge's capacity as an attorney, has violated the Texas Disciplinary Rules of Professional Conduct.

(g) If the commission issues an order suspending a judge who has been indicted for a criminal offense, the order, any withdrawal of the order, and all records and proceedings related to the suspension shall be public.

(h) A voluntary agreement to resign from judicial office in lieu of disciplinary action by the commission shall be public on the commission's acceptance of the agreement. The agreement and any agreed statement of facts relating to the agreement are admissible in a subsequent proceeding before the commission. An agreed statement of facts may be released to the public only if the judge violates a term of the agreement.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 486, Sec. 2, eff. Aug. 31, 1987; Acts 1987, 70th Leg., 2nd C.S., ch. 47, Sec. 1, eff. Oct. 20, 1987; Acts 1999, 76th Leg., ch. 462, Sec. 16, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 14, eff. Sept. 1, 2001.

Sec. 33.0321. CONFIDENTIALITY OF COMPLAINANT'S IDENTITY. On the request of a complainant, the commission may keep the complainant's identity confidential.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 15, eff. Sept. 1, 2001.

Sec. 33.033. NOTIFICATION TO COMPLAINANT. (a) The commission shall promptly notify a complainant of the disposition of the case.

(b) The communication shall inform the complainant that:

(1) the case has been dismissed;

(2) a private sanction or order of additional education has been issued by the commission;

(3) a public sanction has been issued by the commission;

(4) formal proceedings have been instituted; or

(5) a judge has resigned from judicial office in lieu of disciplinary action by the commission.

(c) The communication may not contain the name of a judge unless a public sanction has been issued by the commission or formal proceedings have been instituted.

(d) If a public sanction has been issued by the commission, the communication must include a copy of the public sanction.

(e) If the complaint is dismissed by the commission, the commission shall include in the notification under Subsection (a):

(1) an explanation of each reason for the dismissal; and

(2) information relating to requesting reconsideration of the dismissed complaint as provided by Sections 33.035(a) and (f).

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 486, Sec. 3, eff. Aug. 31, 1987; Acts 1999, 76th Leg., ch. 462, Sec. 17, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 16, eff. Sept. 1, 2001.

Sec. 33.034. REVIEW OF COMMISSION DECISION. (a) A judge who receives from the commission any type of sanction is entitled to a review of the commission's decision as provided by this section. This section does not apply to a decision by the commission to institute formal proceedings.

(b) Not later than the 30th day after the date on which the commission issues its decision, the judge must file with the chief justice of the supreme court a written request for appointment of a special court of review.

(c) Not later than the 10th day after the chief justice receives the written request, the chief justice shall select by lot the court of review. The court of review is composed of three court of appeals justices, other than a justice serving in a court of appeals district in which the judge petitioning for review of the commission's order serves and other than a justice serving on the commission. The chief justice shall notify the petitioner and the commission of the identities of the justices appointed to the court and of the date of their appointment. Service on the court shall be considered a part of the official duties of a justice, and no additional compensation may be paid for the service.

(d) Within 15 days after the appointment of the court of review, the commission shall file with the clerk a charging document that includes a copy of the sanction issued and any additional charges to be considered in the de novo proceeding. The charging document is public on its filing with the clerk. On receipt of the filing of the charging document, the clerk shall send the charging document to the judge who is the subject of the document and to each justice on the court of review.

(e) The review by the court under this section is by trial de novo as that term is used in the appeal of cases from justice to county court. Any hearings of the court shall be public and shall be held at the location determined by the court. Any evidence introduced during a hearing, including papers, records, documents, and pleadings filed with the clerk in the proceedings, is public.

(f) Except as otherwise provided by this section, the procedure for the review is governed to the extent practicable by the rules of law, evidence, and procedure that apply to the trial of civil actions generally.

(g) A judge is not entitled to a trial by jury in a review under this section.

(h) Within 30 days after the date on which the charging document is filed with the clerk, the court shall conduct a hearing on the charging document. The court may, if good cause is shown, grant one or more continuances not to exceed a total of 60 days. Within 60 days after the hearing, the court shall issue a decision as to the proper disposition of the appeal.

(i) The court's decision under this section is not appealable.

Added by Acts 1987, 70th Leg., 2nd C.S., ch. 47, Sec. 2, eff. Oct. 20, 1987. Amended by Acts 1999, 76th Leg., ch. 462, Sec. 18, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 917, Sec. 17, eff. Sept. 1, 2001.

Sec. 33.035. RECONSIDERATION OF COMPLAINT. (a) A complainant may request reconsideration of a dismissed complaint if, not later than the 30th day after the date of the communication informing the complainant of the dismissal, the complainant provides additional evidence of misconduct committed by the judge.

(b) The commission shall deny a request for reconsideration if the complainant does not meet the requirements under Subsection (a). The commission shall notify the complainant of the denial in writing.

(c) The commission shall grant a request for reconsideration if the complainant meets the requirements under Subsection (a). After granting a request, the commission shall vote to:

(1) affirm the original decision to dismiss the complaint; or

(2) reopen the complaint.

(d) The commission shall notify the complainant of the results of the commission's vote under Subsection (c) in writing.

(e) The commission shall conduct an appropriate investigation of a complaint reopened under Subsection (c)(2). The investigation shall be conducted by commission staff who were not involved in the original investigation.

(f) A complainant may request reconsideration of a dismissed complaint under this section only once.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 18, eff. Sept. 1, 2001.

Sec. 33.036. CERTAIN DISCLOSURE OF INFORMATION. (a) To protect the public interest, the commission may disclose information relating to an investigation or proceeding under this chapter to:

(1) a law enforcement agency;

(2) a public official who is authorized or required by law to appoint a person to serve as a judge;

(3) the supreme court; or

(4) an entity that provides commission-ordered education to judges.

(b) Information may be disclosed under this section only to the extent necessary for the recipient of the information to perform an additional duty or function.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 18, eff. Sept. 1, 2001.

Sec. 33.037. SUSPENSION PENDING APPEAL. If a judge who is convicted of a felony or a misdemeanor involving official misconduct appeals the conviction, the commission shall suspend the judge from office without pay pending final disposition of the appeal.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 18, eff. Sept. 1, 2001.

Sec. 33.038. AUTOMATIC REMOVAL. A judge is automatically removed from the judge's office if the judge is convicted of or is granted deferred adjudication for:

(1) a felony; or

(2) a misdemeanor involving official misconduct.

Added by Acts 2001, 77th Leg., ch. 917, Sec. 18, eff. Sept. 1, 2001.

SUBCHAPTER C. JUDICIAL CONDUCT

Sec. 33.051. SOLICITATION OR ACCEPTANCE OF REFERRAL FEES OR GIFTS BY JUDGE; CRIMINAL PENALTY. (a) A judge commits an offense if the judge solicits or accepts a gift or a referral fee in exchange for referring any kind of legal business to an attorney or law firm. This subsection does not prohibit a judge from:

(1) soliciting funds for appropriate campaign or officeholder expenses as permitted by Canon 4D, Code of Judicial Conduct, and state law; or

(2) accepting a gift in accordance with the provisions of Canon 4D, Code of Judicial Conduct.

(b) It is an affirmative defense to prosecution under Subsection (a) that:

(1) the judge solicited the gift or referral fee before taking the oath of office but accepted the gift or fee after taking the oath of office; or

(2) the judge solicited or accepted the gift or referral fee after taking the oath of office in exchange for referring to an attorney or law firm legal business that the judge was engaged in but was unable to complete before taking the oath of office.

(c) An offense under this section is a Class B misdemeanor.

(d) If, after an investigation, the commission determines that a judge engaged in conduct described by Subsection (a) to which Subsection (b) does not apply, the commission may issue a sanction against the judge or institute formal proceedings, regardless of whether the judge is being prosecuted or has been convicted of an offense under this section.

(e) An attorney or judge who has information that a judge engaged in conduct described by Subsection (a) to which Subsection (b) does not apply shall file a complaint with the commission not later than the 30th day after the date the attorney or judge obtained the information. A judge who fails to comply with this subsection is subject to sanctions by the commission. An attorney who fails to comply with this subsection is subject to discipline by the Commission for Lawyer Discipline under Subchapter E, Chapter 81.

(f) For purposes of this section:

(1) "Judge" does not include a constitutional county court judge, a statutory county court judge who is authorized by law to engage in the private practice of law, a justice of the peace, or a municipal court judge, if that judge or justice of the peace solicits or accepts a gift or a referral fee in exchange for referring legal business that involves a matter over which that judge or justice of the peace will not preside in the court of that judge or justice of the peace.

(2) "Referral fee" includes forwarding fees, acknowledgment fees, and any form of payment, benefit, or compensation related to the referral or placement of a potential client for legal services.

Added by Acts 2003, 78th Leg., ch. 850, Sec. 1, eff. Sept. 1, 2003.

THE FAIR DEBT COLLECTION PRACTICES ACT

As amended by Public Law 104-208, 110 Stat. 3009 (Sept. 30, 1996)

To amend the Consumer Credit Protection Act to prohibit abusive practices by debt collectors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Consumer Credit Protection Act (15 U.S.C. 1601 et seq.) is amended by adding at the end thereof the following new title:

TITLE VIII - DEBT COLLECTION PRACTICES [Fair Debt Collection Practices Act]

Sec.

§ 801. Short Title [15 USC 1601 note]

This title may be cited as the "Fair Debt Collection Practices Act."

§ 802. Congressional findings and declarations of purpose [15 USC 1692]

(a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

§ 803. Definitions [15 USC 1692a]

As used in this title --

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include --

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 804. Acquisition of location information [15 USC 1692b]

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall --

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to the communication from the debt collector.

§ 805. Communication in connection with debt collection [15 USC 1692c]

(a) COMMUNICATION WITH THE CONSUMER GENERALLY. Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt --

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) COMMUNICATION WITH THIRD PARTIES. Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) CEASING COMMUNICATION. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except --

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

§ 806. Harassment or abuse [15 USC 1692d]

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3)[1] of this Act.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller's identity.

§ 807. False or misleading representations [15 USC 1692e]
A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of --

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to --

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this title.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act.

§ 808. Unfair practices [15 USC 1692f]
A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true propose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if --

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

§ 809. Validation of debts [15 USC 1692g]
(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing --

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall

cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.
(c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

§ 810. Multiple debts [15 USC 1692h]

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

§ 811. Legal actions by debt collectors [15 USC 1692i]

(a) Any debt collector who brings any legal action on a debt against any consumer shall --

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity --

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

§ 812. Furnishing certain deceptive forms [15 USC 1692j]

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.
(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 813 for failure to comply with a provision of this title.

§ 813. Civil liability [15 USC 1692k]

(a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of –

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors –

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
(d) An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.
(e) No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

§ 814. Administrative enforcement [15 USC 1692*l*]

(a) Compliance with this title shall be enforced by the Commission, except to the extend that enforcement of the requirements imposed under this title is specifically committed to another agency under subsection (b). For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, a violation of this title shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce the provisions of this title in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Compliance with any requirements imposed under this title shall be enforced under --

(1) section 8 of the Federal Deposit Insurance Act, in the case of –

(A) national banks, by the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), by the Federal Reserve Board; and

(C) banks the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 5(d) of the Home Owners Loan Act of 1933, section 407 of the National Housing Act, and sections 6(i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directing or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions;

(3) the Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) subtitle IV of Title 49, by the Interstate Commerce Commission with respect to any common carrier subject to such subtitle;

(5) the Federal Aviation Act of 1958, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that Act; and

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

(c) For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title any other authority conferred on it by law, except as provided in subsection (d).

(d) Neither the Commission nor any other agency referred to in subsection (b) may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this title.

§ 815. Reports to Congress by the Commission [15 USC 1692m]

(a) Not later than one year after the effective date of this title and at one-year intervals thereafter, the Commission shall make reports to the Congress concerning the administration of its functions under this title, including such recommendations as the Commission deems necessary or appropriate. In addition, each report of the Commission shall include its assessment of the extent to which compliance with this title is being achieved and a summary of the enforcement actions taken by the Commission under section 814 of this title.

(b) In the exercise of its functions under this title, the Commission may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 814 of this title.

§ 816. Relation to State laws [15 USC 1692n]

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

§ 817. Exemption for State regulation [15 USC 1692o]

The Commission shall by regulation exempt from the requirements of this title any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this title, and that there is adequate provision for enforcement.

§ 818. Effective date [15 USC 1692 note]

This title takes effect upon the expiration of six months after the date of its enactment, but section 809 shall apply only with respect to debts for which the initial attempt to collect occurs after such effective date.

Approved September 20, 1977

ENDNOTES
1. So in original; however, should read "604(a)(3)."

LEGISLATIVE HISTORY:
Public Law 95-109 [H.R. 5294]
HOUSE REPORT No. 95-131 (Comm. on Banking, Finance, and Urban Affairs).
SENATE REPORT No. 95-382 (Comm. on Banking, Housing, and Urban Affairs).
CONGRESSIONAL RECORD, Vol. 123 (1977):

Apr. 4, considered and passed House.

Aug. 5, considered and passed Senate, amended.

Sept. 8, House agreed to Senate amendment.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 13, No. 39:

Sept. 20, Presidential statement.

AMENDMENTS:
SECTION 621, SUBSECTIONS (b)(3), (b)(4) and (b)(5) were amended to transfer certain administrative enforcement responsibilities, pursuant to Pub. L. 95-473, § 3(b), Oct. 17, 1978. 92 Stat. 166; Pub. L. 95-630, Title V. § 501, November 10, 1978, 92 Stat. 3680; Pub. L. 98-443, § 9(h), Oct. 4, 1984, 98 Stat. 708.
SECTION 803, SUBSECTION (6), defining "debt collector," was amended to repeal the attorney at law exemption at former Section (6)(F) and to redesignate Section 803(6)(G) pursuant to Pub. L. 99-361, July 9, 1986, 100 Stat. 768. For legislative history, *see* H.R. 237, HOUSE REPORT No. 99-405 (Comm. on Banking, Finance and Urban Affairs). CONGRESSIONAL RECORD: Vol. 131 (1985): Dec. 2, considered and passed House. Vol. 132 (1986): June 26, considered and passed Senate.
SECTION 807, SUBSECTION (11), was amended to affect when debt collectors must state (a) that they are attempting to collect a debt and (b) that information obtained will be used for that purpose, pursuant to Pub. L. 104-208 § 2305, 110 Stat. 3009 (Sept. 30, 1996).

Fair Debt Collection

Federal Trade Commission

March 1999

If you use credit cards, owe money on a personal loan, or are paying on a home mortgage, you are a "debtor." If you fall behind in repaying your creditors, or an error is made on your accounts, you may be contacted by a "debt collector."

You should know that in either situation, the Fair Debt Collection Practices Act requires that debt collectors treat you fairly by prohibiting certain methods of debt collection. Of course, the law does not forgive any legitimate debt you owe.

This brochure answers commonly asked questions about your rights under the Fair Debt Collection Practices Act.

What debts are covered?

Personal, family, and household debts are covered under the Act. This includes money owed for the purchase of an automobile, for medical care, or for charge accounts.

Who is a debt collector?

A debt collector is any person who regularly collects debts owed to others. This includes attorneys who collect debts on a regular basis.

How may a debt collector contact you?

A collector may contact you in person, by mail, telephone, telegram, or fax. However, a debt collector may not contact you at inconvenient times or places, such as before 8 a.m. or after 9 p.m., unless you agree. A debt collector also may not contact you at work if the collector knows that your employer disapproves.

Can you stop a debt collector from contacting you?

You can stop a debt collector from contacting you by writing a letter to the collection agency telling them to stop. Once the agency receives your letter, they may not contact you again except to say there will be no further contact or to notify you that the debt collector or creditor intends to take some specific action. Please note, however, that

sending such a letter to a collector does not make the debt go away if you actually owe it. You could still be sued by the debt collector or your original creditor.

May a debt collector contact anyone else about your debt?

If you have an attorney, the debt collector must contact the attorney, rather than you. If you do not have an attorney, a collector may contact other people, but only to find out where you live, what your phone number is, and where you work. Collectors usually are prohibited from contacting such third parties more than once. In most cases, the collector may not tell anyone other than you and your attorney that you owe money.

What must the debt collector tell you about the debt?

Within five days after you are first contacted, the collector must send you a written notice telling you the amount of money you owe; the name of the creditor to whom you owe the money; and what action to take if you believe you do not owe the money.

May a debt collector continue to contact you if you believe you do not owe money?

A collector may not contact you if, within 30 days after you receive the written notice, you send the collection agency a letter stating you do not owe money. However, a collector can renew collection activities if you are sent proof of the debt, such as a copy of a bill for the amount owed.

What types of debt collection practices are prohibited?

Harassment.

Debt collectors may not harass, oppress, or abuse anyone or any third parties they contact. For example, debt collectors may not:

- use threats of violence or harm;
- publish a list of consumers who refuse to pay their debts (except to a credit bureau);
- use obscene or profane language; or
- repeatedly use the telephone to annoy someone;

False statements.

Debt collectors may not use any false statements when collecting a debt. For example, debt collectors may not:

- falsely imply that they are attorneys or government representatives;
- falsely imply that you have committed a crime;

- falsely represent that they operate or work for a credit bureau;
- misrepresent the amount of your debt;
- indicate that papers being sent to you are legal forms when they are not; or
- indicate that papers being sent to you are not legal forms when they are.

Debt collectors also may not state that:

- you will be arrested if you do not pay your debt;
- they will seize, garnish, attach, or sell your property or wages, unless the collection agency or creditor intends to do so, and it is legal to do so; or
- actions, such as a lawsuit, will be taken against you, which legally may not be taken, or which they do not intend to take.

Debt collectors may not:

- give false credit information about you to anyone, including a credit bureau;
- send you anything that looks like an official document from a court or government agency when it is not; or
- use a false name.

Unfair practices.

Debt collectors may not engage in unfair practices when they try to collect a debt. For example, collectors may not:

- collect any amount greater than your debt, unless your state law permits such a charge;
- deposit a post-dated check prematurely;
- use deception to make you accept collect calls or pay for telegrams;
- take or threaten to take your property unless this can be done legally; or
- contact you by postcard.

What control do you have over payment of debts?

If you owe more than one debt, any payment you make must be applied to the debt you indicate. A debt collector may not apply a payment to any debt you believe you do not owe.

What can you do if you believe a debt collector violated the law?

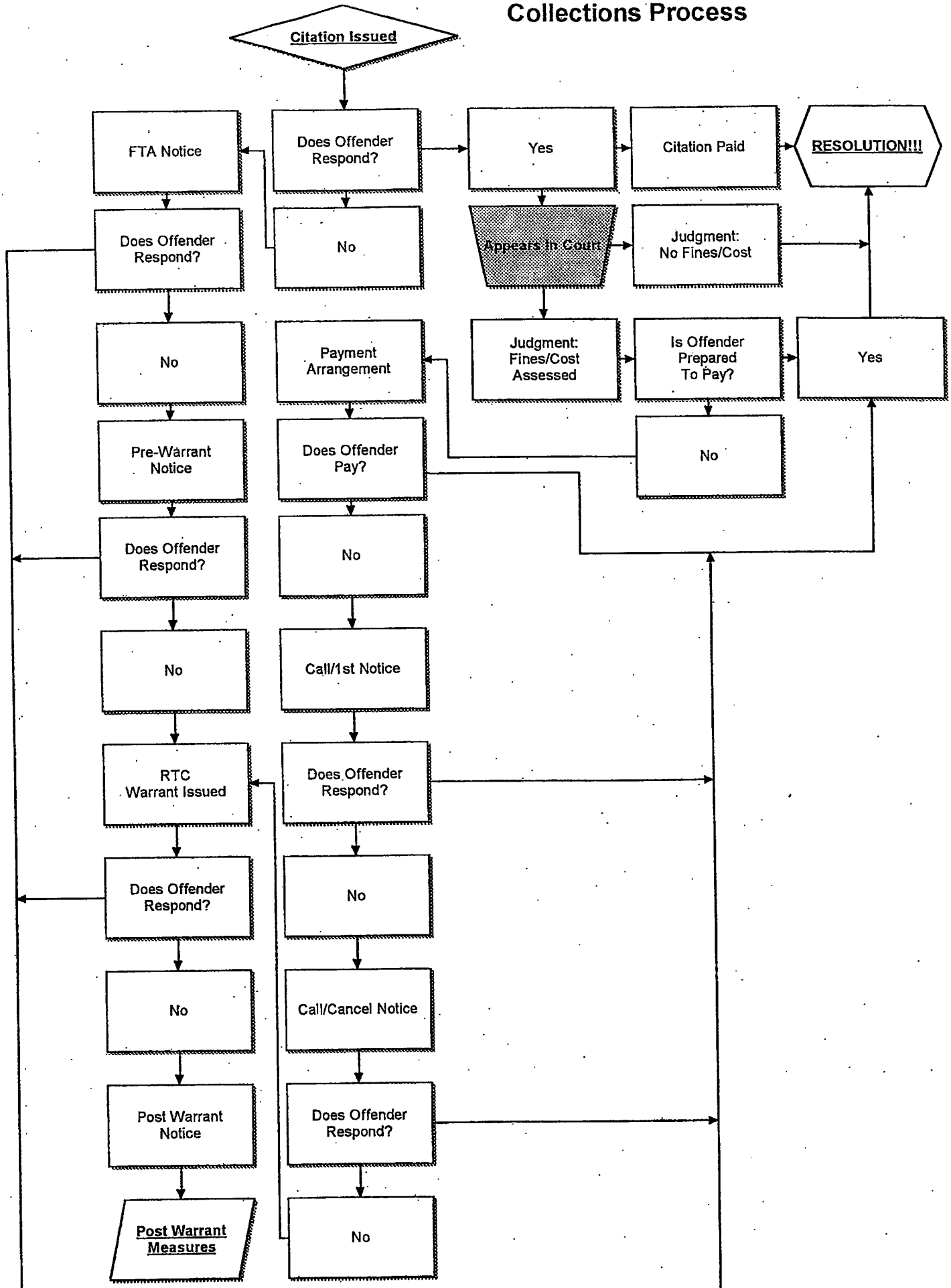
You have the right to sue a collector in a state or federal court within one year from the date from the date the law was violated. If you win, you may recover money for the damages you suffered plus an additional amount up to $1000. Court costs and attorneys fees also can be recovered. A group of people also may sue a debt collector and recover money for damages up to $500,000, or one percent of the collectors net worth, whichever is less.

Where can you report a debt collector for an alleged violation?

Report any problems you have with a debt collector to your state Attorney Generals office and the Federal Trade Commission. Many states have their own debt collection laws, and your Attorney Generals office can help you determine your rights.

The FTC works for the consumer to prevent fraudulent, deceptive and unfair business practices in the marketplace and to provide information to help consumers spot, stop and avoid them. To file a complaint or to get free information on consumer issues, visit the www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters Internet, telemarketing, identity theft and other fraud-related complaints in to Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Justice & Municipal Court Collections Process



Helpful Information

- Ethics "Hotline": (877) 228-5750
- Fax: (512) 463-0511
- Website: www.scjc.state.tx.us
- Annual Reports Available on-line
- Email: Seana.Willing@scjc.state.tx.us
- Collections and Fine Enforcement Help
  Contact: Jim Lehman, Russ Duncan and Don McKinley, Collections Specialists
  State of Texas
  Office of Court Administration
  (512) 936-1625 (office)
  (512)463-1648 (fax)

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Ethics: TV Justice and Reality in the Courtroom

OBJECTIVES

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

1. Identify and discuss the impact TV courtroom shows have had on courtroom participants (judges, attorneys, litigants, and others).
2. Identify common canon provisions that are implicated by difficult courtroom situations.
3. Examine the tools and techniques to deal with difficult courtroom situations.
4. Apply progressive responses to escalating courtroom situations.

Ethics: TV Justice and Reality in the Courtroom

Interactive Notes

FY 2005

I. Food For Thought

A. Facts and Figures about our TV Habits

- The average American child watches _____ hours of TV per week
- The average American watches over _____hours of TV per day
- In the U.S. the average family has its TV on ____ hours and ____ minutes a day
- _____% of Americans polled believe that they "watch too much TV"

B. Does it Matter What We Watch?

- ABA Report on Perceptions of the U.S. Justice System 1999
- Social Learning Theory (Albert Bandura 1977)
- Cultivation Theory (Shanahan & Morgan 1999)

II. Well, let's see...

A. What lessons would a television audience learn if they were only to watch the beginning credits of some of today's syndicated television courtroom programs ("syndi-courts")?

B. What Scholars Say about "Syndi-Court" Programs

- Podlas (2001)
-
    - They _____ socialize citizens to experience the justice system
    - They _____disrespect for courts as critical institutions,
    - Their teachings are sometimes _____ or interpreted by viewers in troubling ways.
    - They potentially have _____ and _____ ramifications on trials, verdicts, and the justice system as a whole.
- Podlas (2004)
    - Possibly encourages _____
    - Encourages _____ representation

III. Reality vs. "Reality Television" in Syndi-Courts: Does the Public Know the Difference

While most judges, court personnel, and attorneys probably cringe when watching syndi-court programs, legal scholars suggest that it is wrong to assume that the public necessarily knows the difference.

> The television judges are not "real" judges. They are not actually sitting in courtrooms, and these shows are not real trials, with real winners and losers, in the legal sense. But Judge Judy and the others invariably look like judges. They wear judicial robes, and they sit on a bench in what looks like a courtroom. There is some evidence that many people think these are real courts. The California Commission on Judicial Performance, for example, receives complaints from people who think Judge Judy goes too far. The Commission is bothered by the fact that the "standards for judicial conduct are set by impostors [sic]."What dismays the Commission even more than the people who find these judges offensive are the people who do the opposite, those persons "who write us to complain that when they went to court, the judges didn't act like they do on television."
>
> The courts may be fakes, but the proceedings look like the genuine article. A man in a uniform leads in the litigants, as if they were in a courtroom. The litigants stand in front of the judge, saying "yes your honor" and "no your honor," and they tell their stories, often interrupting each other, when the judge is not interrupting them herself. ...The litigants are either so foolish, or so greedy for their fifteen minutes of fame, that they are willing to let an imitation judge monitor their claim and decide who wins.
>
> Lawrence M. Friedman, "Lexitainment: Legal Process as Theater"
> 50 DePaul L. Rev. 539 at 552 (Winter 2000)

IV. So do such programs have absolutely no redeeming value?

A. Neil Postman, Media Critic (1931-2003)
   - "The best things on television are its junk."
   - "No medium is excessively dangerous if its users understand what its dangers are." - *Amusing Ourselves to Death* (1985)

B. Not if we are aware of how such programs incorrectly depict the judicial process.

C. Not if we acknowledge how such program can potentially affect the perception of
   1. Jurors
   2. Defendants
   3. Court Personnel
      a. Clerks/Court Administrators
      b. Bailiffs
      c. Lawyers (Prosecutors and Defense Lawyers)
      d. Judges (Yes, even judges!)

D. The goal of this hour is to

   1. To increase awareness of how such images, for better or worse, influence expectations of individuals in court.
   2. To become better-informed consumers of the popular culture that surrounds us.

V. Introduction to Exercise:

For the remainder of the hour we will examine three different segments from popular syndi-court programs. I will introduce each scenario. After each segment we will consider a series of discussion questions contained in your course materials.

Because nearly all syndi-court programs involve civil cases, we have developed scenarios to make them more applicable to the type of criminal matters you encounter in your capacity as a municipal judge or magistrate.

To assist you, in identifying possible ethical violations, excerpts of the Preamble and Canons 1, 2, and 3, and the Texas Constitution are also included in your course materials.

In the interest of time, you are all expected to answer the question in your materials as you watch each segment.

A. "The Ring"*(Time 0:41) - Property Hearing*

Set up: Assume in the following segment that the following municipal judge has been asked in his capacity as a magistrate to conduct a property hearing pursuant to Chapter 47 of the Code of Criminal Procedure. ***As you watch the segment, take notes and be prepared to:***

1. Discuss what erroneous messages about courts may be conveyed to viewers by the segment.

2. Describe the judge's conduct as it relates to the behavior of the parties before him.

3. Identify, if any, potential Canon violations committed by the judge.

B. "Monkey Business" ***(Time 2:07) – Rendering a Verdict***

Set up: In the following segment, the judge is about to render a verdict in an animal case in which restitution is being requested. ***As you watch the segment, take notes and be prepared to:***

1. Describe the demeanor of the judge.

2. Describe the conduct of the bailiff and the spectators in the courtroom.

3. Identify, if any, potential Canon violations committed by the judge.

4. Discuss what erroneous messages about courts may be conveyed to viewers by the segment.

C. "MOEP Redux" ***(Time 1:07) - Modification of a MOEP***

Set up: In the following segment assume that Edward Chacon has requested that the judge reconsider a Magistrate's Order of Emergency Protection, that the judge imposed in her capacity as a magistrate on September 8th. The order was imposed upon Irma Sandoval, Edward's estranged common law wife, whom has a child. ***As you watch the segment, take notes and be prepared to:***

1. **Describe the demeanor of the judge.**

2. **Identify, if any, potential Canon violations committed by the judge.**

D. "I Yelled 'Rocks, Stop!!!'" ***(3:21) – Criminal Mischief Trial***

Set up: Assume the following, for years Kierstin "Jolly" Rogers and Stephanie "Don't Call Me Grace Slick" Smick were archenemies. They each had the own clique. Their history for feuding dated back to middle school. Out of the blue, one day Stephanie asked Kierstin if she wanted to call a truce and go out for a night on the town. Within weeks, they were best friends.

Or so Kierstin thought. On the night in question, the two girls were out in Kierstin's new car. Stephanie asked to drive the new car. Kierstin reluctantly agreed. For some strange reason, Stephanie insisted on taking a different route to Dick's Hamburgers. En route, Stephanie drove the car over what Kierstin claims were a "line of boulders." The car sustained damage to the undercarriage. The next day, Stephanie did not want to have anything to do with her "new best

friend," Kierstin. On top of that, Kierstin learned from three of the girls in Smick's clique that Stephanie had planned the whole rocky affair. Kierstin filed a complaint accusing Stephanie Smick of criminal mischief. Stephanie pled "100 percent, absolutely, not guilty" and has requested a "bench trial."

As you watch the segment, take notes and be prepared to:

1. Describe the demeanor of the judge.

2. Discuss what erroneous messages may be conveyed to viewers by the segment. Was there any member of the courtroom workgroup notably absent?

3. Identify, if any, potential Canon violations committed by the judge.

EXCERPTS
TEXAS CODE
OF JUDICIAL CONDUCT
and Texas Constitution

(As amended by the Supreme Court of Texas through August 22, 2002)

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Canon 1: Upholding the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 2: Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge

or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an *ex parte* communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

TEXAS CONSTITUTION

Article 5, Section 1-a, Retirement, Censure, Removal, and Compensation of Justices and Judges; State Commission on Judicial Conduct; Procedure (*as amended November 6, 2001*).

(6) A. Any Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice. Any person holding such office may be disciplined or censured, in lieu of removal from office, as provided by this section. Any person holding an office specified in this subsection may be suspended from office with or without pay by the Commission immediately on being indicted by a State or Federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct. On the filing of a sworn complaint charging a person holding such office with willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit on the judiciary or on the administration of justice, the Commission, after giving the person notice and an opportunity to appear and be heard before the Commission, may recommend to the Supreme Court the suspension of such person from office. The Supreme Court, after considering the record of such appearance and the recommendation of the Commission, may suspend the person from office with or without pay, pending final disposition of the charge.

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Rubbish and Refuse

OBJECTIVES

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

1. Identify the different laws that give jurisdiction to municipal courts over unsanitary, unsightly and objectionable property conditions.
2. Identify the elements of the offense.
3. Recognize the importance of notice requirements.
4. Distinguish between criminal penalties and administrative penalties.
5. Identify elements required by probably cause affidavits for administrative warrants.

Rubbish and Refuse

Abating the Urban Nuisance

Lisa Aceves Hayes
El Paso City Attorney's Office

Course Objectives

- Identify the various laws providing municipalities with authority to address unsanitary, unsightly and objectionable property conditions
- Identify the elements of the offense(s)
- Recognize the importance of notice requirements
- Distinguish between criminal penalties and administrative penalties
- Identify elements required by probable cause affidavits for administrative warrants

Under any conditions, anywhere,

whatever you are doing,

there is some ordinance under which

you can be booked.

~ Robert D. Sprecht

Texas Local Government Code §51.001

The governing body of a municipality may adopt, publish, amend, or repeal an ordinance, rule, or police regulation that:

- Is for the good government, peace, or order of the municipality or for the trade and commerce of the municipality; and
- Is necessary or proper for carrying out a power granted by law to the municipality or to an office or department of the municipality.

Texas Local Government Code §54.001

- Allows the governing body of a municipality to **enforce** each rule, ordinance, or police regulation of the municipality and to punish violations of such.
- Fines/penalties for the violations may not exceed $500 unless the subject rule, ordinance, or police regulation governs **fire safety, zoning, or public health and sanitation, including dumping of refuse,** which then may result in fines/penalties not to exceed $2,000.

Original Jurisdiction

Municipal courts, including municipal courts of record, have exclusive original jurisdiction in all criminal cases that arise under ordinances of the municipality and are punishable by fine only. *Tex. Gov't Code §29.003.*

Concurrent Jurisdiction

- Municipal Courts have concurrent jurisdiction with justice courts of a precinct in which the municipality is located in all criminal cases arising under state law that are punishable only by a fine. *Tex. Gov't Code §29.003*
- Municipal Courts of record may have concurrent jurisdiction with District or County Courts for the purpose of enforcing municipal ordinances enacted under:
  - Subchapter A, Chapter 214, Local Government Code;
  - Subchapter E, Chapter 683, Transportation Code;
  - Subchapter B, Chapter 54, Local Government Code. *Tex. Gov't Code §30.00005*

Municipal Courts of Record

- The governing body may by ordinance create a municipal court of record if the governing body determines that the creation of the court is necessary to provide a more efficient disposition of the cases arising in the municipality.
- The ordinance may establish as many municipal courts of record as needed as determined by the governing body.
- A municipal court of record may not exist concurrently with a municipal court that is not a municipal court of record in the municipality. *Tex. Govt Code §30.0003*

Texas Local Govt Code §214.001(p)

- Pertains to authority of municipality to regulate substandard buildings
- An administrative hearing under this section may be held by a civil municipal court.

Austin City Code §10-5-21

Duty to maintain property in sanitary condition

- An owner, occupant, or other person in control of real property shall maintain the property in a safe, sanitary condition.
- A person may not allow the following to accumulate on the person's property or in the area from the person's property line to the adjacent curbline:
  - Weeds or grass more than 12 inches tall; Or.
  - Garbage, rubbish, or brush; Or.
  - Filth, carrion, or any other unsightly, objectionable, or unwholesome matter.

San Antonio City Code §14-15

Declaration of public nuisance; Responsibility of property owners.

It shall be unlawful for any person or any tenant or occupant of any lot, building or premises, in person or by his agent or employee to cast, throw, drop, place, sweep or deposit, or allow to accumulate, or to allow waste or liquids from receptacles to leak or spill over, or allow the same to be done in any manner whatsoever, any solid wastes and rubbish, weeds, brush cuttings, offal or other substances or thing whatsoever of an offensive nature or deleterious to health, in or upon any street, sidewalk, park or other public place, or vacant lot or in any yard space of privately owned premises, or in or upon the waters of any canal, stream or other watercourse or public waters, or in any drain, sewer or receiving basin within the city or in, upon or about any building or premises within the city, except as provided in this chapter.

Fort Worth City Code

- Sec. 11A-8. High weeds and grass prohibited.
- (a) Any property upon which weeds or grass exceed an average of twelve (12) inches in height, is hereby declared to be a nuisance.
- (b) A person commits an offense if the person owns, occupies, or controls any real property upon which weeds or grass exceed an average of twelve (12) inches in height.
- (c) A person commits an offense if the person owns, occupies, or controls any real property and fails to maintain the parkway adjacent to the property free of weeds and grass that exceed an average of twelve (12) inches in height. (d) In a prosecution or other enforcement action of subsections (a) or (b) above, it is an exception that the real property was a lot, tract, or parcel of land of two (2) or more acres under common ownership and the high grass or weeds was no closer than one hundred (100) feet to:
  - (1) Any adjacent street; or
  - (2) Any structure or other improvement on any adjacent property owned by another person.
- (e) The provisions of this section apply to real property located within the City of Fort Worth.

What's Missing??

- Mens Rea
  - Must be plainly dispensed with in the definition of the offense to be a strict liability offense
  - If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required, intent, knowledge, or recklessness suffices to establish criminal responsibility. *Tex. Penal Code §6.02(b) & (c)*

Texas Health & Safety Code §342.004

- The governing body of a municipality may **require** the owner of a lot in the municipality to keep the lot free from weeds, rubbish, brush, and other objectionable, unsightly, or unsanitary matter.

Texas Health & Safety Code §342.005

- The governing body of a municipality may **punish** an owner or occupant of property in the municipality who violates an ordinance adopted under this subchapter.

Texas Health & Safety Code §342.006

- If the owner of property in the municipality does not comply with a municipal ordinance or requirement under this chapter within seven days of **notice of a violation**, the municipality may:
  - do the work or make the improvements required; and
  - pay for the work done or improvements made and charge the expenses to the owner of the property.

Notice

Notice must be given:

(1) personally to the owner in writing;

(2) by letter addressed to the owner at the owner's address as recorded in the appraisal district records of the appraisal district in which the property is located; or

(3) if personal service cannot be obtained:

(A) by publication at least once;

(B) by posting the notice on or near the front door of each building on the property to which the violation relates; or

(C) by posting the notice on a placard attached to a stake driven into the ground on the property to which the violation relates.

More on Notice

If a municipality mails a notice to a property owner in accordance with Subsection (b), and the United States Postal Service returns the notice as "refused" or "unclaimed," the validity of the notice is not affected, and the notice is considered as delivered. *Tex. Health & Safety Code 342.006(c)*

In a notice provided under this section, a municipality may inform the owner by regular mail and a posting on the property, or by personally delivering the notice, that if the owner commits another violation of the same kind or nature that poses a danger to the public health and safety on or before the **first anniversary of the date of the notice**, the municipality without further notice may correct the violation at the owner's expense and assess the expense against the property. If a violation covered by a notice under this subsection occurs within the one-year period, and the municipality has not been informed in writing by the owner of an ownership change, then the municipality without notice may take any action permitted by Subsections (a)(1) and (2) and assess its expenses as provided by Section 342.007. *Tex. Health & Safety Code 342.006(d)*

Texas Local Govt Code §54.005

- **If your law requires a notice to the real property owner, this language may come in handy:**
  - "According to the real property records of _____ County, you own the real property described in this notice. If you no longer own the property, you must execute an affidavit stating that you no longer own the property and stating the name and last known address of the person who acquired the property from you. The affidavit must be delivered in person or by certified mail, return receipt requested, to this office not later than the 20th day after the date you receive this notice. If you do not send the affidavit, it will be presumed that you own the property described in this notice, even if you do not."

Texas Local Govt Code §54.005

- **If your law requires a notice to the real property owner, this language may come in handy:**
  - "According to the real property records of _____ County, you own the real property described in this notice. If you no longer own the property, you must execute an affidavit stating that you no longer own the property and stating the name and last known address of the person who acquired the property from you. The affidavit must be delivered in person or by certified mail, return receipt requested, to this office not later than the 20th day after the date you receive this notice. If you do not send the affidavit, it will be presumed that you own the property described in this notice, even if you do not."

Texas Local Govt Code §54.005

- §54.005 language is not mandatory, HOWEVER
  - If used correctly…
    - Sent by certified mail RRR or delivered personally;
    - Ownership verified through property records no sooner than 10 days before notice mailed;
- Ownership will be PRESUMED…
  - Burden on owner to inform sender of change in ownership by affidavit sent by 20th day after notice is received.
  - Failure to respond results in presumption of ownership.

Texas Health & Safety Code §342.008

ADDITIONAL AUTHORITY TO ABATE DANGEROUS WEEDS

(a) A municipality may abate, **without notice**, weeds that:
(1) have grown higher than 48 inches; and
(2) are an immediate danger to the health, life, or safety of any person.

(b) Not later than the 10th day after the date the municipality abates weeds under this section, the municipality shall give notice to the property owner in the manner required by Section 342.006.

(c) The notice shall contain:
(1) an identification, which is not required to be a legal description, of the property;
(2) a description of the violations of the ordinance that occurred on the property;
(3) a statement that the municipality abated the weeds; and
(4) an explanation of the property owner's right to request an administrative hearing about the municipality's abatement of the weeds.

Administrative Hearing

The municipality shall conduct an administrative hearing on the abatement of weeds under this section if, not later than the 30th day after the date of the abatement of the weeds, the property owner files with the municipality a written request for a hearing. *Tex. Health & Safety Code §342.008(d)*

An administrative hearing conducted under this section shall be conducted not later than the 20th day after the date a request for a hearing is filed. The owner may testify or present any witnesses or written information relating to the municipality's abatement of the weeds. *Tex. Health & Safety Code §342.008(e)*

Illegal Dumping

- A person commits an offense if the person disposes or allows or permits the disposal of litter or other solid waste at a place that is not an approved solid waste site, including a place on or within 300 feet of a public highway, on a right-of-way, on other public or private property, or into inland or coastal water of the state. *Tex. Health & Safety Code §365.012*

Illegal Dumping

- A person commits an offense if the person receives litter or other solid waste for disposal at a place that is not an approved solid waste site, regardless of whether the litter or other solid waste or the land on which the litter or other solid waste is disposed is owned or controlled by the person.

Illegal Dumping

- A person commits an offense if the person transports litter or other solid waste to a place that is not an approved solid waste site for disposal at the site.

Penalties – Illegal Dumping

- Class C misdemeanor - five pounds or less or has a volume of five gallons or less.
- Class B misdemeanor - more than five pounds but less than 500 pounds or has a volume of more than five gallons but less than 100 cubic feet.
- Class A misdemeanor - 500 pounds or more but less than 1,000 pounds or has a volume of 100 cubic feet or more but less than 200 cubic feet; or the litter or other solid waste is disposed for a commercial purpose and weighs more than five pounds but less than 200 pounds or has a volume of more than five gallons but less than 200 cubic feet.
- State Jail Felony - 1,000 pounds or more or has a volume of 200 cubic feet or more; is disposed of for a commercial purpose and weighs 200 pounds or more or has a volume of 200 cubic feet or more; or is contained in a closed barrel or drum.

Penalties – Illegal Dumping

- If it is shown on the trial of the defendant for an offense under this section that the defendant has previously been convicted of an offense under this section, the punishment for the offense is increased to the punishment for the next highest category. *Tex. Health & Safety Code §365.012(h)*
- On conviction for an offense under this section, the court shall provide to the defendant written notice that a subsequent conviction for an offense under this section may result in the forfeiture under Chapter 59, Code of Criminal Procedure, of the vehicle used by the defendant in committing the offense. *Tex. Health & Safety Code §365.012(i)*

Penalties – Illegal Dumping

- An offense under this section may be prosecuted without alleging or proving any culpable mental state, unless the offense is a state jail felony. *Tex. Health & Safety Code §365.012(n)*
- For purposes of a prosecution under Subsection (g), a generator creates a rebuttable presumption of lack of culpable mental state if the generator of the solid waste to be disposed of secures, prior to the hauler's receipt of the solid waste, a signed statement from the hauler that the solid waste will be disposed of legally. The statement shall include the hauler's valid Texas driver's license number. *Tex. Health & Safety Code §365.012(o)*

Pros & Cons of Criminal Enforcement

- Pros:
  - More cost effective than civil lawsuit
  - More expeditious than civil lawsuit
  - Imposition of fines as deterrent
- Cons:
  - Court cannot **order** clean-up of the property

Compliance

- In order to achieve compliance at the criminal level, the Court may want to consider:
  - Reduced fines as a means of rewarding property owners who comply
  - Deferred Disposition
    - Conditioned on compliance
    - Terms include requirement to maintain property in compliance with all City Codes

QUIZ

- Q: Do cities have the authority to enact ordinances relating to stagnant water?
- A: YES
- Tex. Health & Safety Code § 342.002

QUIZ

- Q: Do cities have the authority to enact ordinances relating to high grass and weeds?
- A: YES
- Tex. Health & Safety Code §342.004

QUIZ

- Q: Do cities have the authority to punish violators of ordinances enacted to regulate stagnant water, rubbish & high grass?
- A: YES
- Tex. Health & Safety Code §342.005

QUIZ

- Q: What general categories of violations can incur maximum fines up to $2,000?
- A: Tex. Local Govt. Code § 54.001
  - fire safety
  - zoning
  - public health & sanitation
  - dumping

QUIZ

- Q: What is the maximum fine amount for rubbish, refuse, high grass & weeds ordinance violations?
- A: $2,000.00
- Tex. Local Govt. Code § 54.001

QUIZ

- Q: Must a culpable mental state be alleged in complaints?
- A: YES. Unless the definition plainly dispenses with it.
- Tex. Penal Code § 6.02

QUIZ

- Q: Can ordinance violations be consolidated for trial?
- A: YES.
- Texas Local Govt. Code § 54.006

QUIZ

- Section §3.04(a), Penal Code, does not apply to two or more offenses consolidated or joined for trial under Section §3.02, Penal Code, if each of the offenses is:
  - for the violation of an ordinance described by Section §54.012;
  - punishable by fine only; and
  - tried in a municipal court, regardless of whether the court is a municipal court of record. *Tex. Local Gov't Code §54.006*

More to See...

- Texas Local Government Code 54
- Texas Local Government Code 214
- Civil Practice and Remedies Code 125

Texas Health & Safety Code

§ 342.001. Municipal Power Concerning Stagnant Water And Other Unsanitary Conditions.

(a) The governing body of a municipality may require the filling, draining, and regulating of any place in the municipality that is unwholesome, contains stagnant water, or is in any other condition that may produce disease.

(c) The governing body of a municipality may impose fines on the owner of premises on which stagnant water is found.

§ 342.003. Municipal Power Concerning Filth, Carrion, And Other Unwholesome Matter.

The governing body of a municipality may regulate the cleaning of a building, establishment, or ground from filth, carrion, or other impure or unwholesome matter.

§ 342.004. Municipal Power Concerning Weeds Or Other Unsanitary Matter.

The governing body of a municipality may require the owner of a lot in the municipality to keep the lot free from weeds, rubbish, brush, and other objectionable, unsightly, or unsanitary matter.

§ 342.005. Violation Of Ordinance.

The governing body of a municipality may punish an owner or occupant of property in the municipality who violates an ordinance adopted under this subchapter.

§ 365.012. Illegal Dumping; Criminal Penalties.

(a) A person commits an offense if the person disposes or allows or permits the disposal of litter or other solid waste at a place that is not an approved solid waste site, including a place on or within 300 feet of a public highway, on a right-of-way, on other public or private property, or into inland or coastal water of the state.

(b) A person commits an offense if the person receives litter or other solid waste for disposal at a place that is not an approved solid waste site, regardless of whether the litter or other solid waste or the land on which the litter or other solid waste is disposed is owned or controlled by the person.

(c) A person commits an offense if the person transports litter or other solid waste to a place that is not an approved solid waste site for disposal at the site.

(d) An offense under this section is a Class C misdemeanor if the litter or other solid waste to which the offense applies weighs five pounds or less or has a volume of five gallons or less.

Texas Local Government Code

§ 54.006. NONSEVERABILITY OF CERTAIN CONSOLIDATED OFFENSES.

Section 3.04(a), Penal Code, does not apply to two or more offenses consolidated or joined for trial under Section 3.02, Penal Code, if each of the offenses is:

(1) for the violation of an ordinance described by Section 54.012;
(2) punishable by fine only; and
(3) tried in a municipal court, regardless of whether the court is a municipal court of record.

§ 54.012. Civil Action.

A municipality may bring a civil action for the enforcement of an ordinance:

(1) for the preservation of public safety, relating to the materials or methods used to construct a building or other structure or improvement, including the foundation, structural elements, electrical wiring or apparatus, plumbing and fixtures, entrances, or exits;
(2) relating to the preservation of public health or to the fire safety of a building or other structure or improvement, including provisions relating to materials, types of construction or design, interior configuration, illumination, warning devices, sprinklers or other fire suppression devices, availability of water supply for extinguishing fires, or location, design, or width of entrances or exits;
(3) for zoning that provides for the use of land or classifies a parcel of land according to the municipality's district classification scheme;
(4) establishing criteria for land subdivision or construction of buildings, including provisions relating to street width and design, lot size, building width or elevation, setback requirements, or utility service specifications or requirements;
(5) implementing civil penalties under this subchapter for conduct classified by statute as a Class C misdemeanor;
(6) relating to dangerously damaged or deteriorated structures or improvements;
(7) relating to conditions caused by accumulations of refuse, vegetation, or other matter that creates breeding and living places for insects and rodents;
(8) relating to the interior configuration, design, illumination, or visibility of business premises exhibiting for viewing by customers while on the premises live or mechanically or electronically displayed entertainment intended to provide sexual stimulation or sexual gratification; or
(9) relating to point source effluent limitations or the discharge of a pollutant, other than from a non-point source, into a sewer system, including a sanitary or storm water sewer system, owned or controlled by the municipality.

Texas Penal Code

§ 6.02. Requirement of Culpability.

(a) Except as provided in Subsection (b), a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires.

(b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.

(c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.

RUBBISH, HIGH GRASS & WEEDS

ISSUE	ANSWER	WHERE TO FIND IT
Do cities have the authority to enact ordinance relating to stagnant water?		§ 342.002 Texas Health & Safety
Do cities have the authority to enact ordinances relating to rubbish and refuse?		§342.003 % 342.004 Texas Health & Safety
Do cities have the authority to enact ordinances relating to high grass and weeds?		§ 342.004 Texas Health & Safety
Do cities have the authority to punish violators who violate ordinances enacted to regulate stagnant water, rubbish and high grass?		§ 342.005 Texas Health & Safety
What general category of violations can be incur maximum fines up to $2,000?	1. 2. 3. 4.	§ 54.001 Texas Local Govt. Code
What is the maximum fine amount for rubbish, refuse high grass & weeds ordinance violations?		§ 54.001 Texas Local Govt. Code
Must a culpable mental state be alleged in complaints?		§ 6.02 Texas Penal Code
Can ordinance violations be consolidated for trial?		§ 54.006 Texas Local Govt. Code

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Attorney General Opinion Update

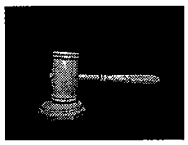
OBJECTIVES

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

1. State the core holdings in the major opinions relating to municipal courts this year.
2. Analyze the underlying legal precedents and the crafting of the conclusions in the opinions.
3. Identify the authorized requestors, and formation process behind Attorney General opinions.

Attorney General Opinions

Opinions of Interest for Municipal Court Judges



Office of the Attorney General
State of Texas
Greg Abbott

Attorney General Opinions

Objectives

1. Explain opinion process--"unwrap the mystery"
2. Present municipal court issues affected by recent AG opinions.
3. Test for knowledge of basic opinion holdings.

AG Opinion Process

How are AG Opinions produced?
Government Code Sections 402.041 - 402.045

- Request for AG opinion must affect public interest or concern official duties of requesting person.
- No private legal disputes! (Whose property fence is on)

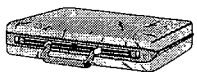
AG Opinion Process (continued)

Authorized requestors: Only certain people can request AG opinions. This includes (but not limited to):

- Committee of a house of Legislature--In practice, chair of committee

Does not have to relate to committee business

- County or District Attorney



Requirement they submit brief (of any quality)

AG Opinion process

Other details

1. Written request sent by certified/registered mail.
2. Opinion must be issued *no later than 180 days* after date request is received.
3. If litigation is pending, AG will close out request.
4. Briefs from requestor and anyone else within 30 days.

AG Opinion process

Opinion about AG Opinions

- Don't believe rumours about how opinions may be coming out
- Opinions help new legislation address gaps in original statutes
- Opinions are not judicial authority, but courts rarely reject analysis in opinions

AG Opinion Initials

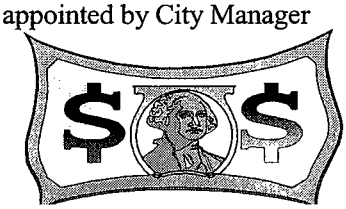
What do Letters and Numbers mean?

- **Example:** GA-0160 **Example:** RQ-0160-GA
- GA=Greg Abbott RQ = Request
- 160s = number that opinion was issued or request was accepted
- However, 160 in RQ does not coincide with 160 in the GA's
- No more LO's since 1999 Ex. LO 98-097 issued in 1998

AG Opinion Scenario # 1

Dual Service (GA-199)
FACTS

1. City Finance Director serves as temporary municipal judge
2. Temporary judges are unpaid
3. Finance Director appointed by City Manager



AG Opinion Scenario # 1

Dual Service (GA-199)
LAW

- City employee can't be record court judge
- Texas Const. Art. XVI Sec. 40
  --cannot hold two paid offices of independent discretion (exception--two municipal judgeships)

AG Opinion Scenario # 1

Dual Service (GA-199)
LAW

- Conflicting Loyalties doctrine (Thomas v. Abernathy, GA-127)
  --cannot hold two conflicting offices of independent discretion
- Code of Judicial Conduct
  --impartiality, integrity

AG Opinion Scenario # 1

Dual Service (GA-199)
Question # 1

Does Constitution prevent dual service?

A) Yes, judge is paid for actual expenses

B) No, judge is unpaid, expenses don't count

C) No, finance director is not independent

D) Both B and C

AG Opinion Scenario # 1

Dual Service **(GA-199)**
Question # 2

Does Conflicting Loyalties Doctrine prevent dual service?

A) Yes, finance director controls judge's salary

B) Yes, judge could increase city treasury with rulings

C) Both A and B

D) No, finance director is not independent

AG Opinion Scenario # 1

Dual Service (GA-199)
Question # 3

Can Judicial Code prevent dual service?

A) No, judges would never steal

B) No, chance of impropriety is too slight

C) It's up to Judicial Conduct Commission

D) Yes, it would cast shadow on judiciary

AG Opinion Scenario # 2

Jury Service Postponement **(GA-161)**
FACTS/LAW

- Municipal court allowed juror postponement requests before service
- Medical and hardship reasons not valid statutory DQ's or exemptions
- County and district courts allowed to postpone by statute
- District judges have inherent power to excuse jurors for hardships
- No municipal statute about postponement

AG Opinion Scenario # 2

Jury Service Postponement (GA-161)
Question

Can municipal judge postpone jury service for medical or hardship reasons?

A) Yes, judge can postpone under inherent powers

B) Yes, judge can use county statutory authority

C) No, judge is limited to statutory DQ's and exemptions

D) No, defendant has not agreed to postponement

AG Opinion Scenario # 3

Bailiff Immunity (GA-146)
FACTS

- Peace officer acting as bailiff
- Bailiff escorted unruly person out of courthouse
- Unruly person then slips and hurts self

AG Opinion Scenario # 3

Bailiff Immunity (GA-146)
LAW

- Judges immune from lawsuit for judicial acts
- Other court officers immune for acts related to judicial decisionmaking
- Court reporter not immune for negligent preparation of record
- Bailiffs generally immune if following judge's orders; sherrifs immune for arrest

AG Opinion Scenario # 3

Bailiff Immunity (GA-146)
Question

Is bailiff immune for escorting unruly person from courthouse?

A) No, he did not exercise reasonable care

B) No, his acts were not connected with judge's order

C) Yes, his acts were closely related to arrest

D) Yes, he acted in good faith

AG Opinion Scenario # 4

Fines Before Costs **(GA-147)**
FACTS/LAW

- JP wants to order defendant to pay fine before court costs
- Code Crim. Proc. Art. 45.041:
  The justice...may direct the defendant to pay (1) the entire fine and costs when sentence is pronounced; (2) the entire fine and costs at some later date; or (3) a specified portion of the fine and costs at designated intervals

AG Opinion Scenario # 4

Fines Before Costs **(GA-147)**
FACTS/LAW

- AG Opinions have developed "allocation rule" where money collected goes to costs before fines
- Article 45.041 was passed to do away with "pay or lay" problem after Tate v. Short

AG Opinion Scenario # 4

Fines Before Costs **(GA-147)**

Question #1: Did Article 45.041 overturn allocation rule?

(A) Yes, you can prorate fines and costs

(B) No, allocation rule remains

(C) You can prorate fines and costs only with installments payments

(D) You can arrest defendant for failure to pay

AG Opinion Scenario # 4

Fines Before Costs **(GA-147)**

Question #2: If defendant pays some installments and defaults...

(A) You need only allocate the final payment

(B) You do not have to follow allocation rule

(C) You must allocate entire amount

(D) If total doesn't cover costs, part can go to fine

AG Opinion Scenario # 4

Fines Before Costs **(GA-147)**

Question #3: What portion does private collector get of partial payment?

(A) 30% of the fine amount, if any

(B) nothing

(C) 30% of the costs collected

(D) 30% of the total payment collected

AG Opinion Scenario # 5

Juvenile Detention for Contempt (GA-131)
LAW

- **Code of Criminal Procedure Art. 45.050:**
- If child acts in a manner that constitutes contempt, municipal court may
  - (1) refer to juvenile court, or
  - (2) make child pay pay fine or face DL sanctions
  - Family Code contains factors for detaining child before hearing

AG Opinion Scenario #5

Juvenile Detention for Contempt (GA-131)

Question #1

May juvenile court detain child for contempt of municipal court order?

(A) Yes, if Family Code factors are met

(B) Never

(C) Not unless municipal judge requests detention

(D) Yes, detention is automatic

AG Opinion Scenario #5

Juvenile Detention for Contempt (GA-131)

Question #2

May juvenile court place child in secure correctional facility for this contempt?

(A) Yes

(B) Only if specific findings of dangerous are made

(C) No

(D) Only if parents request detention

AG Opinion Scenario # 6

Racing on the Highway--What court? (GA-157)
LAW

- Family Code chapter 51--juvenile court has jurisdiction except for traffic offenses
- Traffic offenses found in chapter 729, elsewhere in Transportation Code
- Numerous exceptions that are not traffic offenses in FC and TC
- Racing on Highway--TC Section 545.420

AG Opinion Scenario # 6

Racing on the Highway--What court? (GA-157)
Question

Which court has jurisdiction over child racing on highway?

A) Juvenile court, if death or serious injury occurs

B) Juvenile court, if injury occurs

C) Municipal or justice court

D) Juvenile court for all cases

AG Opinion Of Interest

Texas Attorney General Opinion
GA-166

Issue Presented: Whether city council may prohibit use of municipal jail as temporary holding facility for (1) person arrested by deputy constable for violating state law or (2) person arrested on warrant for penal code offenses waiting to be transported to county facility.

Conclusion: A city council may prohibit the use of the municipal jail as a holding facility for persons arrested by deputy constables for state law violations while such persons wait to appear before a magistrate, to post bond, or to be transported to a county facility.

AG Opinions to Look For

- **RQ-0276-GA**: Whether a commissioners court may compel a justice of the peace to collect delinquent court fines and fees under a contract authorized by section 101.0031 of the Code of Criminal Procedure
- **RQ-0278-GA**: Whether a finding of no probable cause for a nonconsensual tow in a Transportation Code hearing is final and unappealable

For More Information

Municipal Affairs Section: (512) 475-4683

Copies of Attorney General Opinions:
www.oag.state.tx.us/opinopen/opindex.shtml

Thank You for Coming!

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 15, 2003

The Honorable Charles A. Rosenthal, Jr.
Harris County District Attorney
1201 Franklin Street, Suite 600
Houston, Texas 77002

Opinion No. GA-0131

Re: Whether a juvenile court may detain a child under section 53.02 or 54.01, Family Code, before adjudicating and disposing of a charge of delinquent conduct, such as contempt of a justice court order (RQ-0072-GA)

Dear Mr. Rosenthal:

You ask generally whether a juvenile court may detain a child under section 53.02 or 54.01 of the Family Code before adjudicating and disposing of a charge of delinquent conduct, such as contempt of a justice court order.[1] *See* TEX. FAM. CODE ANN. §§ 51.03(a), 53.02, 54.01 (Vernon 2002 & Supp. 2004). You are specifically concerned that Attorney General Opinion JC-0454 erroneously construes sections 53.02(b) and 54.01(e) of the Family Code, concerning juvenile detention, with respect to detaining children charged with violating a justice court order. *See id.* §§ 53.02(b), 54.01(e) (Vernon 2002 & Supp. 2004); Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6; Brief attached to Request Letter, *supra* note 1, at 3; *see also* Probation Commission Letter, *supra* note 1, at 1.

The statutes you cite are spread throughout the Juvenile Justice Code (the "Code"), chapters 51 through 61 of the Family Code. *See* TEX. FAM. CODE ANN. tit. 3, chs. 51-60 (Vernon 2002 & Supp. 2004); *id.* ch. 61 (Vernon Supp. 2004) ("Rights and Responsibilities of Parents and Other Eligible Persons"). Section 51.03(a)(2) defines the term "delinquent conduct" to include "conduct that violates a lawful order of a court under circumstances that would constitute contempt of that court in: . . . (A) a justice . . . court." *Id.* § 51.03(a)(2)(A) (Vernon Supp. 2004).

A law-enforcement officer may take custody of a child who has allegedly violated a penal law or ordinance, engaged in delinquent conduct, or engaged in conduct indicating a need for supervision. *See id.* § 52.01(a). After taking the child to a juvenile processing office, the officer may

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[1]*See* Letter from Honorable Charles A. Rosenthal, Jr., Harris County District Attorney, to Honorable Greg Abbott, Texas Attorney General (June 24, 2003) (on file with the Opinion Committee) [hereinafter Request Letter]; Brief attached to Request Letter, *supra*, at 1-2; *see also* Letter from John Gonzales, Attorney, Texas Juvenile Probation Commission, to Nancy S. Fuller, Chair, Opinion Committee, Office of the Attorney General, at 1-2 (Aug. 20, 2003) (on file with the Opinion Committee) (discussing Opinion JC-0454) [hereinafter Probation Commission Letter].

release the child to a parent or guardian; bring the child to a detention or medical facility; or dispose of the case in accordance with section 52.03, Family Code. *Id.* § 52.02(a); *see also id.* § 52.025 (Vernon 2002) (providing for and restricting the use of a juvenile processing office). If the child's case is referred to a juvenile court, or if the child is brought to a secure detention facility, the child typically is released until later proceedings unless a preliminary investigation indicates that section 53.02(b) authorizes detaining the child. *Id.* § 53.02(a) (Vernon 2002); *see infra* (listing factors warranting detention under sections 53.02 and 54.01). If a child is detained, the court promptly must hold a detention hearing and release the child unless the court finds that continued detention is warranted under section 54.01(e). *See* TEX. FAM. CODE ANN. § 54.01(a) (Vernon Supp. 2004); *see infra* (listing factors warranting detention under sections 53.02 and 54.01). A juvenile court determines the truth or falsity of the allegations against a child at a subsequent, separate adjudication hearing. *See* TEX. FAM. CODE ANN. § 54.03(a) (Vernon Supp. 2004).

Sections 53.02(b) and 54.01(e) both authorize a juvenile court to order a child's detention before adjudication if one of five circumstances is present:

> (1) the child is likely to abscond or be removed from the jurisdiction of the court;
>
> (2) suitable supervision, care, or protection for the child is not being provided by a parent, guardian, custodian, or other person;
>
> (3) the child has no parent, guardian, custodian, or other person able to return the child to the court when required;
>
> (4) the child may be dangerous to himself or herself or the child may threaten the safety of the public if released;
>
> (5) the child has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released;
>
> . . . .

Id. § 53.02(b) (Vernon 2002); *see id.* § 54.01(e) (Vernon Supp. 2004). In addition, section 53.02(b) authorizes a juvenile court, before a detention hearing, to order a child detained if the child is alleged to have engaged in delinquent conduct involving possession of a firearm. *See id.* § 53.02(b), (f) (Vernon 2002).

While a county's juvenile court generally has exclusive original jurisdiction over proceedings involving a child's alleged delinquent conduct or conduct indicating a need for supervision, juvenile and justice courts have concurrent jurisdiction over truancy cases in counties with populations of less than 100,000. *Id.* § 51.04(a), (h); *see also* TEX. EDUC. CODE ANN. § 25.094(a)-(c) (Vernon Supp.

2004) (creating an offense for failure to attend school); TEX. FAM. CODE ANN. § 54.021 (Vernon Supp. 2004) (permitting juvenile court to waive its exclusive jurisdiction in a truancy case). A justice court also may have jurisdiction over certain traffic offense proceedings involving juveniles. *See* TEX. FAM. CODE ANN. § 51.03(a)-(g) (Vernon Supp. 2004) (defining the phrases "delinquent conduct" and "conduct indicating a need for supervision" to exclude traffic offenses); TEX. CODE CRIM. PROC. ANN. art. 4.11(a) (Vernon Supp. 2004) (outlining justice courts' original jurisdiction).

If a child whose case is before a justice court is accused of violating a court order under circumstances that would constitute contempt of court, article 45.050 of the Code of Criminal Procedure forbids a justice court to order the child confined. *See* TEX. CODE CRIM. PROC. ANN. art. 45.050(b)(2) (Vernon Supp. 2004). Instead, the justice court may, "after providing notice and an opportunity to be heard,"

> (1) refer the child to the appropriate juvenile court for delinquent conduct for contempt of the justice . . . court order;[2] or
>
> (2) retain jurisdiction of the case, hold the child in contempt of the justice . . . court, and order either or both of the following:
>
> > (A) that the contemnor pay a fine not to exceed $500; or
> >
> > (B) that the Department of Public Safety suspend the contemnor's driver's license or permit or, if the contemnor does not have a license or permit, to deny the issuance of a license or permit to the contemnor until the contemnor fully complies with the orders of the court.

Id. art. 45.050(c) (footnote added); *see id.* art. 45.058(h) (defining the term "child" for purposes of article 45.050); *id.* art. 45.050(a).

In Attorney General Opinion JC-0454 this office concluded, among other things, that article 45.050 expressly prohibits a justice court from ordering a child confined "for contempt of a justice

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[2]Under article 45.058 of the Code of Criminal Procedure, a child whom the justice court has referred to a juvenile court for contempt of a justice court order may be detained if the justice court has jurisdiction of the case under article 4.11 of the Code of Criminal Procedure unless the child is charged with public intoxication. *See* TEX. CODE CRIM. PROC. ANN. art. 45.058(f)(2) (Vernon Supp. 2004) (providing that "[a] child taken into custody for an offense that a justice . . . court has jurisdiction of . . . , other than public intoxication, may be presented or detained in a detention facility designated by the juvenile court under [s]ection 52.02(a)(3), Family Code, only if: . . . the child is referred to the juvenile court by a justice . . . court for contempt of court"); *see also id.* art. 4.11(a) (providing justices of the peace with jurisdiction in criminal cases punishable in fine-only cases and in other cases that are not punishable by imprisonment).

court order."[3] Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6; *see* TEX. CODE CRIM. PROC. ANN. art. 45.050 (Vernon Supp. 2004). Rather, article 45.050 limits a justice court "to referring the case to a juvenile court, holding the child in contempt and imposing a fine not to exceed $500, or ordering the Department of Public Safety to suspend the child's driver's license." Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6.

Although the language of article 45.050 was sufficient to reach the conclusion that a justice court is forbidden to order detention for a child who allegedly has violated a justice court order, the opinion also suggested that sections 53.02 and 54.01 of the Family Code are probative:

> Moreover, section 53.02 of the Family Code specifies the reasons for which a child may be detained prior to a detention hearing and contempt is not one of them. TEX. FAM. CODE ANN. § 53.02 (Vernon Supp. 2002). Section 54.01 of the Family Code sets forth the reasons that a child may be detained at a detention hearing, and, again, contempt is not one of them. *Id.* § 54.01. In fact, only after a child has been adjudicated by a juvenile court as engaging in delinquent conduct for violating a court order and is held to be in contempt[] may the child be confined if the court so orders at the later disposition hearing. *Id.* §§ 51.03(a)(2) (defining delinquent conduct to include "conduct that violates a lawful order of a municipal court or justice court under circumstances that would constitute contempt of that court"); 54.03 (adjudication hearing); 54.04 (disposition hearing).

Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6.

You agree with the opinion's conclusion, but you believe that these three sentences discussing sections 53.02 and 54.01 inaccurately suggest that unless "a particular type of delinquent conduct [is] expressly listed in section 53.02 or 54.01, . . . pre-disposition detention for that conduct is not authorized." Brief attached to Request Letter, *supra* note 1, at 2; *see* Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6. You are similarly concerned about the broader implication that, regardless of the conduct charged, a juvenile court may not order the detention of a child prior to an adjudication hearing unless the conduct is expressly listed in section 53.02 or 54.01. *See* Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6; Brief attached to Request Letter, *supra* note 1, at 3. Accordingly, while you believe that "the opinion [is] largely correct," these "inaccuracies . . . unnecessarily limit" a juvenile court's "authority . . . to use all . . . resources" available under Texas law, and you ask us to clarify a juvenile court's authority in this regard. Brief attached to Request Letter, *supra* note 1, at 1.

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[3]Opinion JC-0454 considered article 45.050 of the Code of Criminal Procedure in conjunction with section 54.023 of the Family Code, which was repealed in the most recent regular session of the legislature. *See* Tex. Att'y Gen. Op. No. JC-0454 (2002) at 3-6; Act of May 24, 2001, 77th Leg., R.S., ch. 1297, § 21, 2001 Tex. Gen. Laws 3142, 3149-50, *repealed by* Act of May 30, 2003, 78th Leg., R.S., ch. 283, § 61(1), 2003 Tex. Gen. Laws 1221, 1245 (repealing section 54.023, Family Code). Section 54.023 largely duplicated article 45.050, and its repeal does not affect Attorney General Opinion JC-0454's conclusions.

To the extent Opinion JC-0454 suggests that a juvenile court may not, prior to an adjudication hearing in accordance with section 53.02 or 54.01 of the Family Code, order the detention of a child who is charged with violating a justice court order, it requires clarification. The opinion relies upon the fact that contempt is not among the factors listed in section 53.02 or 54.01, the presence of any one of which warrants detaining a child. *See* Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6; *see also* TEX. FAM. CODE ANN. §§ 53.02(b), 54.01(e) (Vernon 2002 & Supp. 2004). But neither section 53.02 nor 54.01 list the types of conduct defined as "delinquent conduct" or "conduct in need of supervision" as factors warranting detention. *Compare* TEX. FAM. CODE ANN. § 51.03(a)-(b) (Vernon Supp. 2004), *with id.* §§ 53.02(b), 54.01(e) (Vernon 2002 & Supp. 2004). Rather, as you correctly indicate, a juvenile court may order the detention of any child who is taken into custody "if the additional requirements of section 53.02 or 54.01 are met," regardless of the type of delinquent conduct with which the child is charged. Brief attached to Request Letter, *supra* note 1, at 2. Thus, any type of delinquent conduct might form a basis for detention if a circumstance listed in section 53.02 or 54.01 is present.

To directly answer the first issue you raise, we conclude that a juvenile court may order the detention of a child who has been taken into custody for any type of delinquent conduct if a factor listed in section 53.02 or 54.01 is present. *See* TEX. FAM. CODE ANN. §§ 51.03(a), 53.02, 54.01 (Vernon 2002 & Supp. 2004). Accordingly, a child who is charged with contempt of a justice court order may be detained prior to adjudication by the juvenile court if detention is warranted under section 53.02 or 54.01.

You are also concerned that Opinion JC-0454 incorrectly suggests that a juvenile court may order that a child adjudged in contempt of court be detained in a secure post-adjudicative facility. *See id.* § 54.04(o)(3) (Vernon Supp. 2004); Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6; Brief attached to Request Letter, *supra* note 1, at 2-3; *see also* Probation Commission Letter, *supra* note 1, at 3. Section 54.04(o)(3) of the Family Code expressly prohibits a juvenile court from placing a child adjudicated for contempt of a justice court order "in a post-adjudication secure correctional facility or committed to the Texas Youth Commission for that conduct." TEX. FAM. CODE ANN. § 54.04(o)(3) (Vernon Supp. 2004). Consequently, a juvenile court may not order a child adjudicated for contempt of a justice court order to be placed in a secure correctional facility. To the extent Opinion JC-0454 suggests to the contrary, it is clarified.

As clarified here, we affirm Attorney General Opinion JC-0454 (2002).

SUMMARY

Regardless of the type of delinquent conduct with which a child is charged, the child may be detained by a juvenile court before an adjudication hearing if a factor listed in section 53.02 or 54.01 of the Family Code is present. Accordingly, a child who is charged with contempt of a justice court order may be detained by a juvenile court if detention is warranted under section 53.02 or 54.01. A juvenile court may not order a child adjudicated for contempt of a justice court order to be placed in a secure correctional facility.

To the extent Attorney General Opinion JC-0454 (2002) suggests otherwise, it is clarified. Otherwise, it is affirmed.

Very truly yours,

GREG ABBOTT
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Assistant Attorney General, Opinion Committee

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 9, 2004

The Honorable Greg Lowery
Wise County Attorney
Wise County Courthouse, Room 300
Decatur, Texas 76234

Opinion No. GA-0146

Re: Whether an officer, as bailiff and head of courthouse security, is entitled to judicial immunity from a suit for injuries occurring while removing an individual from the courthouse (RQ-0094-GA)

Dear Mr. Lowery:

You ask whether an officer acting as bailiff and chief of courthouse security is entitled to judicial immunity from a suit for an assault allegedly occurring when the officer removed an individual from the courthouse.[1]

You state that Officer Dick Wood is the bailiff for the 271st District Court and chief of courthouse security with the responsibility "to protect the operations of the courthouse and the people inside of it." Request Letter, *supra* note 1, at 3-4. In May 2002, Officer Wood, a certified peace officer, escorted Mr. Kelton from the Wise County Courthouse. *See id.* at 2. Previously, Mr. Kelton had been asked not to return to the district attorney's office, "due to his harassing nature." *Id.*

Mr. Kelton went to the courthouse to complain to the grand jury about the assistant district attorney and other courthouse employees. When Officer Wood asked Mr. Kelton to leave, Mr. Kelton explained that he wished to present his complaints. Officer Wood took Mr. Kelton's arm and escorted him out the courthouse door. Outside, Mr. Kelton slipped on a doormat and fell. It is disputed whether Mr. Kelton fell from his own exertions or because of Officer Wood's actions. *See id.*

You ask: "If an assault has occurred, is Officer Wood covered by judicial immunity, as he was acting in his capacity of bailiff and chief of courthouse security?" *Id.* at 3. You assert that a baliff or a chief of courthouse security would be entitled to derived judicial immunity under these circumstances because the "normal function of these positions is to escort or remove people from the courthouse when they have become disruptive to everyday courthouse proceedings or functions." *Id.*

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[1]*See* Letter from Honorable Greg Lowery, Wise County Attorney, to Honorable Greg Abbott, Texas Attorney General (Aug. 11, 2003) (on file with Opinion Committee) [hereinafter Request Letter].

Derived judicial immunity, like judicial immunity, is immunity from suit for monetary damages, not just from the ultimate award of damages. *Mireles v. Waco*, 502 U.S. 9, 11 (1991). Judicial immunity is imperative to foster judicial independence and to discourage collateral attack of rulings that may be challenged by appeal. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (recognizing judicial immunity from actions for damages under 42 U.S.C. § 1983). Federal courts utilize a functional approach to judicial immunity, focusing on the nature of the challenged action or function and not the identity of the actor. *Forrester v. White*, 484 U.S. 219 (1988).

Judicial immunity has also been extended to others exercising discretion and judgment comparable to judicial decisionmaking, such as grand juries, petit jurors, prosecutors, and administrative judges. *Butz v. Economou*, 438 U.S. 478, 509-13 (1978). However, the United States Supreme Court has cautioned that absolute immunity must not be extended any further than the policy reasons for the doctrine warrant, because it is presumed that in most cases qualified immunity is sufficient to protect government officials exercising their official duties. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433 (1993). When determining whether an official is entitled to absolute immunity, federal courts consider the historic immunity under the common law for the relevant official's functions and practical considerations of the official's functions as currently practiced. *See id.* at 432; *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982). Central to the analysis in such cases is whether the official's challenged conduct was an exercise of discretion functionally comparable to judicial decisionmaking. *Antoine*, 508 U.S. at 436. "Accordingly, the 'touchstone' for the doctrine's applicability has been 'performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.'" *Id.* at 435-36 (quoting *Burns v. Reed*, 500 U.S. 478, 499-500 (1991) (Scalia, J., concurring in part and dissenting in part)); *see also Forrester*, 484 U.S. at 227-28 (judicial immunity does not apply to judges' executive, legislative or administrative functions).

The Supreme Court of Texas determined that the functional approach discussed in *Antoine* comports with derived judicial immunity that Texas courts apply to state-law claims. *Dallas County v. Halsey*, 87 S.W.3d 552, 556-57 (Tex. 2002). In *Halsey*, the question was whether an official district court reporter was entitled to absolute immunity from Dallas County's suit for inaccurately preparing a court reporter's record. *Id.* at 553. The court first noted that when a judge delegates or appoints another as an officer of the court or to perform services for the court, the court's immunity may follow the delegation or appointment. *Id.* at 554. However, because a court reporter preparing a trial record does not engage in judicial decisionmaking, the court concluded that the reporter was not entitled to derived judicial immunity. *Id.* at 556-57. The court stated that, "as applied in Texas, the functional approach in applying derived judicial immunity focuses on the nature of the function performed, not the identity of the actor, and considers whether the court officer's conduct is like that of the delegating or appointing judge." *Id.* at 555.

The United States Supreme Court in *Antoine* and the Supreme Court of Texas in *Halsey* focused on whether the pertinent official exercised the functional equivalent of judicial decisionmaking. *See also Clements v. Barnes*, 834 S.W.2d 45, 46 (Tex. 1992) (bankruptcy trustee); *Delcourt v. Silverman*, 919 S.W.2d 777, 781 (Tex. App.–Houston [14th Dist.] 1996, writ denied), *cert. denied*, 520 U.S. 1213 (1997) (psychiatrist and a guardian ad litem appointed to advise the court). However, other courts have also applied derived judicial immunity to officials whose functions may be more administrative or executive than judicial, but who act pursuant to the explicit

directions of a judicial officer. *See Clay v. Allen*, 242 F.3d 679, 682 (5th Cir. 2001) (holding that a court clerk enjoys absolute immunity for complying with the court's express order or directive, but only qualified immunity for routine duties that are not explicitly commanded); *Mays v. Sudderth*, 97 F.3d 107, 113 (5th Cir. 1996) (holding that a sheriff acting within the scope of a facially valid arrest warrant is absolutely immune from a suit for damages); *Robinson v. Freeze*, 15 F.3d 107 (8th Cir. 1994) (holding that a bailiff is immune for actions requested by the judge during trial). These courts have reasoned that derived judicial immunity should protect court personnel and others acting pursuant to a court's order or at the court's direction because enforcement of court orders is closely intertwined with the judicial function, court personnel should not be subjected to harassing litigation aimed at a judge's ruling, and an official charged with enforcing a facially valid court order has no choice but to comply. *See In re Foust*, 310 F.3d 849, 855 (5th Cir. 2002).

For example, federal courts generally hold that law enforcement officers have absolute immunity for enforcing the terms of a court order but only qualified immunity for the manner in which they choose to enforce it. *See, e.g., In re Foust*, 310 F.3d at 855 (officers not entitled to absolute immunity for manner of executing turnover order); *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002) (deputies who restrained an individual in the courtroom were not judicially immune from wrongful death suit); *Mays*, 97 F.3d at 113 (holding that a sheriff acting within the scope of a facially valid arrest warrant is absolutely immune from a suit for damages); *Martin v. Bd. of County Comm'rs*, 909 F.2d 402, 405 (10th Cir. 1990) (holding that officers were not entitled to absolute immunity against charge that they used excessive force in executing a bench warrant); *Haldane v. Chagnon*, 345 F.2d 601, 604 (9th Cir. 1965) (holding that bailiff signing petition at express direction of judge is entitled to judicial immunity). However, at least one federal court has held that an officer acting at the direction of a court will be immune even for the manner of executing the court's order. *See Martin v. Hendren*, 127 F.3d 720, 721-22 (8th Cir. 1997) (holding that bailiff was judicially immune from action for restraining an individual in the courtroom at the judge's specific order, including the charge of use of excessive force).

In *Robinson v. Freeze*, 15 F.3d 107 (8th Cir. 1994), the court considered whether a bailiff was judicially immune for conduct occurring during trial. The court noted that under the common law bailiffs enjoyed immunity for attending the court during trial, but not other functions. *Id.* at 109. Based on this analysis of a bailiff's historic common-law immunity and a functional analysis of the bailiff's duties, the court concluded that the question of absolute immunity for bailiffs depends "on whether the specific conduct of the bailiff at issue was quasi-judicial in nature." *Id.* The court determined that the bailiff would not be entitled to absolute immunity against claims that he mishandled evidence while monitoring the jury unless the actions were specifically ordered by the trial judge and related to a judicial function. *Id.*

Texas courts have also often stated that court officials such as bailiffs may be entitled to derived judicial immunity. In *Byrd v. Woodruff*, 891 S.W.2d 689, 707 (Tex. App.–Dallas 1994, writ dism'd by agr.), the court stated: "In Texas, judicial immunity applies to officers of the court who are integral parts of the judicial process, such as a prosecutor performing typical prosecutorial functions, court clerks, law clerks, bailiffs, constables issuing writs, and court-appointed receivers and trustees." *Accord Hawkins v. Walvoord*, 25 S.W.3d 882, 890 (Tex. App.–El Paso 2000, pet. denied) (holding that the court administrator selecting an attorney for indigent representation and the sheriff taking the attorney into custody pursuant to court directive were entitled to judicial

immunity); *City of Houston v. W. Capital Fin. Servs. Corp.*, 961 S.W.2d 687, 690 (Tex. App.–Houston [1st Dist.] 1998, pet. dism'd w.o.j.) (but holding that a court clerk's oversight of a collections contract of traffic fees and fines was not a judicial function and clerk was not protected by judicial immunity); *Delcourt*, 919 S.W.2d at 782 (holding that psychiatrist and guardian ad litem appointed to advise court on child custody matters were entitled to immunity).

In *Hawkins v. Walvoord*, an attorney sued a number of individuals, including a county court at law judge, the court administrator, and the sheriff, concerning a county bar plan to appoint attorneys to represent indigent criminals. *Hawkins*, 25 S.W.3d at 886. With respect to the administrator and the sheriff, the court of appeals held that "[t]he key consideration in determining whether an officer is entitled to judicial immunity is whether the officer's conduct is a normal function of the delegating or appointing judge." *Id.* at 890. Pursuant to delegated authority, the court administrator selected the attorney's name from the appointment list and rubber-stamped the judge's name on an order appointing the attorney. *Id.* The court of appeals concluded that the administrator's actions were entitled to derived judicial immunity because the delegated duty of appointing attorneys is a judicial function. *Id.* For similar reasons, the court also extended derived judicial immunity to the sheriff, "as an officer of the court who played an integral part of the judicial process, . . . and who arrested and placed Hawkins in the county jail on two separate occasions, pursuant to facially valid judicial orders." *Id.* at 891.

We first review Officer Wood's duties as a bailiff and chief of courthouse security.[2] Officer Wood is a deputy sheriff assigned to the 271st Judicial District Court. *See* Wise County Sheriff's Department – Court Security, *available at* http://www.sheriff.co.wise.tx.us/court.htm.[3] As court bailiff, his principal responsibility is to act at the direction of the court. TEX. CODE CRIM. PROC. ANN. art. 36.24 (Vernon 1981). Also, Officer Wood served as the grand jury bailiff.[4] *See id.* art. 19.36 (Vernon 1977) (the court and the district attorney may appoint a grand jury bailiff). A grand jury bailiff performs duties as required by the grand jury foreman. *See id.* art. 19.37.

Officer Wood is also chief of courthouse security. Request Letter, *supra* note 1, at 3. By statute, the county sheriff has "charge and control of the county courthouse, subject to the regulations of the commissioners court." TEX. LOC. GOV'T CODE ANN. § 291.003 (Vernon 1999). It appears that courthouse security is overseen by a committee including judges and other elected officers.[5]

While security personnel controlling access to a county courthouse may exercise discretion when they engage members of the public, a court would likely characterize that discretion as

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[2]Chapter 53 of the Government Code provides for the appointment of bailiffs by certain courts, but not the 271st Judicial District Court. *See* TEX. GOV'T CODE ANN. §§ 53.001-.092 (Vernon 1998 & Supp. 2004); *see generally* 36 DAVID B. BROOKS, TEXAS PRACTICE: COUNTY AND SPECIAL DISTRICT LAW § 22.24 (2002) ("There is no general statute governing the designation of a bailiff for the various courts.").

[3]*See also* TEX. CODE CRIM. PROC. ANN. art. 36.24 (Vernon 1981) ("The sheriff of the county shall furnish the court with a bailiff during the trial of any case to attend the wants of the jury and to act under the direction of the court.").

[4]Telephone Conversation with Margaret Shelton, Assistant District Attorney, Wise County (Dec. 22, 2003).

[5]*Id.*

executive or administrative rather than the functional equivalent of judicial decisionmaking described in *Antoine* and *Halsey*. *See Antoine*, 508 U.S. at 436 (holding that judicial immunity does not hinge on the importance of a court officer's duties to the judicial process, but on the kind of discretionary judgment the officer exercises); *Halsey*, 87 S.W.3d at 555 (holding that "derived judicial immunity focuses on the nature of the function performed, not the identity of the actor, and considers whether the court officer's conduct is like that of the delegating or appointing judge."). Consequently, when a bailiff or other courthouse security officer asserts derived judicial immunity a key question would be whether the complained-of action was taken pursuant to a specific judicial order. The principal policy reasons for derived judicial immunity do not apply when an officer was not acting pursuant to a facially valid order. An action against a baliff or other security officer for the exercise of the officer's own discretion would not be, in practical effect, a collateral attack on a court order. *See In re Foust*, 310 F.3d at 855.

Finally, even when an officer acts pursuant to a judicial order, a court might not provide immunity from allegations that the officer's actions exceeded that order. *See id.*; *Richman*, 270 F.3d at 437-38; *Martin v. Bd. of County Comm'rs*, 909 F.2d at 405. *But see Martin v. Hendren*, 127 F.3d at 721-22. Of course, an officer not entitled to judicial immunity may assert other immunity defenses such as official immunity, *see Telthorster v. Tennell*, 92 S.W.3d 457, 460 (Tex. 2002), or qualified immunity, *see McPherson v. Kelsey*, 125 F.3d 989, 993 (6th Cir. 1997).

SUMMARY

Derived judicial immunity applies to officials exercising the functional equivalent of judicial discretion. Generally, a bailiff and chief of courthouse security screening individuals from the courthouse would not be exercising the functional equivalent of judicial discretion. Derived judicial immunity may also apply to an official acting pursuant to facially valid judicial orders or instructions.

Very truly yours,

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ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 11, 2004

The Honorable Jeri Yenne
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Angleton, Texas 77515

Opinion No. GA-0147

Re: Whether, under Code of Criminal Procedure article 45.041(b)(1)(C), a justice of the peace may order a convicted defendant to pay a fine before court costs (RQ-0093-GA)

Dear Ms. Yenne:

You ask whether, under article 42.15(b)(3) of the Code of Criminal Procedure, a justice of the peace may order a convicted defendant to pay a fine or fines before court costs.[1] TEX. CODE CRIM. PROC. ANN. art. 42.15(b)(3) (Vernon 1979). If the defendant pays only part of the total due, you ask whether, in accordance with the long-established costs-first allocation rule, the payments must be allocated to costs and fees before satisfying the fine. *See* Request Letter, *supra* note 1, at 1.

Although you frame the issue in terms of the requirements of article 42.15, it is article 45.041 that applies to justice courts. *See* TEX. CODE CRIM. PROC. ANN. art. 45.041 (Vernon Supp. 2004); Request Letter, *supra* note 1, at 1. Article 42.15, which applies to courts in general, requires a court to order a defendant who is fined to "pay the amount of the fine and all costs to the state." TEX. CODE CRIM. PROC. ANN. art. 42.15(a) (Vernon 1979). The article further authorizes a court to direct the defendant to pay the fine and costs either in a lump sum or in installments. *See id.* art. 42.15(b). Using substantially similar language, article 45.041(a) requires a justice of the peace to order a convicted defendant to "pay the amount of the fine and costs to the state." *Id.* art. 45.041(a) (Vernon Supp. 2004); *cf. id.* art. 42.15(a) (Vernon 1979). With respect to the costs and fine, the justice may require the convicted defendant to pay either a lump sum or in installments:

> The justice . . . may direct the defendant:
>
> (1) to pay:
>
> (A) the entire fine and costs when sentence is pronounced;

[1] *See* Letter from Honorable Jeri Yenne, Brazoria County Criminal District Attorney, to Honorable Greg Abbott, Texas Attorney General, at 1 (Aug. 12, 2003) (on file with Opinion Committee) [hereinafter Request Letter].

> (B) the entire fine and costs at some later date;
>
> or
>
> (C) a specified portion of the fine and costs at designated intervals[.]

Id. art. 45.041(b)(1) (Vernon Supp. 2004). Because article 45.041(b)(1)(C) applies specifically to justice courts, we refer to it rather than to article 42.15.

You ask first whether, under article 45.041(b)(1)(C), a justice of the peace may bifurcate the total amount of money due so that a defendant pays the fines by a specified date and the costs by a later date. Request Letter, *supra* note 1, at 2.

In this regard, you suggest that the allocation rule developed by this office is inconsistent with article 45.041. You describe the rule as a "pro-rata rule for fine and court costs," *id.* at 2, but we believe the rule may be more accurately denominated a costs-first allocation rule. For over sixty years, this office has stated that, where a defendant pays only part of the required fines and costs, "the money collected should go first to the payment of the costs and the balance, if any, to the amount of the fine." Tex. Att'y Gen. Op. Nos. O-755 (1939) at 2, O-469 (1939) at 2; *accord* Tex. Att'y Gen. Op. Nos. M-1076 (1972) at 3-4; O-4924 (1942) at 10; O-1792 (1940) at 6-7; *see also* Tex. Att'y Gen. Op. No. DM-407 (1996) at 6 ("We have no reason to believe that Attorney General Opinion M-1076 incorrectly states the law."). If the defendant does not pay even enough to cover all of the costs, "the money collected should be pro-rated" among the various costs due, with none going toward fines. Tex. Att'y Gen. Op. Nos. O-755 (1939) at 2, O-469 (1939) at 2; *accord* Tex. Att'y Gen. Op. Nos. M-1076 (1972) at 3-4; O-4924 (1942) at 10; O-1792 (1940) at 6-7.

No judicial opinions have discussed the allocation rule. The legislature has not enacted any statute that preempts the allocation rule. *See Cities of Austin, Dallas, Fort Worth, & Hereford v. S.W. Bell Tel. Co.*, 92 S.W.3d 434, 445 (Tex. 2002) (stating that a court will construe a statute that is subject to a "long-standing administrative construction" that the legislature has not amended since the administrative construction was articulated "as the agency did"); *Guar. Mut. Life Ins. Co. v. Harrison*, 358 S.W.2d 404, 408 (Tex. Civ. App.–Austin 1962, writ ref'd n.r.e.) (stating that a court is to give weight to "long standing departmental construction of a statute by the officials charged with its enforcement and the opinions of the Attorney General" in construing an ambiguous statute unless no such long standing construction exists or the Attorney General's construction is in error).

You suggest that article 45.041(b) may affect the allocation rule's application. The legislature adopted the substance of article 45.041(b)(1)(C) (and of article 42.15(b)(3)), permitting the use of installment payments, in 1971. *See* Act of May 26, 1971, 62d Leg., R.S., ch. 987, §§ 1, 5, 1971 Tex. Gen. Laws 2990, 2990-91. Prior to the 1971 amendments, the law ordered a defendant convicted of a fine-only offense who failed to pay costs and fines to be imprisoned, even if the defendant's failure to pay was due to indigency. *See* Act of May 27, 1965, 59th Leg., R.S., ch. 722, § 1, arts. 42.15, 45.50, 1965 Tex. Gen. Laws 317, 502, 528; *Tate v. Short*, 401 U.S. 395, 399 (1971). In 1971 the United States Supreme Court held this practice unconstitutional. *See Tate*, 401 U.S. at 400. The Supreme Court indicated that a state may provide "alternatives" to imprisonment "to serve

its concededly valid interest in enforcing payment of fines," such as a procedure "for paying fines in installments." *Id.* at 399, 400 n.5. On remand to the Texas Court of Criminal Appeals, the court suggested that the legislature amend article 42.15 and the substance of article 45.041 to provide the requisite alternative means for collecting fines and costs from defendants. *Ex parte Tate*, 471 S.W.2d 404, 406 (Tex. Crim. App. 1971). The bill analysis of the 1971 bill amending these articles suggests that the amendments were intended to comply with the Supreme Court's ruling: "It has been declared unconstitutional for the courts to confine a man to jail because of his inability to pay a fine. This has made it necessary for the state to revise the punishment provisions under the Code of Criminal Procedure." HOUSE COMM. ON CRIM. JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 887, 62d Leg., R.S. (1971). Thus, the 1971 amendments were not related to a legislative intent to overrule the costs-first allocation rule.

In accordance with its plain language, article 45.041 authorizes a justice of the peace to determine only the form in which a convicted defendant must render monies due: a lump sum or in installments. Article 45.041 is not relevant to any authority a court may have to specify how the county must allocate the monies, when they have been received (either a lump sum or in installments), and the legislature has not adopted any other statute that preempts the long-standing costs-first allocation rule. Accordingly, whether a defendant pays a lump sum or in installments under article 45.041, the monies must be used to satisfy court costs first and fines second.

You ask second about a situation in which a defendant is ordered to pay in several installments: "[I]n the event a defendant is able to pay one or more installments but fails to pay the entire amount . . . , is the last partial payment prorated or must the court incorporate the prior installments that were successfully paid into an amount that should be prorated?" Request Letter, *supra* note 1, at 3.

The entire sum received must be allocated in accordance with the costs-first allocation rule. Under article 45.041, a lump sum payment and payment in installments are interchangeable, and the allocation of monies received in either form should be treated the same way. Thus, costs must be satisfied first, and any remaining money may be used towards the fine. If the sum total is insufficient to satisfy even the costs due, then the money must be divided, pro rata, among the costs.

Given this answer, you ask whether the county treasurer must "retain all monies received through the payment of installments until the total aggregate amount is collected or it is determined that such amount cannot and will not be fully paid." Request Letter, *supra* note 1, at 3.

In accordance with chapter 133 of the Local Government Code, which became effective on January 1, 2004, all criminal fees due to the state must be remitted to the comptroller quarterly. *See* TEX. LOC. GOV'T CODE ANN. §§ 133.055(a)(1), .012(a) (Vernon Supp. 2004); *see also* Act of June 1, 2003, 78th Leg., R.S., ch. 209, § 62(b), 2003 Tex. Gen. Laws 979, 998 (stating effective date). Thus, with respect to costs due to the state, the portion of payments received that is due to the state must be timely paid.

To the extent chapter 133 does not apply, regulations adopted by the county auditor and the comptroller may prescribe how a county treasurer should handle installment payments. In a county

the size of Brazoria County, the county auditor prescribes a system of accounting for the county and may adopt accounting regulations. *See* TEX. LOC. GOV'T CODE ANN. § 112.002 (Vernon Supp. 2004) (applying to counties with populations greater than 190,000); *see also* UNITED STATES CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2000 CENSUS OF POPULATION: State and County Quick Facts (population of Brazoria County is 241,767), *available at* http://quickfacts.census.gov/qfd/states/48/48039/ (last visited Jan. 12, 2004). The auditor's rules must comport with the comptroller's rules regarding the manner of keeping and stating a county official's accounts. *See* TEX. LOC. GOV'T CODE ANN. § 112.003(a) (Vernon Supp. 2004).

To the extent that the county auditor's and comptroller's rules do not resolve your question, we believe a commissioners court should instruct the treasurer how to proceed in this situation. A county treasurer must "pay and apply" county funds "as required by law and as the commissioners court may require or direct, not inconsistent with law." *Id.* § 113.041(a).

You also ask how the allocation rule should be applied if a court order provides for a different allocation of the collected monies. As we have already determined, article 45.041 is not relevant to the allocation of costs and fines, and no other statute has been enacted that preempts the application of the costs-first allocation rule. Thus, the money received must be allocated to cover costs first, and then to the fine.

You finally ask us to "comment as to what bearing, if any, the terms of a third party collections contract," entered under article 103.0031 of the Code of Criminal Procedure, has on the costs-first allocation rule or a court order issued under article 45.041(b). Request Letter, *supra* note 1, at 3. As amended by the legislature in 2003, article 103.0031 permits a county commissioners court or a municipal governing body to contract with a private attorney or private vendor to collect, among other things, unpaid fines and court costs ordered paid by a court serving the county. *See* TEX. CODE CRIM. PROC. ANN. art. 103.0031(a)(1)(A) (Vernon Supp. 2004). The contract may authorize the private attorney or vendor to collect from a defendant a fee equal to thirty percent of each fine or court cost that is more than sixty days past due and that has been referred to the attorney or vendor for collection. *Id.* art. 103.0031(b); *see also id.* art. 103.0031(f) (providing for calculation of sixty days past due). *But see id.* art. 103.0031(d) (providing that an indigent defendant is not liable for collection fees). Subsection (e), as renumbered and amended in 2003, provides for a situation in which the collector does not recover the total amount due:

> If a county or municipality has entered into a contract . . . and a person pays an amount that is less than the aggregate total to be collected . . . , the allocation to the comptroller, the county or municipality, and the private attorney or vendor shall be reduced proportionally.

Id. art. 103.0031(e).

In our opinion, under article 103.0031(e), the private collector would receive thirty percent of the aggregate amount collected. The amount of collected monies remaining after the private collector has received his or her share must be allocated in accordance with the costs-first allocation rule.

SUMMARY

Article 45.041(b)(1) of the Code of Criminal Procedure authorizes a justice of the peace to order a convicted defendant to pay costs and fines due either as a lump sum or in installments, but it does not preempt the application of the long-standing costs-first allocation rule. Under the allocation rule, a county must allocate monies received from a defendant first to pay costs and then to pay a fine. If the monies received do not cover all of the costs, then the monies must be allocated to costs on a pro rata basis. If a justice of the peace has ordered installment payments, the total sum received must be allocated in accordance with the allocation rule.

If a private collector collects the costs and fines under article 103.0031 of the Code of Criminal Procedure, the private collector will receive thirty percent of the aggregate amount collected. Remaining monies must be allocated to costs first, on a pro rata basis, and then to the fine.

Very truly yours,

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February 24, 2004

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Opinion No. GA-0157

Re: Whether the offense of "racing on the highway" under section 545.420 of the Transportation Code, when committed by a juvenile, is "delinquent conduct," "conduct indicating a need for supervision," or a "traffic offense," as those terms are defined by the Family Code (RQ-0105-GA)

Dear Ms. Yenne:

You ask how the offense of "racing on the highway," section 545.420 of the Transportation Code, should be classified under the Family Code, and whether juvenile courts or the justice and municipal courts have jurisdiction when a juvenile is charged with such an offense.[1]

I. Relevant Law

The Juvenile Justice Code (the "JJC"), title 3 of the Family Code, provides for one or more juvenile courts for each county to be "presided over by a judge who has a sympathetic understanding of the problems of child welfare." TEX. FAM. CODE ANN. § 51.04(a)-(h) (Vernon 2002); *see generally id.* §§ 51.01-61.107 (Vernon 2002 & Supp. 2004) (the JJC). Generally, the juvenile court has exclusive jurisdiction over "the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of [the JJC] at the time the person engaged in the conduct." *Id.* § 51.04(a) (Vernon 2002). A "child" under the JJC is generally defined as a person ten years old or older but less than seventeen years old. *Id.* § 51.02(2) (Vernon Supp. 2004). Delinquent conduct includes violations, other than traffic offenses, of state or federal penal laws punishable by imprisonment or confinement in jail. *Id.* § 51.03(a)(1).[2] Conduct indicating a need for supervision includes conduct, other than traffic

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[1]*See* Letter from Honorable Jeri Yenne, Brazoria County Criminal District Attorney, to the Texas Attorney General (Sept. 16, 2003) (on file with Opinion Committee) [hereinafter Request Letter].

[2]Delinquent conduct is:

(continued...)

offenses, that is a state-law misdemeanor punishable by fine only and penal offenses of political subdivisions. *See id.* § 51.03(b)(1).[3] Consequently, juvenile courts have exclusive jurisdiction over penal violations by a child, from misdemeanors to felonies, other than traffic offenses.

The JJC defines traffic offenses as including penal violations cognizable under chapter 729 of the Transportation Code, with certain enumerated exceptions. *See id.* § 51.02(16).[4] In particular, section 729.001 of the Transportation Code provides that a person "younger than 17 years of age commits an offense if the person operates a motor vehicle on a public road or highway, a street or alley in a municipality, or a public beach in violation of any traffic law of this state," with certain

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[2](...continued)

(1) conduct, other than a traffic offense, that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail[.]

TEX. FAM. CODE ANN. § 51.03(a)(1) (Vernon Supp. 2004).

[3]Conduct indicating a need for supervision is:

(1) subject to Subsection (f), conduct, other than a traffic offense, that violates:

(A) the penal laws of this state of the grade of misdemeanor that are punishable by fine only; or

(B) the penal ordinances of any political subdivision of this state[.]

Id. § 51.03(b).

[4]"Traffic offense" means:

(A) a violation of a penal statute cognizable under Chapter 729, Transportation Code, except for:

(i) conduct constituting an offense under Section 521.457, Transportation Code [driving with an invalid license];

(ii) conduct constituting an offense under Section 550.021, Transportation Code [accident involving personal injury or death];

(iii) conduct constituting an offense punishable as a Class B misdemeanor under Section 550.022, Transportation Code [accident involving vehicle damage];

(iv) conduct constituting an offense punishable as a Class B misdemeanor under Section 550.024, Transportation Code [duty on striking unattended vehicle]; or

(v) conduct constituting an offense punishable as a Class B misdemeanor under Section 550.025, Transportation Code [duty on striking fixture or landscape]; or

(B) a violation of a motor vehicle traffic ordinance of an incorporated city or town in this state.

Id. § 51.02(16).

enumerated exceptions. TEX. TRANSP. CODE ANN. § 729.001(a) (Vernon Supp. 2004).[5] An offense under section 729.001 is punishable by fine or other sanction, other than confinement or imprisonment, as the applicable traffic law provides. *See id.* § 729.001(c).

Section 545.420 of the Transportation Code proscribes certain conduct involving racing on a highway:

> (a) A person may not participate in any manner in:
>
> (1) a race;
>
> (2) a vehicle speed competition or contest;
>
> (3) a drag race or acceleration contest;
>
> (4) a test of physical endurance of the operator of a vehicle; or
>
> (5) in connection with a drag race, an exhibition of vehicle speed or acceleration or to make a vehicle speed record.
>
> (b) In this section:

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[5]Section 729.001(a) provides:

> (a) A person who is younger than 17 years of age commits an offense if the person operates a motor vehicle on a public road or highway, a street or alley in a municipality, or a public beach in violation of any traffic law of this state, including:
>
> (1) Chapter 502, other than Section 502.282 [repealed] or 502.412 [operating a vehicle at a weight in excess of the registration application];
>
> (2) Chapter 521, other than an offense under Section 521.457 [driving with invalid license];
>
> (3) Subtitle C, other than an offense punishable by imprisonment or by confinement in jail under Section 550.021 [accident involving personal injury or death], 550.022 [accident involving vehicle damage if Class B misdemeanor], 550.024 [duty on striking unattended vehicle if Class B misdemeanor], or 550.025 [duty on striking fixture or landscaping if Class B misdemeanor];
>
> (4) Chapter 601;
>
> (5) Chapter 621;
>
> (6) Chapter 661; and
>
> (7) Chapter 681.

TEX. TRANSP. CODE ANN. § 729.001(a) (Vernon Supp. 2004).

(1) "Drag race" means the operation of:

(A) two or more vehicles from a point side by side at accelerating speeds in a competitive attempt to outdistance each other; or

(B) one or more vehicles over a common selected course, from the same place to the same place, for the purpose of comparing the relative speeds or power of acceleration of the vehicle or vehicles in a specified distance or time.

(2) "Race" means the use of one or more vehicles in an attempt to:

(A) outgain or outdistance another vehicle or prevent another vehicle from passing;

(B) arrive at a given destination ahead of another vehicle or vehicles; or

(C) test the physical stamina or endurance of an operator over a long-distance driving route.

(c) [Blank]

(d) Except as provided by Subsections (e)-(h), an offense under Subsection (a) is a Class B misdemeanor.

(e) An offense under Subsection (a) is a Class A misdemeanor if it is shown on the trial of the offense that:

(1) the person has previously been convicted one time of an offense under that subsection; or

(2) the person, at the time of the offense:

(A) was operating the vehicle while intoxicated, as defined by Section 49.01, Penal Code; or

(B) was in possession of an open container, as defined by Section 49.031, Penal Code.

(f) An offense under Subsection (a) is a state jail felony if it is shown on the trial of the offense that the person has previously been convicted two times of an offense under that subsection.

> (g) An offense under Subsection (a) is a felony of the third degree if it is shown on the trial of the offense that as a result of the offense, an individual suffered bodily injury.
>
> (h) An offense under Subsection (a) is a felony of the second degree if it is shown on the trial of the offense that as a result of the offense, an individual suffered serious bodily injury or death.

Id. § 545.420. Previously, the statute prohibited such conduct but did not prescribe a penal sanction. *See* Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1025-1832. Since September 1, 2003, however, a violation of section 545.420 is a penal offense subject to punishment ranging from a Class B misdemeanor to a second degree felony, depending on a particular violation's circumstances. *See* TEX. TRANSP. CODE ANN. § 545.420(d)-(h) (Vernon Supp. 2004); Act of May 30, 2003, 78th Leg., R.S., ch. 535, §§ 1-2, 2003 Tex. Gen. Laws 1825, 1825-26.

In light of the 2003 amendment to section 545.420, you ask:

> 1. Is a violation of Section 545.420 of the Texas Transportation Code a "traffic offense" as defined in Section 51.02(16) of the Texas Family Code?
>
> 2. Is a violation of Section 545.420 of the Texas Transportation Code "delinquent conduct" as defined in Section 51.03 of the Texas Family Code?
>
> 3. Is a violation of Section 545.420 of the Texas Transportation Code "conduct indicating a need for supervision" as defined in Section 51.03 of the Texas Family Code?
>
> 4. Is a violation of Section 545.420 of the Texas Transportation Code referred to juvenile court, a justice of the peace court, or a municipal court?

Request Letter, *supra* note 1, at 2.

II. Analysis

We begin by examining the plain and common meaning of the statutes. Courts generally interpret an unambiguous statute according to its plain language unless a literal construction would lead to absurd results. *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003) ("If a statute's meaning is unambiguous, we generally interpret the statute according to its plain meaning."); *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999) (citations omitted) (unambiguous statutes "should not be construed by a court to mean something other than the plain words say unless there is an obvious error such as a typographical one that resulted in the omission of a word, or application of the literal language of a legislative enactment would produce an absurd result"); *Wolfe v. State*, 120 S.W.3d 368, 370 (Tex. Crim. App. 2003) ("Whenever

possible, this Court interprets a statute pursuant to its 'plain [textual] meaning' and will not consult outside sources unless the statute is ambiguous or unless its literal translation will result in 'absurd consequences.'").

The JJC expressly defines delinquent conduct and conduct indicating a need for supervision to exclude traffic offenses. *See* TEX. FAM. CODE ANN. §§ 51.03(a)(1), (b)(1) (Vernon Supp. 2004). A traffic offense under the JJC is an offense cognizable under chapter 729 of the Transportation Code. *Id.* § 51.02(16). The offenses cognizable under section 729.001 of the Transportation Code include operating a vehicle on a public highway in "violation of any traffic law of this state," and specifically include subtitle C of the Transportation Code. TEX. TRANSP. CODE ANN. § 729.001(a)(3) (Vernon Supp. 2004). Section 545.420 is located in subtitle C of the Transportation Code. Section 545.420 is not among the various exceptions to the definition of a traffic offense in the Family Code nor to the offenses cognizable in chapter 729 of the Transportation Code. *See* TEX. FAM. CODE ANN. § 51.02(16)(A)(i)-(v) (Vernon Supp. 2004); TEX. TRANSP. CODE ANN. § 729.001(a)(1)-(3) (Vernon Supp. 2004). Consequently, according to the plain language of the JJC and the Transportation Code, a violation of section 545.420 by a child is a traffic offense. As such, a violation of section 545.420 by a child is neither delinquent conduct nor conduct indicating a need for supervision as those terms are defined in the Family Code. And because a violation of section 545.420 is a traffic offense, proceedings for its violation are not within the juvenile court's jurisdiction. *See* TEX. FAM. CODE ANN. §§ 51.04(a) (Vernon 2002) (defining juvenile court jurisdiction in terms of delinquent conduct and conduct indicating a need for supervision), 51.03(a)(1) (Vernon Supp. 2004) (excluding traffic offenses from definition of delinquent conduct), 51.03(b)(1) (excluding traffic offenses from definition of conduct indicating a need for supervision).

Justice courts and municipal courts have jurisdiction over criminal violations punishable by fine only or by fine and a statutory sanction other than confinement or imprisonment. *See* TEX. CODE CRIM. PROC. ANN. arts. 4.11, 4.14(b)(1), (c) (Vernon Supp. 2004). A violation of section 729.001 is punishable by fine or sanction other than confinement or imprisonment. *See* TEX. TRANSP. CODE ANN. § 729.001(c) (Vernon Supp. 2004). Accordingly, a violation of section 545.420 of the Transportation Code, which violates section 729.001 when committed by a child, would be within the jurisdiction of justice courts and municipal courts.

The Texas Juvenile Probation Commission (the "Commission") has tendered a brief in which it takes the position that the offense of racing on the highway should be classified as delinquent conduct within the jurisdiction of the juvenile court and not as a traffic offense.[6] The Commission acknowledges that the "letter of the law" is contrary to its position.[7] It notes, however, that the legislature in 2003 excepted two other penal offenses punishable by confinement in jail from the

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[6]*See* Letter Brief from Pierre T. Williams, Staff Attorney, Texas Juvenile Probation Commission, to Honorable Greg Abbott, Texas Attorney General (Nov. 6, 2003) (on file with Opinion Committee) [hereinafter Commission Brief].

[7]*Id.* at 2.

definition of a "traffic offense" in Family Code section 51.02(1).[8] The Commission contends that when the legislature categorized racing on the highway as an offense ranging from a Class B misdemeanor to a second degree felony, it never intended that justice courts would have jurisdiction of the offense when committed by a child. *See* Commission Brief, *supra* note 6, at 3. Furthermore, the Commission suggests that classifying racing on the highway as a traffic offense would be contrary to the spirit of juvenile justice theory reflected in the Family Code that "offenses which carry a penalty of confinement in jail or imprisonment not be classified as traffic offenses but as delinquent conduct under the jurisdiction of the juvenile court." *Id.*

However, the plain language of the statutes classifies the offense of racing on the highway under Transportation Code section 545.420 as a traffic offense. We cannot construe the offense as conduct other than a traffic offense without rewriting the statutes. The legislature's failure to exclude section 545.420 of the Transportation Code from offenses cognizable under section 729.001 could have been an oversight or deliberate; the legislative history does not reveal an obvious error that would permit a contrary construction. Generally, courts are careful to avoid rewriting a statute when attempting to construe it. *See Campbell v. State*, 49 S.W.3d 874, 878 (Tex. Crim. App. 2001) (holding that if claimed omission "was in fact an oversight in the statute, it is the business of the legislature, rather than this court, to correct it"); *Fleming Foods*, 6 S.W.3d at 284 (where codified statute is unambiguous, plain meaning rule applies even if codification is inconsistent with its statutory predecessor).

Moreover, construing section 729.001 of the Transportation Code as including section 545.420 does not lead to absurd results. Before 1999, a violation of section 729.001 was expressly punished as a Class C misdemeanor, regardless of the punishment an adult might receive for violating the underlying offense.[9] In 1999, the legislature amended section 729.001(c) to provide that a cognizable offense committed by a child is "punishable by the fine or other sanction, other than confinement or imprisonment, authorized by statute for violation of the [listed] traffic law . . . that is the basis of the prosecution under this section." TEX. TRANSP. CODE ANN. § 729.001(c) (Vernon Supp. 2004).[10] In other words, after 1999, a violation of section 729.001(c) is not necessarily a Class C misdemeanor; rather, punishment corresponds to the punishment provided for the underlying offense other than confinement or imprisonment. Although the legislature has generally excluded more serious violations from offenses cognizable under 729.001 of the Transportation Code and the definition of a traffic offense under 51.02(16) of the Family Code, it has not done so uniformly. *See, e.g., id.* §§ 545.066(c)(1)-(2) (offense of passing a school bus ranges from misdemeanor to state jail felony), 548.603(d) (Vernon 1999) (offense involving fictitious or counterfeit inspection sticker or insurance document ranges from Class B misdemeanor to second

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[8] *Id.*; *see also* Act of June 2, 2003, 78th Leg., R.S., ch. 283, § 1, 2003 Tex. Gen. Laws 1221, 1221 (excepting Transportation Code sections 521.457, 550.025 from the Family Code definition of a traffic offense).

[9] Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1025-1832, *amended by* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 30.167, 1997 Tex. Gen. Laws 327, 683, *amended by* Act of May 23, 1997, 75th Leg., R.S., ch. 822, § 1, 1997 Tex. Gen. Laws 2657, 2657, *amended by* Act of June 2, 1997, 75th Leg., R.S., ch. 1086, § 40, 1997 Tex. Gen. Laws 4179, 4193-94.

[10] Act of May 27, 1999, 76th Leg., R.S., ch. 1477, § 36, 1999 Tex. Gen. Laws 5067, 5090.

degree felony), 601.371(d) (Vernon Supp. 2004) (operation of motor vehicle in violation of suspension). Consequently, we cannot conclude that construing the Family Code and the Transportation Code as written produces an absurd result.

Finally, we observe that conduct which violates section 545.420, in particular the factors that aggravate punishment to a second or third degree felony, may also violate a section of the Transportation Code that is excluded from the definition of a traffic offense in the Family Code or the offenses cognizable in chapter 729 of the Transportation Code. *Compare* TEX. TRANSP. CODE ANN. § 545.420(e)(2), (g)-(h) (Vernon Supp. 2004) (offense of racing on the highway involving alcohol or personal injury or death), *with id.* §§ 550.021 (Vernon 1999) (offense of causing an accident involving personal injury or death), 550.022 (offense of accident involving vehicle damage if Class B misdemeanor). *See also id.* § 729.001(a) (Vernon Supp. 2004) (excluding sections 550.021 and 550.022 from offenses cognizable under chapter 729); TEX. FAM. CODE ANN. §§ 51.03(a)(3)-(4) (Vernon Supp. 2004) (defining delinquent conduct as including alcohol-related driving offenses), 51.02(16)(A)(ii) (excluding accidents involving personal injury or death from the definition of traffic offense). A charge that a child has violated a penal provision excluded from the definition of a traffic offense would be within the exclusive jurisdiction of the juvenile court. *See* TEX. FAM. CODE ANN. § 51.04(a) (Vernon 2002).

SUMMARY

Operation of a vehicle on a highway in violation of section 545.420 of the Transportation Code — "racing on the highway" by a person younger than seventeen years of age — is a violation of section 729.001 of the Transportation Code, and under the Family Code is a traffic offense rather than delinquent conduct or conduct indicating a need for supervision within the jurisdiction of the juvenile court. A violation of section 729.001 is within the jurisdiction of justice and municipal courts.

Very truly yours,

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

DON R. WILLETT
Deputy Attorney General for Legal Counsel

NANCY S. FULLER
Chair, Opinion Committee

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Assistant Attorney General, Opinion Committee

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 3, 2004

The Honorable Ken Armbrister
Chair, Natural Resources Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Opinion No. GA-0161

Re: Whether a municipal court may reschedule a qualified, nonexempt prospective juror's jury service for medical or hardship reasons without requiring the veniremember to appear in court (RQ-0109-GA)

Dear Senator Armbrister:

On behalf of *The Fayette County Record* in La Grange, you ask whether a municipal court may reschedule a qualified, nonexempt prospective juror's jury service for medical or hardship reasons without requiring the veniremember to appear in court.[1]

In connection with your request, we have received a letter from the City of La Grange (the "City") setting out facts that the City indicates underlie the request. *See* City of La Grange Letter, *supra* note 1, at 1. Preliminarily, the City states that its municipal court is not a court of record. *See id.* According to the City, prior to September 2003, the municipal court judge interpreted the law to preclude the court from verbally granting, prior to the specified court setting, a veniremember's "telephonic request[] to be excused from jury service for reasons other than the existence of a statutory exemption or a matter of statutorily established disqualification." *Id.* Under that interpretation, the court would grant such a request only when the prospective juror was present in court on the date set forth in the summons. *See id.* In September 2003, however, the court, with the advice of the city administrator and the city attorney,[2] established a new procedure for rescheduling a prospective juror's jury service:

> Under the . . . procedure, a [prospective] juror may submit a request in writing prior to the date set forth in the summons for the date of his or her jury service to be rescheduled for the next jury court setting.

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[1]*See* Letter from Honorable Ken Armbrister, Chair, Natural Resources Committee, Texas State Senate, to Ms. Nancy Fuller, Chair, Opinion Committee, Office of the Attorney General (Sept. 18, 2003) (on file with Opinion Committee); *see also* Letter from Maria Angela Flores Beck, La Grange City Attorney, to Honorable Greg Abbott, Texas Attorney General, at 1 (Oct. 27, 2003) (on file with Opinion Committee) [hereinafter City of La Grange Letter].

[2]*See* Telephone Conversation with Maria Angela Flores Beck, La Grange City Attorney (Jan. 13, 2004).

> Thus, the [prospective] juror seeks, in writing, a rescheduling of his/her jury service, not an excuse from service altogether. That request may . . . be considered and granted prior to the date set forth in the summons.

Id. at 2.

A municipal court is established by statute in each municipality. *See* TEX. GOV'T CODE ANN. § 29.002 (Vernon 1988); *see also id.* §§ 29.001, .003 (Vernon 1988 & Supp. 2004) (defining the term "municipality" and defining municipal courts' jurisdiction). If a defendant in municipal court does not waive trial by jury, the judge must command "the proper officer to summon a venire from which six qualified persons shall be selected to serve as jurors in the case." TEX. CODE CRIM. PROC. ANN. art. 45.027(a) (Vernon Supp. 2004). A prospective juror "who fails to attend may be fined an amount not to exceed $100 for contempt." *Id.* art. 45.027(c).

> A person is disqualified from serving on a municipal court jury if he or she:
>
> (1) is less than 18 years of age;
>
> (2) is not a citizen of the municipality, county, and state in which the court sits;
>
> (3) is not qualified to vote in the municipality, county, and state;
>
> (4) is not of sound mind or of good moral character;
>
> (5) is unable to read and write in English;
>
> (6) has served as a petit juror for six days during the preceding three months in the county court or during the preceding six months in the district court;
>
> (7) has been convicted of a felony; or
>
> (8) is under indictment or other legal accusation of misdemeanor or felony theft or any other felony.

See id. arts. 35.12, .16 (Vernon 1989 & Supp. 2004); TEX. GOV'T CODE ANN. §§ 62.102, .501 (Vernon 1998); *see also* TEX. MUN. COURTS EDUC. CTR., BENCH BOOK 8-13 to 8-14 (4th ed. 2001), *available at* http://www.tmcec.com/benchbook4.html [hereinafter MUNICIPAL COURTS' BENCH BOOK] (listing disqualifying factors).

A qualified veniremember may be exempt from jury service; if so, he or she may, but is not required to, claim an exemption from serving. *See* TEX. GOV'T CODE ANN. § 62.106(a) (Vernon Supp. 2004); *see also* MUNICIPAL COURTS' BENCH BOOK, *supra*, at 8-14 to 8-16 (listing exemptions). A qualified juror may establish an exemption if he or she:

> (1) is over 70 years of age;
>
> (2) has legal custody of a child or children younger than 10 years of age and the person's service on the jury requires leaving the child without adequate supervision;
>
> (3) is a student of a public or private secondary school;
>
> (4) is . . . enrolled and in actual attendance at an institution of higher education;
>
> (5) is an officer or an employee of the senate, the house of representatives, or any department, commission, board, office, or other agency in the legislative branch of state government;
>
> (6) is summoned for service in a county with a population of at least 200,000, unless that county uses [an electronic or mechanical method of selection authorized by section 62.011 of the Government Code,] and the period authorized under Section 62.011(b)(5) exceeds two years, and the person has served as a petit juror in the county during the 24-month period preceding the date the person is to appear for jury service;
>
> (7) is the primary caretaker of a person who is an invalid unable to care for himself;
>
> (8) [unless the county's jury wheel has been reconstituted since the person's prior jury service,] is summoned for service in a county with a population of at least 250,000 and the person has served as a petit juror in the county during the three-year period preceding the date the person is to appear for jury service; or
>
> (9) is a member of the United States military forces serving on active duty and deployed to a location away from the person's home station and out of the person's county of residence.

TEX. GOV'T CODE ANN. § 62.106(a) (Vernon Supp. 2004); *see also* MUNICIPAL COURTS' BENCH BOOK, *supra*, at 8-14 to 8-16 (listing exemptions). Medical excuses and other hardship excuses are not permissible statutory reasons for disqualification or an exemption.

We understand that the municipal court modeled its rescheduling procedure on the system that may be used in county courts. *See* Telephone Conversation, *supra* note 2. Section 62.0111 of the Government Code, in conjunction with sections 62.011 and 62.110, expressly permits a county commissioners court to implement a system for postponing jury service in its county courts prior to the date the venire is to appear in court. *See* TEX. GOV'T CODE ANN. §§ 62.011, .0111, .110 (Vernon 1998 & Supp. 2004). Under these statutes, a county that implements an electronic or mechanical system for selecting veniremembers may allow a prospective juror to respond to a jury summons via computer, an automated telephone system, or by "appearing before the court in person." *Id.* § 62.0111(a) (Vernon Supp. 2004); *see id.* § 62.011(a) (Vernon 1998) (permitting a commissioners court to adopt a plan for selecting a venire using "electronic or mechanical equipment instead of drawing the names from a jury wheel"). In a response by computer or automated telephone system, the veniremember may submit information that he or she is disqualified for or exempt from jury service or may request that his or her jury service be postponed. *See id.* § 62.0111(b). A designee of the court may hear a prospective juror's "reasonable excuse . . . and . . . release him from jury service until a specified day of the term." *Id.* § 62.110(b) (Vernon 1998); *accord* TEX. CODE CRIM. PROC. ANN. art. 35.03, § 2 (Vernon 1989) (permitting, "[u]nder a plan approved by the commissioners court," a court's designee to hear a veniremember's excuse, and if he finds the excuse sufficient, to postpone the juror's service). *But see* TEX. GOV'T CODE ANN. § 62.110(c) (Vernon 1998) (prohibiting a court or a court's designee from excusing "a prospective juror for an economic reason unless each party . . . is present and approves").

No statute expressly authorizes a municipal court to implement a rescheduling system such as the City describes. Section 62.0111 applies only to county courts. *See id.* § 62.0111 (Vernon Supp. 2004). Two statutes, article 35.04 of the Code of Criminal Procedure and section 62.107 of the Government Code, authorize a prospective juror who is disqualified or who wishes to raise an exemption to establish that fact before the juror is scheduled to appear in court by filing a statement with the clerk of the court. *See* TEX. CODE CRIM. PROC. ANN. art. 35.04 (Vernon 1989); TEX. GOV'T CODE ANN. § 62.107(a) (Vernon 1998). But these statutes do not apply to rescheduling jury service for reasons other than disqualification or exemption.

Nevertheless, a court has inherent authority to excuse or reschedule veniremembers, even before the date set to appear for service. *See Ott v. State*, 627 S.W.2d 218, 227 (Tex. App.–Fort Worth 1981, writ ref'd). In *Ott v. State* the Fort Worth Court of Appeals considered whether a trial court could excuse certain veniremembers from jury service "prior to trial on the court's own motion in the absence of counsel" for reasons relating to business or work, *id.* at 225, and reasons relating to scheduled vacation, *id.* at 227-28. The court concluded that the trial court did not abuse its discretion:

> We think it important to note that the problems of jurors, presented to the trial judge in this case, are somewhat typical and exist in every county in which juries are selected. While jury service is vital and essential, and while most citizens of this state are aware of this, some people called for jury service on relatively short notice[]

> simply have insurmountable problems in serving in a particular week that must be recognized by the trial judge.
>
> Prior commitments of jurors, made sometimes weeks and months before their call to duty, are extremely difficult, if not impossible, to change or postpone. To do so, in many cases, would work severe hardship on the very people on which the jury system in this state depends. The trial court must be allowed some leeway and authority to use some judgment in excusing jurors entirely or in postponing jury service for those individuals.

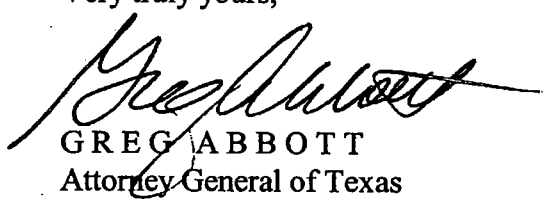
Id. at 227; *accord id.* at 228 (concluding that the trial court did not abuse its discretion to grant vacation requests by either "entirely excus[ing] or . . . postpon[ing] the service to another week"); *see also Bouchillon v. State*, 540 S.W.2d 319, 323 (Tex. Crim. App. 1976) (stating that a district court's procedure of postponing veniremembers' service "is proper upon a request from a juror"); *cf. Matchett v. State*, 941 S.W.2d 922, 932 n.11 (Tex. Crim. App. 1996) (en banc) (recognizing a court's inherent power to adopt procedural rules for managing and administering cases).

Given the court's inherent authority, we conclude that a municipal court may adopt a policy under which it may reschedule a qualified, nonexempt veniremember's jury service for medical or hardship reasons without requiring the prospective juror to appear in court.

SUMMARY

A municipal court may adopt a policy under which it may reschedule a qualified, nonexempt prospective juror's jury service for medical or hardship reasons without requiring the veniremember to appear in court.

Very truly yours,



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March 15, 2004

The Honorable Joe Warner Bell
Trinity County Attorney
P.O. Box 979
Groveton, Texas 75845

Opinion No. GA-0166

Re: City council's authority to prohibit the use of the municipal jail as a holding facility for persons arrested by deputy constables for violations of state law (RQ-0115-GA)

Dear Mr. Bell:

You ask whether a city council of a Type A general-law municipality may prohibit the use of a municipal jail as a temporary holding facility for (1) a person arrested by a deputy constable for violating state law while the person waits to appear before a magistrate, or (2) a person arrested on a warrant for penal code offenses while the person arranges bond or waits to be transported to a county facility.[1]

You acknowledge that the answer to your question could be controlled by an interlocal agreement between a municipality and another jurisdiction. *See* Request Letter, *supra* note 1, at 2; *see also* TEX. GOV'T CODE ANN. §§ 791.001-.032 (Vernon 1994 & Supp. 2004) (concerning interlocal cooperation contracts). You contend that absent an interlocal agreement the city council may deny use of the municipal jail as a temporary holding facility for persons arrested by deputy constables for violations of state law. *See* Request Letter, *supra* note 1, at 2.

You have clarified that your request concerns Trinity, Texas, a Type A general-law municipality.[2] Local Government Code section 341.902 authorizes the governing body of a Type A municipality to build jails and promulgate necessary rules:

> (a) The governing body of a Type A general-law municipality may build and establish one or more jails inside or outside the municipality.

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[1] *See* Letter from Honorable Joe Warner Bell, Trinity County Attorney, to Opinions Division, Office of Attorney General (Oct. 3, 2003) (on file with Opinion Committee) [hereinafter Request Letter]; Telephone Conversation with Honorable Joe Warner Bell (Jan. 28, 2004) [hereinafter Bell Conversation].

[2] Bell Conversation, *supra* note 1.

> (b) The governing body may adopt necessary rules and appoint necessary keepers or assistants for the jails.
>
> (c) Vagrants and disorderly persons may be confined in a jail on commitment by a municipal court judge. A person who fails or refuses to pay the fine or costs imposed for an offense may be confined in a jail.

TEX. LOC. GOV'T CODE ANN. § 341.902 (Vernon Supp. 2004). Subsection (c) authorizes using a municipal jail to confine vagrants, disorderly persons, and persons failing or refusing to pay their fines and costs, which are uses designed to address primarily local or municipal concerns. *See id.* § 341.902(c); *see also* TEX. GOV'T CODE ANN. § 21.002(c) (Vernon 2004) (authorizing municipal and justice courts to punish contempt by confinement in jail). However, the list of permissible jail uses in section 341.902(c) does not purport to be exclusive. *See* TEX. LOC. GOV'T CODE ANN. § 341.902(c) (Vernon Supp. 2004). Subsection (b)'s broad grant of rulemaking authority would allow the city council to promulgate "necessary" rules about municipal jail use, subject to any overriding requirements elsewhere in the law. *See id.* § 341.902(b). Consequently, we next consider whether the Code of Criminal Procedure, which specifies the duties of arresting officers, magistrates, and other officials upon a person's arrest, requires the municipal jail to be available for temporary detention under the circumstances you describe.

A constable or deputy constable is a peace officer with the authority and responsibility that office entails. *See* TEX. CODE CRIM. PROC. ANN. art. 2.12(2) (Vernon Supp. 2004); *Wilson v. State*, 36 S.W.2d 733, 734 (Tex. Crim. App. 1931). After arresting a person, a deputy constable or other lawful authority "shall without unnecessary delay, but not later than 48 hours after the person is arrested, take the person arrested or have him taken before some magistrate of the county where the accused was arrested," or, as necessary, to the magistrate of a bordering county. TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (Vernon Supp. 2004). Under the code, magistrates include certain state officials, county officials, and municipal officials such as mayors, recorders, and municipal court judges. *See id.* art. 2.09. When an arrested person is brought before a magistrate, the magistrate must perform a number of duties set out in article 15.17, such as providing constitutional warnings and admitting the person to bail as allowed. *See id.* art. 15.17(a)-(b).

The code does not specifically address detention while an arrested person waits to appear before a magistrate. Article 45.015 of the code provides generally that "[w]henever, by the provisions of this title, the peace officer is authorized to retain a defendant in custody, the peace officer may place the defendant in jail in accordance with this code or other law." *Id.* art. 45.015. Article 45.015 contemplates temporary detentions in jail, but does not attempt to specify the governmental unit or units that must take custody of an arrested person during such detentions.

Neither the courts nor this office has addressed whether a municipal jail must be available as a holding facility for persons arrested for state law violations. In the past this office has considered the converse of your question, whether a county has a duty under the code to accept persons arrested for violating municipal ordinances or persons arrested by city police officers for

violating state law. Article 2.18 of the code provides that "[w]hen a prisoner is committed to jail by warrant from a magistrate or court, he shall be placed in jail by the sheriff." *Id.* art. 2.18 (Vernon 1977). Based on article 2.18, this office has determined that a sheriff could not refuse to accept persons arrested by city police for state law violations and ordered committed to jail by a magistrate. *See* Tex. Att'y Gen. Op. No. DM-313 (1995) at 1, 3; *see also* Tex. Att'y Gen. Op. Nos. JC-0312 (2000) at 2 (a sheriff has the responsibility for a person arrested by a law enforcement agency other than the sheriff's department upon the issuance by a magistrate of a commitment order directing the sheriff to "'receive and place in jail the person so committed'") (quoting TEX. CODE CRIM. PROC. ANN. art. 16.20 (Vernon 1977)), JM-615 (1987) at 3-4 (county must accept custody of Board of Pardons and Paroles' prisoners pending a revocation hearing).

This office has concluded, however, that article 2.18 does not require a sheriff to take custody of persons arrested for violating purely municipal law. *See* Tex. Att'y Gen. Op. Nos. JM-1009 (1989) at 2, MW-52 (1979) at 2-3. The distinction rests in large measure on the lack of "a plain manifestation of the legislature's intent that a city may impose such a duty [to confine municipal law violators] on the sheriff and the county." Tex. Att'y Gen. Op. Nos. MW-52 (1979) at 2 (citing *Ex parte Ernest*, 136 S.W.2d 595, 597 (Tex. Crim. App. 1939)); *see also* JM-1009 (1989) at 2.

In Attorney General Opinion JM-151, this office determined that a sheriff may but is not required to take custody of a person arrested by city police for state law violations prior to appearance before a magistrate. *See* Tex. Att'y Gen. Op. No. JM-151 (1984) at 2. The opinion observed that no statute requires a sheriff to take custody of state law violators arrested by municipal police officers until, under article 2.18, the magistrate has issued a commitment order. *See id.*

Likewise, no statute requires municipal authorities to confine in municipal jail a person arrested by a deputy constable for violations of state law. The legislature has devoted considerable attention to the county sheriff's responsibilities and county confinement, and has provided for confinement in county jail of federal prisoners and prisoners of another county. *See generally* TEX. LOC. GOV'T CODE ANN. §§ 351.001-.015 (Vernon 1999 & Supp. 2004) (concerning county jail facilities), .041(a) (Vernon 1999) (sheriff is keeper of county jail), .043-.044 (federal and out-of-county prisoners); TEX. CODE CRIM. PROC. ANN. art. 2.18 (Vernon 1977) (custody of prisoners). But no statute requires municipal authorities to confine in municipal jail a person arrested by a deputy constable for violations of state law while waiting to appear before a magistrate, to arrange bond, or to be transported to a county facility. Absent a clear manifestation of legislative intent in this regard, we believe that no court would infer such a duty. Consequently, we conclude that a city council, as the governing body under Local Government Code section 341.902, may promulgate rules prohibiting use of the municipal jail as a temporary holding facility for persons arrested by deputy constables for violations of state law. *See* TEX. LOC. GOV'T CODE ANN. § 341.902 (Vernon Supp. 2004).

SUMMARY

A city council may prohibit the use of the municipal jail as a holding facility for persons arrested by deputy constables for state law violations while such persons wait to appear before a magistrate, to post bond, or to be transported to a county facility.

Very truly yours,

GREG ABBOTT
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ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 10, 2004

The Honorable Joe F. Grubbs
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Opinion No. GA-0199

Re: Whether a municipality's finance director may simultaneously serve as a temporary municipal judge in the same city (RQ-0144-GA)

Dear Mr. Grubbs:

You state that the City of Waxahachie's full-time finance director has been named temporary judge of the Waxahachie Municipal Court.[1] You ask whether, in light of Texas Constitution article XVI, section 40, the common-law doctrine of incompatibility, and the canons of judicial ethics, the city finance director may also serve in this position. *See* Request Letter, *supra* note 1, at 1.

You state that a temporary judge serves when the regular municipal court judge is unavailable or unable to serve, hearing cases in the Waxahachie Municipal Court and serving as magistrate[2] for the City of Waxahachie and for Ellis County. *See id.* The finance director is employed by and reports to the city manager. *See id.* at 2; *see also* WAXAHACHIE, TEX., CITY CHARTER art. III, § 3.04(1).[3] As finance director, he is responsible for working on the city budget and for projecting revenue flow to the city. *See* Request Letter, *supra* note 1, at 2. He receives a salary as finance director but does not receive extra compensation for serving as temporary municipal judge. *See id.*

Government Code section 29.002 creates a municipal court in each municipality. *See* TEX. GOV'T CODE ANN. § 29.002 (Vernon 2004); *see also id.* § 29.003 (jurisdiction of municipal court). In a home-rule city like Waxahachie, *see* WAXAHACHIE, TEX., CITY CHARTER art. I, § 1.02, the municipality may provide by charter or ordinance for appointing one or more temporary judges to serve if the regular municipal judge is unable to act. *See* TEX. GOV'T CODE ANN. § 29.007(g) (Vernon 2004).

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[1]*See* Letter from Honorable Joe F. Grubbs, Ellis County and District Attorney, to Honorable Greg Abbott, Texas Attorney General (Dec. 8, 2003) (on file with Opinion Committee, *also available at* http://www.oag.state.tx.us) [hereinafter Request Letter].

[2]The request letter states that the municipal judge "handles arraignments," Request Letter, *supra* note 1, at 1, a term sometimes used to indicate that the judge serves as a magistrate. *See Watson v. State*, 762 S.W.2d 591, 594 n.4 (Tex. Crim. App. 1988) (stating that an appearance before a magistrate under article 15.17, Code of Criminal Procedure, "is not arraignment in Texas"). We read the request letter as referring to a municipal judge's service as a magistrate.

[3]Online Code of Ordinances *available at* http://www.waxahachie.com.

We note that the Uniform Municipal Courts of Record Act (the "Act"), Government Code chapter 30, provides that "[a] person may not serve as a municipal judge if the person is employed by the same municipality." *Id.* § 30.00006(g). This provision applies to each municipality listed in Government Code chapter 30, *see id.* § 30.00001(b), but Waxahachie is not among the cities listed in that chapter. *See id.* §§ 30.00041-.01882 (subchapters B through XX). While the Act authorizes a city to create a municipal court of record by ordinance, *see id.* § 30.00003, Waxahachie has not done so. The Waxahachie Charter provides for "the corporation court[4] of the City of Waxahachie, Texas," WAXAHACHIE, TEX., CITY CHARTER art. II, § 2.09, but we find no ordinance creating a municipal court of record under chapter 30. Thus, because the Waxahachie municipal court was not created under chapter 30, the section 30.00006(g) prohibition against a city employee serving as a municipal judge does not apply to a Waxahachie municipal judge.

We turn to your question about Texas Constitution article XVI, section 40. This section provides that "[n]o person shall hold or exercise at the same time, more than one civil office of emolument." TEX. CONST. art. XVI, § 40. As the Texas Supreme Court observed in *Aldine Independent School District v. Standley*, 280 S.W.2d 578 (Tex. 1955), "the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others." *Aldine*, 280 S.W.2d at 583. Because the Waxahachie finance director is appointed by and accountable to the city manager, he is a city employee. A municipal judge is an officer. *See French v. State*, 572 S.W.2d 934, 938-39 (Tex. Crim. App. 1978); *Thompson v. City of Austin*, 979 S.W.2d 676, 682 (Tex. App.–Austin 1998, no pet.). However, in this case, the temporary municipal judge receives no compensation and thus does not hold a civil office of emolument. Article XVI, section 40 does not prohibit the city finance director from serving as temporary municipal judge.

We next address the common-law doctrine of incompatibility, which has three aspects: self-appointment; self-employment; and conflicting loyalties. *See* Tex. Att'y Gen. Op. No. GA-0127 (2003) at 2. All officers authorized to appoint someone to another office are disqualified from the office over which they hold the appointive power. *See Ehlinger v. Clark*, 8 S.W.2d 666, 674 (Tex. 1928). Self-appointment does not apply in this case because the city manager appoints the finance director, and the city council appoints municipal judges. *See* WAXAHACHIE, TEX., CITY CHARTER art. I, § 2.09(b), art. III, § 3.04.

Self-employment incompatibility, which derives from the self-appointment aspect of incompatibility, prevents one person from holding an office and an employment that the office supervises. *See* Tex. Att'y Gen. LA-114 (1975) at 8 (concluding on the basis of *Ehlinger* that a teacher in a school district may not serve as trustee for the same district). *See also* Tex. Att'y Gen. Op. No. JC-0371 (2001) at 2-5; Tex. Att'y Gen. LO-97-034, at 2. Self-employment incompatibility does not apply in this case because neither position has authority to supervise the other.

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[4]Government Code section 29.002 defines "corporation court" as "municipal court." *See* TEX. GOV'T CODE ANN. § 29.002 (Vernon 2004).

Finally, one person may not hold two offices if their loyalties and duties are in conflict. *See Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152, 153 (Tex. Comm'n App. 1927, judgm't adopted) (offices of school trustee and city alderman were incompatible because the city council had supervisory powers over school property within the city limits). The "conflicting loyalties" aspect of incompatibility applies only where both positions are offices. *See* Tex. Att'y Gen. Op. Nos. GA-0127 (2003) at 3, JC-0054 (1999) at 2. It does not apply to the office and employment at issue here.

You also ask us to determine whether the canons of judicial conduct prevent the city finance director from serving as a temporary municipal judge. *See* TEX. CODE JUD. CONDUCT, Canons 1-8, *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G. app. B (Vernon 1998 & Supp. 2004) (adopted by the Texas Supreme Court). A municipal court judge is required to comply with the Code of Judicial Conduct with certain exceptions. *See id.* Canon 6C(1). A municipal court judge "shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.* Canon 2A. In addition, the judge's judicial duties "take precedence over all the judge's other activities," and a judge shall conduct all "extra-judicial activities so that they do not . . . cast reasonable doubt on the judge's capacity to act impartially as a judge." *Id.* Canons 3A, 4A.

You state that the finance director works on the city budget and projects revenue flow to the city. *See* Request Letter, *supra* note 1, at 2. A temporary municipal judge sets the fine amount on a guilty plea or finding of guilt, subject to the limits in Texas Government Code section 29.003. *See* TEX. GOV'T CODE ANN. § 29.003 (Vernon 2004); TEX. CODE CRIM. PROC. ANN. art. 4.14 (Vernon Supp. 2004) (jurisdiction of municipal court). While there has been "no indication whatsoever that the Temporary Judge has allowed his capacity as Finance Director to influence him in setting fine amounts, . . . the theoretical possibility of a conflict does exist." Request Letter, *supra* note 1, at 2. You are particularly concerned about the requirement that a judge avoid the appearance of impropriety, but you suggest that allowing the temporary judge to serve as a magistrate but not preside over cases would eliminate that concern. However, a municipal judge's powers are conferred by statute and may not be withdrawn by the city council. *See Thompson v. City of Austin*, 979 S.W.2d at 681. A temporary judge has the same powers and duties as the judge he replaces. *See* TEX. GOV'T CODE ANN. §§ 29.003, .007(g) (Vernon 2004). The city council may not limit the temporary municipal judge's statutory powers.

The State Commission on Judicial Conduct ("the Commission") is responsible, in the first instance, for applying the judicial canons to specific conduct by a judge. The Commission, established by Texas Constitution article V, section 1-a, is responsible for investigating allegations of judicial misconduct and for disciplining judges, including municipal judges. *See* TEX. CONST. art. V, § 1-a(2), (6), (8). *See also* TEX. GOV'T CODE ANN. §§ 33.001-.051 (Vernon 2004) (chapter 33, Commission's statutory authority). Any judge may be removed from office for willful violation of the Code of Judicial Conduct or willful or persistent conduct that is "clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice." TEX. CONST. art V § 1-a(6)A. The Commission may receive complaints and investigate complaints against judges and "[a]fter such investigation as it deems necessary," may "issue a private

or public admonition, warning, reprimand, or requirement that the person obtain additional training or education." *Id.* § 1-a(8); *see also* TEX. GOV'T CODE ANN. § 33.022 (Vernon 2004) (investigation procedures). The Commission "shall develop and distribute" materials describing "the types of conduct that constitute judicial misconduct." *Id.* § 33.007(a)-(b); *see also id.* § 33.008 (Commission shall provide information relating to judicial misconduct to entities that provide education to judges).

The Commission has determined that an individual improperly held dual employment as a justice of the peace and a law enforcement officer in neighboring counties. *See* State Comm'n on Judicial Conduct, *Summaries of Public Sanctions* (Public Reprimand Apr. 24, 2001).[5] "Such positions created an appearance of impropriety, bias, prejudice, and partiality in the handling of criminal cases. Furthermore, it would appear to the public that the Judge's fellow law enforcement officers are in a special position to influence the Judge in his decisions." *Id.* The justice of the peace was publicly reprimanded for violating and canons 2A, 4A(1), and 4D(1) of the Texas Code of Judicial Conduct. *See id.* These canons require a judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," TEX. CODE JUD. CONDUCT, Canon 2A; to conduct all "extra-judicial activities so that they do not . . . cast reasonable doubt on the judge's capacity to act impartially as a judge," *id.* Canon 4A(1), and to "refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality," *id.* Canon 4D(1).

The Commission has also issued a public statement condemning the practice of judges serving as active law enforcement officers. *See* State Comm'n on Judicial Conduct, *Public Statement No. PS-2000-1*;[6] *see also* TEX. CONST. art. V, § 1-a(10) (authorizing the Commission to issue a public statement during proceedings against a judge when the Commission determines that the best interests of the public will be served and other circumstances). The Commission stated that "by attempting to fulfill the requirements of both offices, a judge severely compromises the impartiality and independence of the judicial office." State Comm'n on Judicial Conduct, *Public Statement No. PS-2000-1*. The guiding factor in the Commission's analysis was "the public's trust in the ability of a judge to remain impartial and fair while conducting judicial business." *Id.*

The temporary municipal judge's service as city finance director raises some of the issues that the Commission addressed in connection with a judge's service as an active law enforcement officer. His involvement with the city budget and projected revenue flow might undermine the public's trust in his ability to remain impartial and fair while conducting judicial business. *See also* TEX. CODE JUD. CONDUCT, Canons 2A, 4A(1), 4D(1).

However, this office cannot in the opinion process investigate and resolve the fact questions that may be necessary to determine whether the temporary municipal judge has violated any of these canons of judicial ethics. *See* Tex. Att'y Gen. Op. No. GA-0003 (2002) at 1.[7] The Commission on

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[5] *Available at* http://www.scjc.state.tx.us/sumpub.php (under "Disciplinary Actions" heading).

[6] *Available at* http://www.scjc.state.tx.us (under "Public Information" heading).

[7] *See also* Tex. Att'y Gen. Op. Nos. GA-0100 (2003) at 4, JC-0328 (2001) at 4, M-187 (1968) at 3, O-2911 (1940) at 2.

Judicial Conduct is authorized to investigative allegations of misconduct by judges. The Texas Constitution moreover requires the Commission to "keep itself informed as fully as may be of circumstances relating to the misconduct . . . of particular persons holding [judicial office], receive complaints or reports, formal or informal, from any source in this behalf and make such preliminary investigations as it may determine." TEX. CONST. art. V, § 1-a(7). *See also* TEX. GOV'T CODE ANN. § 33.022 (Vernon 2004) (setting out Commission's authority to investigate the circumstances surrounding an appearance of misconduct and to take formal action on such matters). Whether a judge's conduct in specific circumstances offends the Code of Judicial Conduct is ultimately a matter for the State Commission on Judicial Conduct.

SUMMARY

Neither Texas Constitution article XVI, section 40 nor the common-law doctrine of incompatibility prohibits a city finance director from serving as a temporary municipal judge in the same city. The Commission on Judicial Conduct is authorized to investigate issues arising under the Code of Judicial Conduct in connection with this dual service.

Very truly yours,

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DSC and Deferred Disposition

OBJECTIVES

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

1. Set office procedures for processing driving safety courses.
2. Require court personnel to process the proper paperwork for granting and disposing of a case granting a driving safety course.
3. Determine the rehabilitative issues when granting deferred disposition. and
4. Identify and apply proper procedures for processing and handling cases in which the court has granted deferred.

DEFERRED DISPOSITION AND DRIVING SAFETY COURSES

Deferred Disposition

Article 45.051
Code of Criminal Procedure

Deferred Disposition

- Discretionary
- Plea of guilty or nolo contendere or a finding of guilty
- Payment of court costs
- Court defers proceedings for 1 to 180 days

Deferred Disposition

- All fine only Offenses Except
  - Offenses committed in a construction maintenance work zone (472.022 T.C.)
  - DUI and consumption w/2 convictions
  - Holder of CDL for Traffic Offenses
    - » Sec 720.002(f)(2)
    - » Subtitle C (Rules of the Road)
    - » Chapter 521 (DL)

Deferred Disposition

- Conditions
  - Post bond in amount of fine to secure payment of fine
  - Pay restitution not to exceed fine
  - Professional counseling
  - Reasonable Conditions

Deferred Disposition

- Diagnostic Testing for Alcohol or Drugs
- Psychosocial Assessment
- Participate in alcohol and drug abuse treatment or education program
- Pay costs directly or through court costs of testing, assessment, treatment or education program
- Driving Safety Course

Deferred Disposition

- All alcohol offenses, including PI- under age 21
  - Alcohol Awareness Course required
  - Community service required (except DUI)
    - » First offense - 8 to 12 hours
    - » Second offense - 20 to 40 hours

Deferred Disposition

- Completion of terms
  - Dismisses charge
  - Court may impose special expense not to exceed amount of fine
- Failure to complete terms
  - Impose judgment
  - Assess fine or reduce fine
  - Defendant pays fine or may appeal

Deferred Disposition

- Report to DPS
  - May not report traffic offenses deferred unless defendant fails to complete and there is a conviction (Sec. 543.204, T.C.)
  - Required to report deferrals of all Alcoholic Beverage Code offenses (Sec. 106.117, A.B.C.)

DSC
Art. 45.0511, C.C.P.

DSC - Subsection (b)

- Qualified Offense
- If Defendant Elects DSC
- And does so Timely
- And Defendant meets the Qualifications

DSC: Offenses Eligible

- DSC applies to:
  - Jurisdiction of JP or Municipal Court
  - Involves the Operation of Motor Vehicle
    - » Subtitle C Rules of the Road
    - » Disobeying Warning Signs
    - » Juvenile Offenders on Same Violations
- DSC Does Not Apply to Offense Committed by CDL holder 45.0511 (s)

DSC - Disqualified Offenses

- Does not apply to
  - Speeding 25 mph over limit (b)(5)
  - Passing a school bus
  - Hit and Run Offenses (Occupied Vehicles)
  - Serious traffic offenses (CMV)
  - Work Zone While Workers are Present
    - » Subtitle C Rules of Road
    - » Not including Seatbelt and Inspection Offenses

DSC - Election (b)(3)(A)&(B)

- Election
  - In Person
  - By Attorney
  - By Certified Mail

DSC - Timely

- Before the Answer Date
- Mailbox Rule Art. 45.013, C.C.P.
  - If mailed on or before answer date
  - Must be received within 10 days of answer date
    - » Don't count weekends or holidays
  - Keep envelope
    - » Legible postmark evidence(US Mail)

DSC - Qualifications

- Evidence of Financial Responsibility
- Texas DL

DSC - Discretionary

- 45.0511 (d)
  - Defendant had DSC in preceding 12 months
  - Request not timely, but before Final Disposition
- Court may require DSC during deferral period under Art. 45.051 (Deferred Disposition)

DSC-Fees

- Mandatory or (b)
  - no more than $10, plus Court Cost
- Discretionary (d)
  - Special expense up to maximum possible fine amount, plus Court Cost
- No refunds if course not taken

Safety Seats and Seatbelts

- Violations of 545.412 & 545.13(b) TC
- Must take DSC w/ 4 hours of Instruction Encouraging Use of Child Seats and Seatbelts
- TEA must approve this Special DSC
- Rule is found in 545.413 (i) TC

DSC-Notification

- Ticket required to have notice Art. 45.0511 (q)
  - Statement of right
  - May be able to have charged dismissed
- Court required to notify Art. 45.0511(r)

DSC - Subsection (c)

- Court enters judgment on plea
- Court costs collected
- Court defers imposition of judgment for 90 days (180 if offense before 9/1/03)
- During deferral period - court requires
  - DSC Court
  - Driving Record (certified copy from DPS)
  - Affidavit

DSC – Compliance

- On proof of Completion
  - Court removes judgment
  - Reports to DPS date of completion
  - Court may only dismiss one charge for each completion

DSC - Show Cause Hearing

- Failure to complete
  - Court notifies in writing of show cause hearing
    - » of failure
    - » of time of hearing
    - » of place of hearing
  - Court mails notice to address on file with court

DSC - Show Cause Hearing

- Appears at show cause
  - Court may allow extension of time to present certificate, or
  - Court may impose judgment
  - Defendant may pay the fine or appeal

DSC - Show Cause Hearing

- Failure to appear at show cause hearing
  - Impose judgment on underlying charge
  - Issues capias pro fine

The End

DSC AND DEFERRED

TABLE OF CONTENTS

DSC AND DEFERRED

I. DRIVING SAFETY COURSES/MOTORCYCLE OPERATOR COURSES

A. Application

1. Offenses to Which DSC Applies

Article 45.0511, C.C.P., is now entitled "Driving Safety Course (DSC) or Motorcycle Operator Course (MOC) Dismissal." DSC and MOC only applies to an offense that in the jurisdiction of the justice or municipal court and involves the operation of a motor vehicle that is defined by Section 472.022, T.C.; Subtitle C, Title 7, T.C.; and Section 729.001(a)(3), T.C.

2. Exceptions

Exceptions to the application of Article 45.0511 include:

- Persons with a commercial driver's license are excluded from taking a driving safety course, including when the person is driving his or her own personal vehicle;
- An offense committed in a construction or maintenance zone when workers are present;
- Persons who are alleged to have been speeding 25 mph or more over the speed limit
- Persons charged with passing a school bus loading or unloading children
- Persons charged with leaving the scene of an accident after causing damage to a vehicle; and
- Persons charged with leaving the scene of an accident who fail to give information and render aid.

B. Course Requirements

1. DSC

If the offense was committed in a passenger car or a pickup truck, the judge must require the defendant to complete a driving safety course approved by the Texas Education Agency. Court costs statutes require the defendant to pay all applicable court costs when the case is deferred; the court may also require a $10 administrative fee if the request if made on or before the answer date on the citation.

2. MOC

If the offense was committed on a motorcycle, the judge must require a motorcycle operator course under the motorcycle operator training and safety program approved by the Texas Department of Public Safety.

3. Safety Belt Course

If the offense charged is under the child safety seat system or safety belt law involving the driver not restraining a child under the age of four or a child under 36 inches in height in a child passenger safety seat system or a person under the age of 17 in a safety belt, the defendant must take a special driving safety course that contain four hours of instruction on the effectiveness and safety of using a child safety seat system or seat belt.

C. Eligibility and Requirements

To be eligible for a DSC or a MOC, the defendant:

- May not have completed an approved driving safety course or motorcycle operator training course, as appropriate, with the 12 months preceding the date of the offense;
- Must enter a plea of guilty or nolo contendere on or before the answer date on the citation and present the court in person, by counsel, or by certified mail (postmarked on or before due date) a request to take the course;
- Must present the court with a valid Texas driver's license or permit; and
- Must provide the court evidence of financial responsibility.

D. Court Requirements

After the defendant enters a plea and makes the request for the course, the court must enter judgment on the plea at the time the plea is made, defer imposition of the judgment, and *allow the defendant 90 days to successfully complete the approved course and present to the court the following on or before the 90th day*:

- a certificate of completion of the DOC or MOC;
- the defendant's driving record as maintained by the Department of Public Safety showing that the defendant had not completed an approved driving safety course or motorcycle operator training course, as applicable, within the 12 months preceding the date of the offense; and
- an affidavit stating that the defendant was not taking a driving safety course or motorcycle operator training course, as applicable.

If a defendant fails to present all three by the end of the 90 days deferral period, the court may not dismiss the charge.

E. Judge's Discretion before Final Disposition

If a defendant has completed an approved driving safety course or motorcycle operator training course within the 12 months preceding the date of the current offense, the court has discretion to grant a request to take DSC or MOC if the request is made before the final disposition of the case.

F. Costs

1. Mandatory

Court costs statutes require the defendant to pay all applicable court costs when the case is deferred; the court may also require a $10 administrative fee if the request if made on or before the answer date on the citation.

2. Judge's Discretion

The court has discretion to grant a request to take DSC or MOC if the request is made before the final disposition of the case. If the judge grants the request, the defendant must pay all the required court costs. In addition the judge may require a fee in an amount not to exceed the maximum amount of the fine for the offense. If the person does not complete the course or present the other required evidence, the person is not entitled to a refund of the fee.

G. Required Evidence at End of 90 Days

Before a court may dismiss a charge when a defendant has requested DSC or MOC, the defendant must present the following to the court on or before the 90th day after the request:

- A uniform certificate of completion of the driving safety course or a verification of completion of the motorcycle operator course;
- His or her driving record as maintained by the Texas Department of Public Safety showing that the defendant had not completed an approved driving safety course or motorcycle operator training course, as applicable, within the 12 months preceding the date of the current offense; and
- An affidavit stating that the defendant was not taking a driving safety course or motorcycle operator course, as applicable, for another case on the date the request to take the course was made and had not completed such a course that is not shown on the defendant's driving record within the 12 months preceding the date of the offense.

H. Satisfactory Completion

When the defendant presents all the evidence required, the court shall remove the judgment and dismiss the charge.

I. Failure to Complete Course/Submit Evidence of All Requirements

If a person fails to present the court with the required evidence of course completion, copy of driving record as maintained by the Texas Department of Public Safety; and the affidavit, the court shall set a show cause hearing and notify the defendant by mail of the hearing. If the defendant fails to appear for the show cause hearing, the court shall enter an adjudication of guilt and impose the fine. If the person appears and can show good cause for the failure to furnish evidence to the court, the court may allow an extension of time during which the defendant may present the evidence of course completion.

J. Appeal

If the defendant fails to complete the course or fails to submit all the required evidence and the judge subsequently adjudicates the defendant's guilt, the defendant may appeal the conviction if the municipal court is a non-record municipal court. If the defendant does not appeal, the defendant must pay the fine.

K. Reports to the Texas Department of Public Safety

If the defendant completes the DSC or MOC and presents satisfactory evidence of the other requirements and dismisses the charge, the court reports to the Department of Public Safety the fact that the defendant successfully completed a driving safety course or a motorcycle operator training course under Article 45.0511, C.C.P., and the date of completion.

If the defendant fails to complete the course and the offense charged is a traffic offense, the court reports the conviction to the Department of Public Safety.

II. DEFERRED DISPOSITION

When the court grants deferred disposition, the court defers further proceedings in the case without entering an adjudication of guilty and places the defendant on probation. Only judges have the discretion to grant deferred disposition.

A. Offense eligible for Deferred

Deferred disposition applied to misdemeanor offenses punishable by fine only, with a few exceptions.

- Offense committed in a construction and maintenance work zone with workers are present.
- A minor charged with the offense of consuming an alcoholic beverage is not eligible for deferred disposition if the minor has been previously convicted twice or more of this offense.
- A minor charged with the offense of driving under the influence of an alcoholic beverage is not eligible for deferred disposition if the minor has been previously convicted twice or more of this offense.
- A minor who is not a child (under the age of 17) and who has been previously convicted at least twice of minor consuming alcohol, minor in possession of alcohol, purchase of alcohol y a minor, minor attempting to purchase alcohol, or a misrepresentation of age is not eligible to receive a deferral of a subsequent offense.
- A person charged with a traffic offense who has a commercial driver's license.

B. Proceedings

- The defendant must enter a plea of guilty or nolo contendere or there must be a finding of guilty.
- The defendant must pay court costs before the judge grants deferred.
- The judge may set the probation period up to 180 days.
- The judge may require the defendant to do any of the following:
  - Post a bond in the amount of the fine assessed to secure payment of the fine;

- Pay restitution to the victim of the offense in an amount not to exceed the fine assessed;
- Submit to professional counseling;
- Submit to diagnostic testing for alcohol or a controlled substance or drug;
- Submit to a psychosocial assessment;
- Participate in an alcohol or drug abuse treatment or education program;
- Pay the costs of any diagnostic testing, psychosocial assessment, or participation in a treatment or education program either directly or through the court as court costs;
- Complete a driving safety course approved by the Texas Education Agency or another course as directed by the judge; and
- Present satisfactory evidence that the defendant has complied with each requirement imposed by the judge; and comply with any other reasonable condition.

If the offense is an Alcoholic Beverage Code offense or the Penal Code offense of public intoxication and the defendant is younger than 21 years of age, as a term of the deferral, the court must require the defendant to take an alcohol awareness course. The court must require community service as a term of probation when granting deferred if the offense is one of the following:

- purchase of alcohol by a minor;
- attempt to purchase alcohol by a minor;
- consumption of alcohol by a minor;
- possession of alcohol by a minor;
- misrepresentation of age by a minor; or
- public intoxication if the age of the defendant is at least age 17 and under the age of 21.

For a first offense, the court must require not less than eight or more than 12 hours community service. For a subsequent offense, the court must require not less than 20 or more than 40 hours of community service.

C. Satisfactory Completion

At the conclusion of the deferral period if the judge determines that the defendant has presented satisfactory evidence of compliance with the requirements imposed by the judge, the judge shall

- dismiss the complaint, and
- clearly note in the docket that the complaint is dismissed and that there is not a final conviction.

If the complaint is dismissed, a special expense not to exceed the amount of the fine assessed may be imposed.

D. Failure to Comply with the Terms

When a defendant fails to comply with the terms of probation, the judge may proceed with an adjudication of guilty and then the judge may:

- impose a fine, or
- reduce the fine previously assessed.

E. Expunction

Adult records relating to a complaint dismissed under deferred disposition may be expunged under Article 55.01, C.C.P. Expunction is the process by which the record of a criminal conviction is destroyed or sealed. Under Chapter 55, C.C.P., the defendant must apply to the District Court for the expunction.

If the defendant is under the age of 17 and the defendant completed the terms of the deferral for a penal offense, the defendant may request expunction under Article 45.0216, C.C.P.

F. Appeal

If the defendant fails to complete the terms of probation and the judge subsequently adjudicates the defendant's guilt, the defendant may appeal the conviction if the municipal court is a non-record municipal court. If the defendant does not appeal, the defendant must pay the fine.

G. Reports to the Texas Department of Public Safety

- Traffic offense – if the defendant fails to complete the terms of the deferral and does not appeal, report a conviction to the Department of Public Safety. If the defendant completes the terms of the deferral, do not report anything to the Department of Public Safety.
- Alcoholic Beverage Code offenses – Courts must report to the Department of Public Safety the order of deferred disposition for all minors charged with offenses under the Alcoholic Beverage Code. The report is made at the time the deferred disposition is granted.

ORDER DEFERRING FURTHER PROCEEDINGS (Art. 45.051, CCP)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF** _____
_____	§	_____**COUNTY, TEXAS**

The Court finds that _____, Defendant, (having been found guilty, pled (guilty)(no contest) to the offense of _____, and that the punishment has been set at a fine of $_____ and court costs. Court costs in the amount of _____ are hereby ordered to be paid immediately.

Under the authority of Article 45.051, Code of Criminal Procedure, the Court defers further proceedings without entering an adjudication of guilt until the _____ day of _____, 200__.

DEFERRAL PERIOD: _____, 200__ until _____, 200__ (not to exceed 180 days).

CONDITIONS OF DEFERRED DISPOSITION

DEFENDANT SHALL:

☐ 1. Post a bond in the amount of $_____to secure payment of the fine;
☐ 2. NOT be subsequently convicted of an offense committed after the date of this order to wit:
  ☐ any moving traffic violation incurred in _____ County, Texas during the above stated deferral period, regardless of final conviction date;
  ☐ any non-traffic, fine-only misdemeanor of the same nature as the deferred offense during the above stated deferral period, regardless of final conviction date;
  ☐ any offense against the laws of the state, the United States, or any penal ordinance of any political subdivision of the State;
☐ 3. Submit proof of financial responsibility as required by law to the Court at the termination of the deferral period; said proof showing that Defendant kept in force financial responsibility during the entire deferral period;
☐ 4. Pay restitution to _____ in the amount of $_____ within the deferral period;
☐ 5. Submit to professional counseling as follows: _____;
☐ 6. Submit to diagnostic testing for alcohol or a controlled substance or drug as follows: _____ _____;
☐ 7. Submit to a psychosocial assessment as follows: _____;
☐ 8. Participate in an alcohol or drug abuse treatment or education program, as follows: _____ _____;
☐ 9. Pay the costs of diagnostic testing, psychosocial assessment, or participation in a treatment or education program, as follows: _____;
☐ 10. Perform _____ hours community service at: _____;
☐ 11. Complete an alcohol awareness program approved by the Texas Commission on Alcohol and Drug Abuse;
☐ 12. Complete a driving safety course approved by the Texas Education Agency;
☐ 13. Complete the following course: _____;
☐ 14. Other: _____.
☐ 15. Present to the Court satisfactory evidence of complying with each requirement imposed by the Judge.

Violation of any of the above noted conditions shall constitute a violation of this agreement.

If Defendant successfully complies with the conditions of the agreement, then this case shall be **DISMISSED** by the Court and shall **NOT** be reported as a conviction, but a special expense fee of $_____ (not to exceed amount of fine) will be collected. Failure to comply shall cause this case to result in a **CONVICTION**, payment of a **FINE** of $_____ and the conviction will be reported as required by law.

A copy of this Order was delivered to the Defendant on this date.

Agreed to and signed this the _____ day of _____, 200___. _____
Defendant's Signature

_____
Municipal Court Judge
City of_____
_____County, Texas

Editor's Note: *A person who was under age 17 at the date of the offense may request the Court expunge the records in the above noted cause after successful completion of deferred disposition if the cause is a violation of a Penal Code offense or a violation of a city penal ordinance. (Art. 45.0216(h), CCP)*

REV. 8/03

JUDGMENT – FINAL DISPOSITION OF DEFERRED DISPOSITION (Art. 45.051, CCP)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	_____**COUNTY, TEXAS**

☐ On this the ____ day of _____, 200__, on the above numbered and entitled cause

- ☐ The Defendant, not complying with the terms of deferred disposition, is **Ordered** to pay the fine assessed in the amount of $_____.
- ☐ The Defendant, not complying with the terms of the deferred disposition, the cash bond posted by the Defendant is **Ordered** forfeited to pay the fine assessed in the amount of $_____.
- ☐ It is **Ordered** dismissed on the grounds that the Defendant presented evidence of successful completion of the terms of the deferred disposition.
- ☐ It is **Ordered** that the Defendant pay a special expense fee in the amount of $_____.
- ☐ It is **Ordered** that the cash bond to secure payment of the fine posted by Defendant in the amount of $_____ shall be refunded.

☐ If the Defendant fails to comply with the orders of this Judgment, the Defendant shall be committed to the custody of the Chief of Police of the City of _____, Texas until said fine and costs are fully paid. In the event the Defendant defaults in the discharge of this judgment, pursuant to Article 45.048(b), Code of Criminal Procedure, the Court specifies that the Defendant remain in jail:

_____ hours (*not less than eight or more than 24*) to earn.
_____ (*minimum Dollar amount $50**) to satisfy the fine and costs.

It is further Ordered and Adjudged by the Court that execution may issue against the property of the said Defendant for the amount of such fine and costs.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____

_____County, Texas

*Effective 1/04

REV. 8/03

You may be able to require that this charge be dismissed by successfully completing a driving safety course or a motorcycle operator training course. You will lose that right if, on or before your appearance date, you do not provide the Court with notice of your request to take the course.

Art. 45.0511(q), CCP

ADDED 8/03

REQUEST FOR A DRIVING SAFETY COURSE (Art. 45.0511(b), CCP)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	_____**COUNTY, TEXAS**

I hereby enter my appearance on the complaint of the offense of: _____ (in person)(by counsel)(by certified mail). I understand that I have a right to a jury trial. I hereby waive my right to a jury trial, plead (guilty)(no contest) and elect under Art. 45.0511, CCP, to take a driving safety course.

I understand that I must present to the court the following with this request:

1. a valid Texas driver's license or permit;
2. proof of financial responsibility pursuant to Chapter 601, Transportation Code (automobile liability insurance);
3. payment of court cost; and
4. payment of a $10 nonrefundable fee.

I understand that I must:

1. complete a driving safety course or motorcycle operator training course as applicable within 90 days of this request;
2. submit by the 90th day from this request a uniform certificate of course completion of a driving safety course or a verification of course completion of a motorcycle operator course as evidence of that I have completed such a course;
3. submit by the 90th day from this request an affidavit that I was not taking a such a course nor had I completed one within the preceding 12 months from the date of my current offense that is not shown on my driving record as maintained by the Texas Department of Public Safety; and
4. submit by the 90th day from this request a copy of my driving record as maintained by the Texas Department of Public Safety.

I understand that:

1. if I comply with the court order granting the taking of a driving safety/motorcycle operator course and submit all the required evidence as ordered that the court will dismiss my case and report to the Texas Department of Public Safety the date that I completed my course for inclusion on my driving record;
2. failure to submit all the evidence required by the court, that I will be notified of a show cause hearing and be required to appear before the court to show cause why I did not present the required evidence of course completion;
3. the judge may at the show cause hearing enter a final adjudication against me and require me to pay the fine; and
4. the failure to appear at the show cause hearing will result in a final adjudication being enter against me and that I will be required to pay the fine and any additional costs required by law.

_____ _____

Defendant's Signature Date Defendant's Attorney (if applicable) Date

REV. 8/03

AFFIDAVIT FOR DRIVING SAFETY COURSE (Art. 45.0511(c)(3), CCP)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

AFFIDAVIT*

I, _____, state under oath that on the date of my request for a driving safety course/motorcycle operator training course in the above numbered cause that I was not taking such a course nor had I completed one within the 12 months preceding the date of my current offense that is not shown on my driving record as maintained by the Texas Department of Public Safety.

_____
Defendant's Signature

Sworn and Subscribed before me, the undersigned authority on this the ____ day of _____, 200__.

_____
(Judge)(Court Clerk)(Deputy Court Clerk)
(Notary Public in and for the State of Texas)

***Editor's Note:** *Required to be filed within 90 days of the request for a driving safety course/motorcycle operator course.*

REV. 8/03

DRIVING SAFETY – NOTICE TO DEFENDANT TO SHOW CAUSE (Art. 45.0511, CCP)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	_____**COUNTY, TEXAS**

Name: _____ Offense: _____

Address: _____

You are hereby ordered to appear before the _____ Municipal Court at _____ o'clock ___.m., on the _____ day of _____, 200__, to show cause why you failed to comply with the Court's order in this case by _____, 200__.

Failure to appear on this date and time will result in the issuance of a capias pro fine (arrest warrant) against you based on the judgment of $_____ entered against you when you submitted your plea and request for a driving safety course.

_____
(Judge)(Clerk), Municipal Court

City of_____

_____County, Texas

REV. 8/03

JUDGMENT – DRIVING SAFETY COURSE/MOTORCYCLE OPERATOR TRAINING SAFETY PROGRAM GRANTED (Art. 45.0511, CCP)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

On this the ____day of _____, 200__, the Defendant in the above numbered and entitled cause appeared (by attorney) (in person) (by mail) and entered a plea of (guilty) (no contest) and waived a jury trial; and the Court finds the Defendant guilty of the offense of _____. The Defendant, having been found guilty, is assessed a fine of $_____ plus any and all costs required to be paid.

The Defendant, having elected to take a driving safety course on or before the answer date on the citation, the Court finds that the Defendant meets the requirements for taking a driving safety course, the imposition of this judgment is hereby deferred for a period of 90 days and the Defendant is hereby granted the right to take a (driving safety course) (motorcycle operator training course). The Defendant is ordered to pay immediately all Court costs and fees required by statute or ordinance in the amount of $_____.

The Defendant is required to complete the course by and present evidence to this Court of (a uniform certificate of completion of the driving safety course) (a verification of completion of the motorcycle operator training course) by _____, 200___. Furthermore, when presenting evidence of course completion, the Defendant is order to present a copy of the Defendant's driving record as maintained by the Department of Public Safety showing that the Defendant has not completed an approved driving safety course or motorcycle operator training course, as applicable, within the 12 months preceding the date of the offense and an affidavit stating that the Defendant was not taking a driving safety course or motorcycle operator training course, as applicable, under this article on the date the request to take the course was made and has not completed such a course that is not shown on the Defendant's driving record within the 12 month preceding the date of the offense.

(municipal court seal)

_____
Judge, Municipal Court Date

City of _____
_____County, Texas

. . . . . .

FINAL JUDGMENT

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

☐ On this the ____ day of _____, 200__, on the above numbered and entitled cause

☐ The judgment is **Ordered** removed and the case dismissed on the grounds that the Defendant presented evidence of successful completion of a driving safety course/the motorcycle operator training course and presented the ordered driving record and affidavit under Art. 45.0511, C.C.P.

☐ The Defendant, having not complied with the Court's order set forth above, having been given notice of a show cause hearing, and having failed to show cause why he/she failed to comply with the Court's order, is **Ordered** to pay the fine assessed in the amount of $_____. If the Defendant fails to comply with the orders of this Judgment, the Defendant shall be committed to the custody of the Chief of Police of the City of _____, Texas until said fine and costs are fully paid. In the event the Defendant defaults in the discharge of this judgment, pursuant to Article 45.048(b), Code of Criminal Procedure, the Court specifies that the Defendant remain in jail:

_____ hours (*not less than eight or more than 24*) to earn.
_____ (*minimum Dollar amount $50*) to satisfy the fine and costs.

It is further Ordered and Adjudged by the Court that execution may issue against the property of the said Defendant for the amount of such fine and costs.

(municipal court seal)

_____
Judge, Municipal Court Date

City of _____
_____County, Texas

*Effective 1/04

REV. 8/03

APPLICATION FOR COPY OF DRIVER RECORD

Mail to: Driver Records Bureau, Texas Department of Public Safety, Box 149246, Austin, Texas 78714-9246
MAKE CHECK or **MONEY ORDER PAYABLE TO:** TEXAS DEPARTMENT OF PUBLIC SAFETY
Any questions regarding the information on this form should be directed to Customer Service at 512/424-2600. Allow 2-3 weeks for delivery

CHECK TYPE OF RECORD DESIRED	**FEE**
☐ 1. Name - DOB - License Status - Latest Address.	$ 4.00
☐ 2. Name - DOB - License Status - List of Accidents/Moving Violations in Record within Immediate Past 3 Year Period.	$ 6.00
☐ 2A. CERTIFIED version of #2. This Record Is Not Acceptable for DDC Course.	$ 10.00
☐ 3. Name - DOB - License Status - List of ALL Accidents and Violations in Record. **Furnished to Licensee ONLY.**	$ 7.00
☐ 3A. CERTIFIED version of #3. **Furnished to Licensee ONLY and is Acceptable for DDC Course.**	$ 10.00
☐ Other: (Original Application, DWLS, etc.)_____ (If Required)	$ ____

MAIL DRIVER RECORD TO: (PLEASE TYPE OR PRINT)

Requestor's Name _____ DL Number _____

Address _____

City, State, Zip Code _____ Telephone # _____

If requesting on behalf of a business, organization, or other entity, please include the following:

Name of business, organization, entity, etc. _____

Your Title or Affiliation with above _____

Type of business, organization, etc. _____
(i.e. Insurance provider, towing company, private investigation firm, etc.)

INFORMATION REQUESTED ON:

Texas Driver License # _____ Date of Birth (Month/Day/Year) _____

Last Name _____ First Name _____ Middle/Maiden _____

INDIVIDUAL'S WRITTEN CONSENT FOR *ONE TIME* RELEASE TO ABOVE REQUESTOR

(Requestor, if you do not meet one of the exceptions listed on the back of this form, please be advised that without the written consent of the driver license/ID card holder, the record you receive will not include personal information.)

I, _____, hereby certify that I grant access on this one occasion to my Driver License/ID Card record, inclusive of the personal information (name, address, driver identification number, etc.), to _____

_____ _____
Signature of License/ID Card Holder or Parent/Legal Guardian Date

State and federal law requires requestors to agree to the following:

In requesting and using this information, I acknowledge that this disclosure is subject to the federal Driver's Privacy Protection Act (18 U.S.C. Sect. 2721 et seq.) and Texas Transportation Code Chapter 730. False statements or representations to obtain personal information pertaining to any individual from the DPS could result in the denial to release any driver record information to myself and the entity for which I made the request. Further, I understand that if I receive personal information as a result of this request, it may only be used for the stated purpose and I may only resell or redisclose the information pursuant to Texas Transportation Code §730.013. Violations of that section may result in a criminal charge with the possibility of a $25,000 fine.

I certify that I have read and agree with the above conditions and that the information provided by me in this request is true and correct. If I am requesting this driver record on behalf of an entity, I also certify that I am authorized by that entity to make this request on their behalf. I also acknowledge that failure to abide by the provisions of this agreement and any state and federal privacy law can subject me to both criminal and civil penalties.

_____ _____
Signature of Requestor Date

If you are not requesting a copy of your own record or do not have the written consent of DL/ID holder, you must provide the information requested on the reverse.

DR-1 (Rev. 9/01)

The Texas Department of Public Safety may disclose personal information to a requestor without written consent of the DL/ID holder, on proof of their identity and a certification by the requestor that the use of the personal information is authorized under state and federal law and that the information will be used only for the purpose stated and in complete compliance with state and federal law.

You must meet one or more of the following exceptions if you do not have written consent of the DL/ID holder to be entitled to receive personal information on the above named individual. Please *initial* each category that applies to the requested driver record.

_____ 1. For use in connection with any matter of (a) motor vehicle or motor vehicle operator safety; (b) motor vehicle theft; (c) motor vehicle emissions; (d) motor vehicle product alterations, recalls, or advisories; (e) performance monitoring of motor vehicles or motor vehicle dealers by a motor vehicle manufacturer; or (f) removal of nonowner records from the original owner records of a motor vehicle manufacturer to carry out the purposes of the Automobile Information Disclosure Act, the Anti Car Theft Act of 1992, the Clean Air Act, and any other statute or regulation enacted or adopted under or in relation to a law included in the above.

_____ 2. For use by a government agency in carrying out its functions or a private entity acting on behalf of a government agency in carrying out its functions.

_____ 3. For use in connection with a matter of (a) motor vehicle or motor vehicle operator safety; (b) motor vehicle theft; (c) motor vehicle product alterations, recalls, or advisories; (d) performance monitoring of motor vehicles, motor vehicle parts, or motor vehicle dealers; (e) motor vehicle market research activities, including survey research; or (f) removal of nonowner records from the original owner records of motor vehicle manufacturers.

_____ 4. For use in the normal course of business by a legitimate business or an authorized agent of the business, but only to verify the accuracy of personal information submitted by the individual to the business or the authorized agent of the business and to obtain correct information if the submitted information is incorrect to prevent fraud by pursuing a legal remedy against, or recovering on a debt or security interest against the individual.

_____ 5. For use in conjunction with a civil, criminal, administrative, or arbitral proceeding in any court or government agency or before any self regulatory body, including service of process, investigation in anticipation of litigation, execution or enforcement of a judgment or order, or under an order of any court.

_____ 6. For use in research or in producing statistical reports, but only if the personal information is not published, redisclosed, or used to contact any individual.

_____ 7. For use by an insurer or insurance support organization, or by a self insured entity, or an authorized agent of the entity, in connection with claims investigation activities, antifraud activities, rating or underwriting.

_____ 8. For use in providing notice to an owner of a towed or impounded vehicle.

_____ 9. For use by a licensed private investigator agency or licensed security service for a purpose permitted as stated on this page.

_____ 10. For use by an employer or an authorized agent or insurer of the employer to obtain or verify information relating to a holder of a commercial driver license that is required under 49 U.S.C. Chapter 313.

_____ 11. For use in connection with the operation of a private toll transportation facility.

_____ 12. For use by a consumer-reporting agency as defined by the Fair Credit Reporting Act (15 U.S.C. §1681 et seq.) for a purpose permitted under the Act.

_____ 13. For any other purpose specifically authorized by law that relates to the operation of a motor vehicle or to public safety.

Please state specific statutory authority _____

_____ 14. For use in the preventing, detecting, or protecting against identity theft or other acts of fraud. The Department prior to release of personal information may require additional information.

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TEXAS MUNICIPAL COURTS EDUCATION CENTER

1609 SHOAL CREEK BLVD., SUITE 302 AUSTIN, TEXAS 78701
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1-800-252-3718
FAX (512) 435-6118

Juvenile Statements

OBJECTIVES

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

1. Distinguish between procedures for taking a juvenile statement and other magistrate functions.
2. Compare and contrast taking a juvenile statement with an adult statement.
3. Identify ethical and legal violations associated with taking juvenile statements.

Magistrate Duties: Taking Juvenile Statements

Ryan Kellus Turner
General Counsel
TMCEC

I. Reading the News is Better than being in the News:

II. Hurdles

A. Frequency of Performance
B. Ambiguities in the Law

A. Frequency of Performance - Relatively, Few Juvenile Statements are Taken

According to OCA's ***Annual Report of the Texas Judicial System*** (2003) Municipal Judges as Magistrates:

- Administered 3,696 Juvenile Warnings
- Certified 1,555 Juvenile Statement

B. Ambiguities in the Law

1. Different Statutes (Family Code vs. Code of Criminal Procedure)
2. Terminology

2. Terminology

(a) "Magistrating": Requirements for "adults" similar, not same as "child."

(b) Municipal judges as a magistrate may only conduct detention hearings if the juvenile judge is unavailable

2. Terminology (continued)

(b) The taking of a juvenile statement by a magistrate (Sec. 51.095, FC) is neither a "15.17 hearing" nor a "detention hearing"

(c) The law relating to the taking of a juvenile statement (Sec. 51.095, FC) is also distinguishable from the criminal law relating to when statements may be admitted against a defendant (Art. 38.22, CCP)

3. Application: Sec. 51.095 FC vs. Art. 38.22 CCP

(a) Sec. 51.095, FC applies to:

1. Any person who is questioned under age 17 .
2. A 17 year old questioned for behavior prior to 17.

3. Application (continued)

(b) Sec. 51.095, FC **does not** apply to:

1. A 17 year old questioned about behavior occurring while 17 (Art. 38.22 applies)
2. A 18 year old (or older) investigated for an offense committed before the person became 17 (51.02(2) FC) (Art. 38.22 applies)
3. Criminal proceedings in municipal or justice court (Art. 38.22 applies)

3. Application (continued)

(c) Tranfers and Waivers from Municipal and Justice Court

1. Sec. 51.095 would likely apply to a Class C misdemeanor that is transferred or refilled in juvenile court (persuant to Sec. 51.08, FC) (*Texas Juvenile Law 5th Ed.* p. 282).
2. Fine only offenses other than traffic and tobacco are a category of CINS (Sec 51.03(b)(1)) thus triggering 51.095.

III. Key Observations and Case Law

A. "Custody" Critical in Determining Application of Sec. 51.095, F.C.
B. Certain Requests Don't Invoke 5th Amendment
C. No Right for the Parent/Attorney Presence When Confession is Obtained
D. "Totality of Circumstances" Standard Determines Voluntariness of Confession
E. Police Station Must be a Juvenile Processing Office
F. Transportation Delay Can Invalidate Confession
G. "Magistrate-related" Issues Can Affect Confessions Admissibility

A. Whether a Juvenile was "in Custody" is Critical in Determining Application of Section 51.095, FC

1. ***In the matter of RJH***, 79 S.W.3d 1 (Tex. 2002) -Despite first invalid confession made to police and father, with no magistrate present, subsequent confession was admissible because juvenile was not in custody.
2. ***In re VP***, 55 S.W.3d 25 (Tex. App-Austin 2001) - Questioning by assistant principle not custodial.
3. ***In re MRR***, 2 S.W.3d 319 (Tex.App.-San Antonio 1999) - Questioning not custodial so warnings not required.
4. ***Melendez v. State***, 873 S.W.723 (Tex.App.-San Antonio 1994) - Oral statement from juvenile not in custody and not being interrogated admissible.

B. Certain Requests Do Not Invoke the Right to Counsel

1. ***Fare v. Michael C.,*** U.S. 707 (1979) - Request to see a probation officer does not invoke his Fifth Amendment right.

2. ***In Interest of R.D.,*** 627 S.W.2d 803 (Tex.App.-Tyler - 1982) - Minor's request to talk to his mother did not per se invoke his Fifth Amendment right.

C. There is No Right For a Parent or Attorney to be Present When Confession is Obtained

1. However, Sec. 52.02(b), F.C., requires parental notice that (1) there child has been taken into custody and (2) why their child was taken into custody. AND
2. Sec. 52.025(c), F.C., child shall not be left unattended in the juvenile processing office and is entitled to be accompanied by parent, custodian, guardian, or attorney.
3. Finally, the Legislature in 2003 added the Rights of the Parent (Sub C to Ch. 61 Family Code). Sec. 61.103 provides the right of access to the child. Sec. 61.106 seriously limits the legal implication of such new parental rights being violated.
4. Consider in light of ***Gonzales v. State***, 67 S.W.3d 910 (Tex.Crim.App. 2002) - Failure to notify a parent of arrest does not per se require exclusion of confession absent proof of causal connection.

D. "Total of Circumstances" is the Standard for Determining Voluntariness of a Child's Confession: Key Factors (Fare v. Michael C.)

1. Age
2. Experience
3. Education
4. Background
5. Intelligence

Bottom Line: Did the child have the capacity to understand the warning given, the nature of 5th Amendment rights, and the consequences of waiver?

E. Police Stations Must be Designated a Juvenile Processing Office in Order to Obtain an Admissible Confession

Le v. State, 993 S.W.2d 650 (Tex.Crim.App.1999) Under Section 52.02, Family Code, juveniles can only be questioned in a designated juvenile processing office. They must be brought without undue delay.

F. Unnecessary Delay in Obtaining Confessions or in Transporting the Child Can Render a Confession Invalid

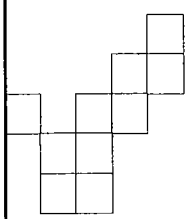
1. ***Comer v. State***, 776 S.W.2d 191 (Tex.Crim.App.1989) - Three hours is too long.
2. ***Contreas v. State***, 67 S.W.3d 181 (Tex.Crim.App.2001) -45 min. delay permissible where police were trying to save the victim's life and secure the crime scene.
3. ***Roquemore v. State***, 60 S.W.3d 862 (Tex.Crim.App.2001) Unlawful to first take a juvenile to recover stolen property before taking him to one of the six places listed in Sec. 52.02 FC

G. Magistrate-related Issues Can Affect Confessions Admissibility

1. ***Vega v. State***, 84 S.W.3d 613 (Tex.Crim.App. 2002) - Where statement taken by police in Illinois did not comply with requirements of the Family Code (including the magistrate function), the statement was inadmissible. Furthermore, for juvenile statements, the sections of the Family Code relevant to confessions prevail over Art. 38.22, Code of Criminal Procedure.

Note: "Good Person" Doctrine

2. ***Spears v. State***, 801 S.W.2d 358 (Tex.App.-Ft Worth 1990) – No reversible error where an officer briefly comes into the room where child and magistrate are situated and whispers something into the magistrate's ear and a civilian witness is present.
3. ***Diaz v. State***, 61 S.W.2d 525 (Tex.App.-San Antonio 2001) - Statement deemed inadmissible where magistrate made error in advising as to punishment range of offense.



Magistrate's Role

FC §51.095

Not Required

- No probable cause determination
- Do not need to inquire if officer has complied with Family Code requirements

Location

- Juvenile Processing Office (FC §52.025)
- Place of temporary detention designated by the Juvenile Board
  - Office or room
  - May be in a police facility or sheriff's offices
  - May not be a cell or holding facility

- Child cannot be in JPO over 6 hours
- Detention in JPO should only be long enough to accomplish one or more of the following:
  - Return to parent
  - Complete required paperwork
  - Photograph or fingerprint
  - Issuance of warnings
  - Receipt of statement

Parent may be present FC §52.025(c)

- Child may have a parent or attorney in the JPO with him
- IMPORTANT: child's right, not parent's right

Officer tells you that the child already confessed orally

- The warning should include that prior oral statement may not be admissible in court

Statement

- The officer can then interview the child, outside of your presence.
- If the child makes a statement, it can be handwritten or typed by
  - The child
  - The officer
  - Or another person
- The child must wait to sign the statement

Signing a written statement

- The statement must be signed in the presence of a magistrate
- No peace officer or prosecutor may be present
  - Unless the magistrate believes a law enforcement officer's presence is necessary for the magistrate's personal safety
  - This officer cannot carry a weapon

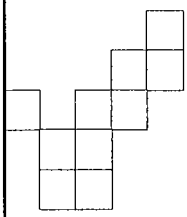
Recording of a Child's Oral Statement FC §51.095(a)(5)

- Audio
- Video
- Warnings given by magistrate are the same as given for written statements except that they must be recorded in the same manner as the oral statement

- Recording Requirements:
  - Recording device is capable of making an accurate recording
  - The operator of the device is competent
  - The recording is accurate and unaltered
  - Each voice on the recording is identified
  - The recording must be preserved until all juvenile or criminal matters relating to any conduct referred to in the statement are final, including the exhaustion of all appeals, or barred from prosecution

Terminating the Process

- The juvenile tells the magistrate he wishes to remain silent
- The juvenile asks for an attorney
- The magistrate is not fully convinced that the juvenile understands



Testifying in Juvenile or District Court

- Establish a basic procedure
- Make notes if you need them to refresh memory
- Formulate an answer to the most frequently asked question by a juvenile- "What should I do?"
  - Your answer must adequately convey your neutrality and avoid giving advice

STATUTORY EXCERPTS

§ 51.095. ADMISSIBILITY OF A STATEMENT OF A CHILD.

(a) Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:

(1) the statement is made in writing under a circumstance described by Subsection (d) and:

(A) the statement shows that the child has at some time before the making of the statement received from a magistrate a warning that:

(i) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;

(ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;

(iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and

(iv) the child has the right to terminate the interview at any time;

(B) and:

(i) the statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child; and

(ii) the magistrate must be fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily, and if a statement is taken, the magistrate must sign a written statement verifying the foregoing requisites have been met;

(C) the child knowingly, intelligently, and voluntarily waives these rights before and during the making of the statement and signs the statement in the presence of a magistrate;
and

(D) the magistrate certifies that the magistrate has examined the child independent of any law enforcement officer or prosecuting attorney, except as required to ensure the personal safety of the magistrate or other court personnel, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights;

(2) the statement is made orally and the child makes a statement of facts or circumstances that are found to be true and tend to establish the child's guilt, such as the finding of secreted or stolen property, or the instrument with which the child states the offense was committed;

(3) the statement was res gestae of the delinquent conduct or the conduct indicating a need for supervision or of the arrest;

(4) the statement is made:

(A) in open court at the child's adjudication hearing;

(B) before a grand jury considering a petition, under Section 53.045, that the child engaged in delinquent conduct;

or

(C) at a preliminary hearing concerning the child held in compliance with this code, other than at a detention hearing under Section 54.01; or

(5) the statement is made orally under a circumstance described by Subsection (d) and the statement is recorded by an electronic recording device, including a device that records images, and:

(A) before making the statement, the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning;

(B) the recording device is capable of making an accurate recording, the operator of the device is competent to use the device, the recording is accurate, and the recording has not been altered;

(C) each voice on the recording is identified;

and

(D) not later than the 20th day before the date of the proceeding, the attorney representing the child is given a complete and accurate copy of each recording of the child made under this subdivision.

(b) This section and Section 51.09 do not preclude the admission of a statement made by the child if:

(1) the statement does not stem from interrogation of the child under a circumstance described by Subsection (d); or

(2) without regard to whether the statement stems from interrogation of the child under a circumstance described by Subsection (d), the statement is voluntary and has a bearing on the credibility of the child as a witness.

(c) An electronic recording of a child's statement made under Subsection (a)(5) shall be preserved until all juvenile or criminal matters relating to any conduct referred to in the statement are final, including the exhaustion of all appeals, or barred from prosecution.

(d) Subsections (a)(1) and (a)(5) apply to the statement of a child made:

(1) while the child is in a detention facility or other place of confinement;

(2) while the child is in the custody of an officer;

or

(3) during or after the interrogation of the child by an officer if the child is in the possession of the Department of Protective and Regulatory Services and is suspected to have engaged in conduct that violates a penal law of this state.

(e) A juvenile law referee or master may perform the duties imposed on a magistrate under this section without the approval of the juvenile court if the juvenile board of the county in which the statement of the child is made has authorized a referee or master to perform the duties of a magistrate under this section.

Added by Acts 1997, 75th Leg., ch. 1086, § 4, eff. Sept. 1, 1997. Amended by Acts 1999, 76th Leg., ch. 982, § 1, eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 1477, § 1, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 1297, § 7, eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 1420, § 21.001(29), eff. Sept. 1, 2001.

§ 52.02. RELEASE OR DELIVERY TO COURT.

(a) Except as provided by Subsection (c), a person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under Section 52.025, shall do one of the following:

(1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;

(2) bring the child before the office or official designated by the juvenile board if there is probable cause to believe that the child engaged in delinquent conduct, conduct indicating a need for supervision, or conduct that violates a condition of probation imposed by the juvenile court;

(3) bring the child to a detention facility designated by the juvenile board;

(4) bring the child to a secure detention facility as provided by Section 51.12(j);

(5) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment; or

(6) dispose of the case under Section 52.03.

(b) A person taking a child into custody shall promptly give notice of the person's action and a statement of the reason for taking the child into custody, to:

(1) the child's parent, guardian, or custodian; and

(2) the office or official designated by the juvenile board.

(c) A person who takes a child into custody and who has reasonable grounds to believe that the child has been operating a motor vehicle in a public place while having any detectable amount of alcohol in the child's system may, before complying with Subsection (a):

(1) take the child to a place to obtain a specimen of the child's breath or blood as provided by Chapter 724, Transportation Code; and

(2) perform intoxilyzer processing and videotaping of the child in an adult processing office of a law enforcement agency.

(d) Notwithstanding Section 51.09(a), a child taken into custody as provided by Subsection (c) may submit to the taking of a breath specimen or refuse to submit to the taking of a breath specimen without the concurrence of an attorney, but only if the request made of the child to give the specimen and the child's response to that request is videotaped. A videotape made under this subsection must be maintained until the disposition of any proceeding against the child relating to the arrest is final and be made available to an attorney representing the child during that period.

Acts 1973, 63rd Leg., p. 1460, ch. 544, § 1, eff. Sept. 1, 1973. Amended by Acts 1991, 72nd Leg., ch. 495, § 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 1013, § 15, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 1374, § 2, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 62, § 6.08, eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 1477, § 5, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 1297, § 12, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 283, § 9, eff. Sept. 1, 2003.

CHAPTER 13 JUVENILE AND MINOR PROCEEDINGS

Q. Juvenile Magistration – Magistrate's Warning for a Written or Oral Juvenile Confession, Sec. 51.095, Family Code

Magistrates are not required to admonish a juvenile regarding discretionary transfer and determinate sentencing possibilities. All that is required is the basic Texas *Miranda* warning. The magistrate must still certify, however, that the juvenile understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived his or her rights.

Checklist 13-27	Script/Notes
☐ 1. Identify yourself to the juvenile.	"My name is _____. I am the Judge of _____ Court."
☐ 2. Determine if the juvenile sufficiently understands the English language or possesses any impairments.	
☐ 3. If necessary, swear a person to act as an interpreter.	Art. 38.30, C.C.P.
☐ 4. If the juvenile is deaf, obtain the services of an interpreter as provided by Art. 38.31, C.C.P., to interpret the warning.	Art. 15.17(c), C.C.P. SEE CHECKLIST 53
☐ 5. All activities must take place in a setting approved by the juvenile court. This means the juvenile processing office, or the office or official designated by the juvenile court as required in Sec. 52.02 of the Family Code.	A "juvenile processing office" should not be confused with the "juvenile curfew processing office" found in Art. 45.059, C.C.P., or a "place of nonsecure custody" described in Art. 45.058, C.C.P.
☐ a. Be sure that you know the policy set out by your local juvenile court or juvenile board as to where a juvenile might be taken for receipt of a statement.	
☐ 6. Advise the juvenile of the following:	Sec. 51.095(a)(1)(A), F.C.
☐ a. "You may remain silent and not make any statement at all and that any statement that you make may be used in evidence against you."	
☐ b. "You have the right to have an attorney present to advise you either prior to any questioning or during the questioning."	
☐ c. "If you are unable to employ an attorney, you have the right to have an attorney appointed to counsel with you before or during any interviews with peace officers or attorneys	

representing the State."

☐ d. "You have the right to terminate the interview at any time."

☐ 7. Advise the juvenile that:

☐ a. "You will not be penalized for not making a statement."

☐ b. "Any prior oral statements made by you are not admissible except if the statement contains assertions of facts or circumstances that are found to be true, and which tends to establish your guilt."

☐ 8. Sign the written warning noting the date and time.

☐ 9. After the statement is reduced to writing, a magistrate must again give a proper warning to the child before the written statement is signed by the juvenile in the presence of the magistrate.

The child's statement may be taken by an electronic recording device—video or tape recording. To be admissible, the following requirement must be satisfied:

1) The juvenile must be given the Texas *Miranda* warning by a magistrate;

2) The confession must be taken in juvenile processing office;

3) The magistrate's warning must be part of the video or tape recording;

4) The juvenile must knowingly, intelligently, and voluntarily waive each right stated in the warning;

5) The recording devise must be capable of making an accurate recording;

6) The person operating the recording device must be competent;

7) Each voice on the recording must be identified;

8) The recording device may not be altered; and

9) Not later than the 20th day

before the proceeding, the juvenile's attorney must be given a compete and accurate copy of each recording of the juvenile.

☐ 10. No law enforcement official or prosecuting attorney can be present except that a magistrate may require a bailiff or law enforcement officer to be present to insure the safety of the magistrate and other court personnel.

  ☐ a. The bailiff or law enforcement officer may not carry a weapon in the presence of the child.

☐ 11. The magistrate must certify in writing that he or she is convinced that the juvenile understands the nature and contents of the statement and signs it voluntarily.

STATUTORY WARNING OF JUVENILE (Sec. 51.095, FC)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	_____**COUNTY, TEXAS**

On this day before me, personally appeared _____, age _____ having been accused of an offense alleged to have been committed in _____ County, Texas, on _____, 200__.

I, _____, in my capacity as a magistrate informed (him)(her) of the following warning:

- ☐ You may remain silent and not make any statements at all;
- ☐ Any statement you make may be used in evidence against you;
- ☐ You have the right to have an attorney present to advise you either prior to any questioning or during any questioning;
- ☐ If you are unable to employ an attorney, you have the right to have an attorney appointed to advise you before or during any questioning and interviews with peace officers or attorneys representing the State; and
- ☐ You have the right to terminate the interview at any time.

I gave the foregoing warnings to the child at _____ o'clock, ____.m. on the _____ day of _____, 200____ at _____*(location)*_____.

_____
Magistrate
Judge of _____ Court

of _____, Texas

I acknowledge that I was given the above warning and I understand my rights as explained to me in the warning.

_____
Person Warned

Juvenile refused to sign acknowledgement of warning.

_____
Magistrate

Remarks:

Magistrate's Verification and Certification for Statement of a Juvenile

Re: Statement of _____, a juvenile.

I, the below listed magistrate of the State of Texas, do hereby **verify and certify** the following:

On _____, 200__, I gave the above named juvenile the warning as required by Section 51.095 of the Texas Family Code. (See the attached warning which is made a part hereof.)

After administering the warning, I examined the juvenile and made the following observations:

☐ Claims to be _____ years of age and reasonably appears to be of that age;

☐ (Can)(cannot) read the _____ language; and
(a) demonstrated to me that (he)(she) could do so; OR
(b) I read the attached warning and statement aloud to the juvenile.

☐ Is a citizen of _____;

☐ Advised me that (he)(she) has completed the _____ grade in school, and is now in the _____ grade in school;

☐ Was not threatened or promised anything by law enforcement officers or any other agents of the State of Texas;

☐ Does not appear to be under the influence of drugs or intoxicating beverages, and informs me that (he)(she) is not under the influence of drugs or alcohol;

☐ Does not appear to have been abused by law enforcement officers, or anyone else, and upon inquiry denies that any type of abuse has occurred;

☐ Shows no signs of psychiatric problems which might be readily apparent, and upon inquiry by the undersigned, the juvenile claims no history of psychiatric treatment or problems;

☐ Appears to understand the meaning of the warnings given and had no questions about the warnings, except as may be described as follows, if any:

_____

_____

☐ Understands what the attached statement says, and agrees that the statement is (his)(her) version of the facts surrounding the said offense, and that the statement is true;

☐ Made the statement voluntarily and of (his)(her) own free will without any improper inducements or prohibited conduct by any law enforcement officers or any other persons;

☐ Indicated that (he)(she) had not been deprived of food, drink or sleep.

☐ Additional observations that I have made during the course of interviewing the said juvenile are as follows, if any:

_____

_____

Only after receiving the proper warning and being examined by the undersigned Magistrate did the juvenile, _____, sign the attached statement.

Based on the foregoing determinations, I, the undersigned Magistrate, do hereby certify as follows:

☐ I have examined the child independently of any law enforcement officer or prosecuting attorney.

☐ I have examined the child in the presence of _____, a (bailiff)(law enforcement officer) employed by _____, whose presence was required to ensure my personal safety and that of other Court personnel, and who did not carry a weapon in the presence of the child.

☐ I have determined that the child understands the nature and content of the statement, and has knowingly, intelligently, and voluntarily waived the rights set out in the warning given pursuant to Section 51.095 of the Texas Family Code.

☐ I am convinced that the child understands the nature and content of the statement, and that the child is signing the statement voluntarily.

☐ The statement was signed by the child in my presence with no law enforcement officer or prosecuting attorney present.

☐ The statement was signed by the child in my presence and the presence of _____, a (bailiff) (law enforcement officer) employed by _____, and who did not carry a weapon in the presence of the child, because I determined that the presence of said (bailiff) (law enforcement officer) was necessary for my personal safety and that of other Court personnel.

THIS CERTIFICATION made by the undersigned magistrate on _____, 200___, at _____ o'clock, ___.m., in _____ County, Texas.

_____
Magistrate's Name (print or type)

_____
Magistrate's Signature

_____
Office Held

THE MAGISTRATE AND JUVENILE CONFESSIONS

Special Topic School
JUVENILES AND THE LAW
Omni Corpus Christi
Corpus Christi, Texas 78401
June 17 – 18, 2003

sponsored by
Texas Municipal Courts Education Center

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386TH District Court
Bexar County, Texas
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THE MAGISTRATE AND JUVENILE CONFESSIONS

by Pat Garza

I. INTRODUCTION

In the area of statement taking and confessions the legislature enacted a number of statutes which pertain exclusively to children. While a child may be taken into custody with less protections and less safeguards than an adult, once that child is in custody, he accorded special protections and safeguards that an adult could only dream about.

The legislature in recognizing the tenuous predicament that children are placed, have attempted to protect them in their interactions with law enforcement. Especially in the area of juvenile confessions, the legislature has gone to great lengths to provide special assistance for children. That assistance has been placed squarely on the shoulders of the magistrate. However, not just any magistrate is allowed to assist a juvenile who wishes to give a statement to the police. The provisions of the code are quite specific, only the "neutral" magistrate is allowed to assist the child before giving any such statement. He is there to inform, explain, and maybe even protect the child from himself, but he is neither the arm of law enforcement, nor the public defender of the child.

II. PREREQUISITES FOR JUVENILE STATEMENTS

A. Must be a Child

The requirements of the §51.095 of the Texas Family Code apply only to the admissibility of a statement given by a child. The term "child" is defined by §51.02(2) of the Texas Family Code and provides:

(2) "Child" means a person who is:
(A) ten years of age or older and under 17 years of age; or
(B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

A child under this section is any person who is under 17 years of age while being questioned. If the person being questioned is 17 years old, but is being investigated for an offense committed while younger than 17, the person is still a child and Section 51.095 applies. If the person was 17 years old when questioned and is

being questioned about an offense committed while 17, the person is not considered a child and Section 51.095 does not apply, but Article 38.22 of the Code of Criminal Procedure does.[1]

If the suspect's age cannot accurately be determined before questioning begins, the safer course of action is to conduct the interrogation under the protections of §51.095. If a statement is taken in compliance with §51.095, it will also comply with the Code of Criminal Procedure Article 38.22. On the other hand, if the officer questions a person (who is a child) under adult rules, there is a substantial risk that the statement may be inadmissible in evidence under §51.095.[2]

B. Must Be Voluntary

All statements which the State attempts to use against a child (whether in custody or out, written or oral) must be voluntary. If the circumstances indicate that the juvenile defendant was threatened, coerced, or promised something in exchange for his confession, or if he was incapable of understanding his rights and warnings, the trial court must exclude the confession as involuntary.[3] A statement is also not voluntary if there was ***"official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker."***[4] In judging whether a juvenile confession is voluntary, the trial court must look to the totality of circumstances.[5]

1. Totality of the Circumstances

The Supreme Court in ***Fare v. Michael C.***, 442 U.S. 707, 99 S.Ct. 2560 (1979), noted that the courts are required to look at the totality of the circumstances to determine whether the government has met its burden regarding the voluntariness of a confession. It then applied the same standard to juveniles:

> ***The totality approach permits – indeed, it mandates – inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.***[6]

In another case, ***E.A.W. v. State,*** a child, age 11, was arrested for burglary and detained from midnight to about nine the next morning. She had no opportunity while in detention to talk with a parent or attorney. Although the confession statute was fully complied with by the police, the Court of Civil Appeals held that the waiver of rights was not voluntary:

> ***...we are confronted with this problem: Can an eleven year old girl of average intelligence for her age, with a sixth grade education, "knowingly, intelligently, and voluntarily" waive her constitutional privilege against self-incrimination, where she has spent from midnight to 9:00 A.M. in the Juvenile Detention Center, and where she has had no guidance from or the presence of a parent or other adult in loco parentis, or an attorney? We think not. In our opinion, a child of such immaturity and tender age cannot knowingly, intelligently, and voluntarily waive her constitutional privilege against self-incrimination in the absence of the presence and guidance of a parent or other friendly adult, or of an attorney.***[7]

2. Factors

The factors mentioned in ***Fare***, are not the only factors that should be examined to determine whether a confession by a juvenile is voluntary. There are many factors that can be considered.

The circumstances that should be addressed by the child's attorney should include but not be limited by the following:

1. The child's age, intelligence, maturity level, and experience in the system;
2. The length of time left alone with the police;
3. The absence of a showing that the child was asked whether he wished to assert any of his rights;
4. The isolation from his family and friendly adult advice;
5. The failure to warn the appellant in Spanish;
6. The length of time before he was taken before a magistrate and warned.

In any situation where a child has given up a right to a person in authority, undue influence by that person, while unintentional, is a factor on the issue of voluntariness.

III. WRITTEN CONFESSIONS

Before the 1996 amendments to §51.095, in order to take a written statement from a child who was in custody the child would have to be brought before a magistrate and that magistrate had to go over a very long detailed list of warnings prior to allowing the questioning of the child. The warnings included traditional Miranda warnings and warnings regarding Certification and Transfer and Determinate Sentencing offenses. The legislature simplified the provision.

§51.095. Admissibility of a Statement of a Child

(a) Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:

(1) the statement is made in writing under a circumstance described by Subsection (d) and:

(A) the statement shows that the child has at some time before the making of the statement received from a magistrate a warning that:

(I) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;

(ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;

(iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and

(iv) the child has the right to terminate the interview at any time;

(B) and:

(I) the statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child; and

(ii) the magistrate must be fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily, and if a statement is taken, the magistrate must sign a written statement verifying the foregoing requisites have been met;

(C) the child knowingly, intelligently, and voluntarily waives these rights before and during the making of the statement and signs the statement in the presence of a magistrate; and

(D) the magistrate certifies that the magistrate has examined the child independent of any law enforcement officer or prosecuting attorney, except as required to ensure the personal safety of the magistrate or other court personnel, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights;

The statute still requires an officer taking the child before a magistrate, prior to the taking of a statement, but only the Miranda warnings are necessary.[8] It no longer requires the detailed warnings related to certification and determinate sentencing offenses.

A. Attorney May Be Waived (Even if currently represents child)

The statute appears to allow the taking of a statement of a child even when he is represented by an attorney. While §51.09 (Waiver of Rights) requires that a child can not waive a right without the agreement of his attorney, §51.095 begins... **"Notwithstanding Section 51.09..."** As a result, a child can waive his right to counsel both before and after he is being represented by counsel.

In ***Vega v. State,*** an unpublished opinion from Corpus Christi, the child had given a statement and was being held in the juvenile detention facility. An investigator took Vega from the juvenile detention center, pursuant to court order, for the purpose of going for a medical exam. He said that Vega, on his own initiative, indicated a desire to amend the statement that he had given on August 28. After Vega was again given proper warnings in accordance with the Texas Family Code, his amended statement was reduced to writing and signed by Vega after the proper admonishments by a justice of the peace. The juvenile court had appointed an attorney to represent Vega prior to his giving the amended statement. The investigator had sought to notify Vega's attorney about the fact that Vega was in the process of amending his statement, but the attorney was unavailable at the time of his call. The investigator notified Vega that his attorney was unavailable. Vega did not seek any additional time in order to consult with his attorney. The court held:

> ***...that where, as here, the making of the new statement originated with Vega, and where that statement meets the admissibility requirements set forth in TEX. FAM. CODE § 51.095, the statement is admissible even though the juvenile's attorney does not join in waiving the juvenile's rights.***[9]

B. The Neutral Magistrate

1. Magistrate Defined

The confession statute requires that warnings be given to the child by a neutral magistrate. Magistrate is defined in Article 2.09 of the Texas Code of Criminal Procedure:

> **Art. 2.09. Who Are Magistrates**
> **Each of the following officers is a magistrate within the meaning of this Code: The justices of the Supreme Court, the judges of the Court of Criminal Appeals, the justices of the Courts of Appeals, the judges of the District Court, the magistrates appointed by the judges of the district courts of Bexar County, Dallas County, Tarrant County, or Travis County that give preference to criminal cases, the criminal law hearing officers for Harris County appointed under Subchapter L, Chapter 54,**

Government Code, the magistrates appointed by the judges of the district courts of Lubbock County or Webb County, the magistrates appointed by the judges of the criminal district courts of Dallas County or Tarrant County, the masters appointed by the judges of the district courts and the county courts at law that give preference to criminal cases in Jefferson County, the magistrates appointed by the judges of the district courts and the statutory county courts of Williamson County, the county judges, the judges of the county courts at law, judges of the county criminal courts, the judges of statutory probate courts, the masters appointed by the judges of the statutory probate courts under Subchapter G, Chapter 54, Government Code, the justices of the peace, the mayors and recorders and the judges of the municipal courts of incorporated cities or towns.

In a nutshell they are : The justices of the Supreme Court, the judges of the Court of Criminal Appeals, the justices of the Courts of Appeals, the judges of the District Court, some magistrates appointed by District and County Courts, some criminal law hearing officers (Harris County), county judges, judges of the county courts at law, judges of the county criminal courts, the judges of statutory probate courts, the masters appointed by the judges of the statutory probate courts, justices of the peace, mayors and recorders and judges of the municipal courts of incorporated cities or towns.

2. Referee as Magistrate

The Juvenile Referee is not a magistrate as defined by Article 2.09 of the Texas Code of Criminal Procedure. In 1999, the legislature added §51.095(e), which allows referees to perform the duties of the magistrate if approved by the juvenile board in the county where the statement is being taken.[10]

3. The Warnings

Under §51.095(a)(1)(A) the magistrate must give the child the following warnings:

(I) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;
(ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;
(iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and
(iv) the child has the right to terminate the interview at any time;

These are the same warnings required by the United States Supreme Court, in ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602 (1966). The difference for a child is

that these warnings must be given by a magistrate, whereas, for an adult the warnings can be given by either a magistrate or a law enforcement officer.

The magistrate must be sure that he gives the proper warnings. In ***Diaz v. State***, the magistrate misstated the maximum range of punishment. He told sixteen year old Daniel Diaz that he "might get up to a year in confinement or up to a $ 10,000 fine if he were tried as an adult." The actual maximum prison term in the adult system is up to 99 years for aggravated assault with a deadly weapon. Daniel was certified to stand trial as an adult, and the trial court overruled his objection to the introduction of his confession into evidence. Daniel was convicted on two counts of aggravated robbery and assessed two concurrent fifteen year sentences. The appeals court found that defendant's decision to give a statement following the misstatement regarding the possible punishment, rendered that decision involuntary.[11] The child's age at the time of his statement further emphasized its involuntary nature in viewing the totality of the circumstances. Since the statement was undoubtedly inculpatory, the court could not conclude that the admission of the statement did not contribute to his conviction.

While the warnings must be given by the magistrate, there is no statutory requirement that the warnings be given without a law enforcement officer or prosecuting attorney being present in the room at the time the warnings are given. That requirement is restricted to when the child signs the statement.

Once the child has been given the proper warnings by the magistrate, the child may not be questioned unless he or she has "knowingly, intelligently, and voluntarily" waived the rights he or she was informed of by the magistrate's warnings. The waiver must be made "before and during the making of the statement."[12]

4. Signing the Statement

Once the child has been warned by the magistrate, if he or she agrees to being interviewed without an attorney, the police may do so. If the child makes a writing, the officer may write out the statement, have someone write out the child's statement, or ask the child to do so, but must not have the child sign statement.

Section 51.095(a)(1)(B)(I) provides:

> **(I) the statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child; and**

The statement must be signed in the presence of the magistrate. It must be signed with no law enforcement officer or prosecuting attorney present. A bailiff may be allowed, but he may not carry a weapon in the presence of the child.

5. Findings of the Magistrate

Section 51.095(a)(1)(B)(ii) provides

(ii) the magistrate must be fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily, and if a statement is taken, the magistrate must sign a written statement verifying the foregoing requisites have been met;

Once the statement has been reduced to writing, it is the Magistrate, through his discussions with the child (outside the presence of the officer) who must be convinced that the child understands the nature and content of the statement. He must be convinced that the child is voluntarily given up his rights as he himself has explained them to him. The magistrate would then have the child sign the statement in his presence. The magistrate then certifies that he has examined the child independent of any law enforcement officer or prosecuting attorney, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights.[13]

If the juvenile tells the magistrate that he or she wishes to remain silent, then there should be no questioning. If the child indicates that he or she wishes to consult with an attorney prior to questioning, then there must be no questioning until the juvenile has consulted with counsel. If the magistrate is unable to provide counsel for a juvenile who requests an attorney and cannot afford one, then there should be no questioning of the juvenile at all.[14]

C. Parental Presence

There is no requirement that the Magistrate notify the juvenile's parent of his interrogation when the juvenile does not request the parent's presence. In ***Glover v. State***, UNPUBLISHED, No. 14-95-00021-CR, 1996 WL 384932, 1996 Tex.App.Lexis 2935 (Tex.App. – Houston [14th Dist.] 1996), the court stated the following:

> ***We first note that the Family Code does not require that a juvenile be allowed to speak with a parent or guardian prior to making a statement. See TEX. FAM. CODE ANN. §§ 51.09 (Vernon 1986 & Supp. 1996). Also, Texas courts have held that a juvenile's request to speak to a parent is not a per se invocation of that individual's Fifth Amendment rights. In the Interest of R.D., 627 S.W.2d 803, 806 (Tex. App.–Tyler 1982, no writ).***

Here, a magistrate gave appellant all the proper warnings before he made his statement.[15]

However, if the child has recently been taken into custody, and law enforcement is attempting to obtain a statement from the child, law enforcement must be aware of two provisions that may effect the validity of the statement. First, § 52.02(b) requires that a parent be notified "promptly" when their child has been taken into custody. Statements have been thrown out of court because of an officer's neglect in notifying the parent of the child's arrest.[16] Secondly, § 52.025(c) entitles the child to have a parent present in the juvenile processing office.[17] Since most interrogations and confessions are required to be conducted in a juvenile processing office,[18] it would be prudent for someone to inform the child of this entitlement. While not spelled out in the statute, I would recommend that the magistrate advice the child of this entitlement when he is informing him of his rights. (See Part VI, Section B, Subsection 3, of this paper)

The juvenile processing office is the place a law enforcement officer must take the child if he intends to have any extended interactions with child after the initial arrest. If a child is brought to a magistrate from some other person or place (i.e. detention), and not as a result of a recent arrest, there is no juvenile processing office requirement and no parental entitlement. The parental entitlement goes to the juvenile processing office and not to the taking of the statement. However, be aware a child being brought from detention to give a statement may already be represented by an attorney.

D. Tape Recorded Custodial Statements

Section 51.095(a)(5) allows for the admission of an oral statement if the statement is tape recorded (including video).

Section 51.095(a)(5) provides:

> **(A) before making the statement, the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning;**
>
> **(B) the recording device is capable of making an accurate recording, the operator of the device is competent to use the device, the recording is accurate, and the recording has not been altered;**
>
> **(C) each voice on the recording is identified; and**
>
> **(D) not later than the 20th day before the date of the proceeding, the attorney representing the child is given a complete and accurate copy of each recording of the child made under this subdivision.**

Section 51.095 (a)(5) provides for the admissibility of an oral statement if when the child is in a detention facility or other place of confinement or in the custody of an officer the statement is recorded and the child is given his warnings, as stated above (Miranda Warnings), ***on the recording*** and it appears that the waiver is made knowingly, intelligently, and voluntarily.[19] The warnings still have to be given by a magistrate. The attorney representing the child must be given a complete and accurate copy of each recording not later than the 20th day before the date of the proceeding.

IV. POLICE DETENTION AND RELEASE DECISIONS

> **"A statement by a juvenile that is otherwise admissible under section 51.09 [51.095] may be found to be inadmissible if the requirements of section 52.02(a) are not followed."**
>
> ***Comer, 776 S.W.2d at 195-96***

Once a law enforcement officer has taken a child into custody he is given very strict guidelines by the Family Code as to how he can proceed and a juvenile's statement will be inadmissable for violations of section §52.02(a) notwithstanding the fact that the statement was otherwise admissible under section §51.095.[20] Every person who takes a child into custody must fully comply with §52.02 and §52.025 of the Family Code.

A. Release Or Delivery to Court.

52.02. Release or Delivery to Court

(a) Except as provided by Subsection (c), a person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under Section 52.025, shall do one of the following:

(1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;

(2) bring the child before the office or official designated by the juvenile court if there is probable cause to believe that the child engaged in delinquent conduct or conduct indicating a need for supervision;

(3) bring the child to a detention facility designated by the juvenile court;

(4) bring the child to a secure detention facility as provided by Section 51.12(j);

(5) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment; or

(6) dispose of the case under Section 52.03.

The statute has three requirements once the juvenile is taken into custody: 1) the officer must do one of six enumerated acts; 2) without unnecessary delay; ***and*** 3) without first taking the child to any place other than a juvenile processing office. By the clear language of the statute, it is not merely a question of whether the officer does one of the six enumerated options without unnecessary delay, but also whether he took the juvenile to any other place first.[21]

1. Comer v. State

Comer v State, 776 S.W.2d 191 (Tex. Crim. App. –1989).

Comer was arrested and taken to a magistrate for the Section 51.095 warnings. He was then questioned at the police station for almost two hours, where he confessed to murder. Upon return to the magistrate, he signed the written confession. The Court of Appeals upheld the admission of the written confession into evidence in the criminal trial on the grounds that compliance with Section 51.095 was all that was required.

At the time that ***Comer*** was heard, Section 52.025 was not in existence. The Court of Criminal Appeals reversed, rejecting the argument that the enactment of Section 51.09(b) [now Section 51.095] should be read as creating an exception to the requirement of Section52.02.

> ***...once he has a found cause initially to take a child into custody and makes the decision to refer him to the intake officer or other designated authority, a law enforcement officer relinquishes ultimate control over the investigative function of the case... In our view the Legislature intended that the officer designated by the juvenile court make the initial decision whether to subject a child to custodial interrogation. He can take a statement himself, consistent with §51.09(b)(1) ... at the detention facility, or, pursuant to §52.04(b), he can refer the child back to the custody of law enforcement officers to take the statement. This construction gives effect to the Legislature's revised attitude that a juvenile is competent to waive his privilege against self incrimination without recourse to counsel, while preserving in full its original intention that involvement of law enforcement officers be narrowly circumscribed.***

In 1991 Section 52.025 was enacted to authorize each juvenile court to designate "juvenile processing offices" for the warning, interrogation and other handling of juveniles. Section 52.02 was amended to authorize police to take an arrested juvenile to "a juvenile processing office" designated under Section 52.025 of the Family Code. While Section 52.025 was enacted to give law enforcement more options after ***Comer,*** the Court of Criminal Appeals has reiterated its holding and has

once again sent a message to law enforcement regarding continuous contact with children after arrest.

2. John Baptist Vie Le v. State

John Baptist Vie Le v. The State of Texas, 993 S.W.2d 650 (Tex. Crim. App.–1999).

John Baptist Vie Le was arrested by a law enforcement officer who wanted to take the child's statement. The officer first took Le to a magistrate to receive the required warnings. Then the officer took the juvenile directly to the homicide division of the police department, where he interviewed him and obtained a statement from him. Le gave a statement admitting his part in a murder and an attempted robbery, but he did not sign the statement at that time. Le, was then taken to another magistrate and given the warnings again. At that time he signed his statement, without any police officers being present. The statement was offered by the State at Le's trial. Le filed a motion to suppress his statement, which was denied. He was tried as an adult for capital murder and sentenced to life in prison.

In Le, the following occurred:

1. Le was arrested
2. Le was taken to a magistrate
3. The magistrate gave Le the required warnings
4. The officer took Le to the homicide division of the police department to obtain the statement
5. Le gave the officer a written statement in the homicide office
6. Le was taken before a second magistrate
7. The second magistrate gave Le the required warnings
8. Le signed the statement before the second magistrate outside the presence of the officer.

The court examined §52.02(a)(2), & (3), and §52.05(a) & (b) of the Texas Family Code, which states that an officer taking a child into custody had to take the child to an office designated by the juvenile court if there was probable cause the child had engaged in delinquent conduct, or to a juvenile court designated detention facility.

The court concluded that appellant's statement was taken in violation of the Family Code, and reversed and remanded the case for the appeals court to consider whether admission of the improper statement had harmed appellant.

The Court in its opinion discussed the Legislative intent of §52.025. It stated that the Legislature envisioned the "juvenile processing office" in §52.025 as little more than a temporary stop for completing necessary paperwork pursuant to the arrest.

In Le the detective took the child to a city magistrate, which, according to testimony presented at the hearing, had been designated by the juvenile court as a "juvenile processing office." He then took Le to the homicide division of the Houston police department to obtain a statement. The homicide division was not one of the five options listed in §52.02(a).

Upon leaving the juvenile processing office, the detective was required to do one of the five options listed in §52.02(a) "without unnecessary delay." Taking Le to the homicide division did not constitute any of these five options and as a result violated the Family Code by his actions. The Court stated that the detective could have obtained the statement at the processing office, but was not required to. The detective did not error by obtaining the statement at the homicide division. His mistake was in not complying with the statute and "without unnecessary delay," taking Le to a juvenile officer or detention facility. A juvenile officer could have, at that point, referred the case back to the detective for the purpose of obtaining a statement.

The Court recognized in ***Comer v. State,*** ten years earlier, that the language of §52.02 dictated what an officer ***must*** do "without unnecessary delay" when he takes a child into custody. The Court concluded, then, that:

> ***the clear intent of the statutory scheme as a whole... from this point on [is that] the decision as to whether further detention is called for is to be made, not by law enforcement personnel, but by the intake or other authorized officer of the court... It appears that... the legislature intends to restrict involvement of law enforcement officers to the initial seizure and prompt release or commitment of the juvenile offender.***[22]

In reaffirming its decision in ***Comer*** the Court of Criminal Appeals stated:

> ***"...we must not ignore the Legislature's mandatory provisions regarding the arrest of juveniles. We informed the citizenry, a decade ago in a unanimous opinion, of the Legislature's clear intent to reduce an officer's impact on a juvenile in custody. Today we remind police officers of the Family Code's strict requirements."***[23]

3. Unnecessary Delay

In ***Roquemore v. State***, a Court of Criminal Appeals opinion, the officer instead of taking the respondent directly to a juvenile processing office, at the

respondent's request took him to the place where he had said stolen property was hidden. After quoting ***Comer*** and ***Baptist Vie Le*** the court stated:

> ***The procedure and options are clear in section 52.02(a), and first taking the juvenile, at his own suggestion, to the location of stolen property is not enumerated. Because the appellant was not transported to the juvenile division "without first being taken to any other place," the officers violated section 52.02(a). Comer, 776 S.W.2d at 196-97.***[24]

In ***In the Matter of D.M.G.H.***, it was an "unnecessary delay" to arrest a juvenile at 12:30 p.m., hold her at the police station before taking her before a magistrate at 7:25 p.m., and then taking her to the detention center at 10:20 p.m.. The State attempted to justify the delay on the grounds that it was necessary to complete the paperwork on the case before taking the child to juvenile detention. The court rejected the state's argument and reversed the adjudication of delinquency ruling that the child's statement should have been suppressed.[25]

In ***In re G.A.T.***, it was an unnecessary delay for the officer, after taking four juveniles into custody, to take them back to the scene of the crime for identification rather than taking them directly to a designated juvenile processing office.[26]

4. Necessary Delay

> ***This section of the Family Code "by its very terms contemplates that 'necessary' delay is permissible." Whether the delay is necessary is "determined on a case by case basis."***[27]

In ***Contreras v. State***, a Court of Criminal Appeals opinion, it was a "necessary delay" to hold a child in a patrol car at the scene of an offense for 50 minutes before bringing her to the juvenile processing office to obtain a statement. The court accepted the state's argument that the delay was necessary because police were attending to the victim and interviewing witnesses to the offense.[28] The delay was considered deminimus.

5. Notice To Parents

Section 52.02(b) states:

> **52.02(b). A person taking a child into custody shall promptly give notice of his action and a statement of the reason for taking the child into custody, to:**
>
> **(1) the child's parent, guardian, or custodian; and**
>
> **(2) the office or official designated by the juvenile court.**

In ***Gonzales v. State,*** the court held that section 52.02(b)(1) was not satisfied where the evidence at the hearing on the juvenile's motion to suppress did not show that the juvenile's parents had been notified at all.[29]

In ***State v. Simpson***, the Tyler Court of Appeals affirmed the trial court's suppression of a juvenile's confession pursuant to section 52.02(b) when the juvenile's mother was not notified until the Sunday evening following his arrest at 11:00 a.m. on the preceding Friday.[30]

In ***In the Matter of C.R.,*** Police failed to notify the respondent's mother that her son had been taken into custody and the reason for doing so. At a minimum, one hour elapsed from the time the respondent was taken into custody until the initial contact with his mother. In addition, police discouraged her from coming to the police station to see her son and ultimately notified her only when the respondent was taken to the juvenile detention facility. The Court held that the requirement of parental notice had been violated and that the written statement given during the period of violation should have been excluded from evidence.[31]

It is the responsibility of the person taking the child into custody to notify the parents of the arrest with a statement of the reason for taking him into custody. In ***Pham v. State***, the police officer arrested the child at school, took the child to a magistrate to have the child's warning explained, then returned the child to a processing office to take his statement, but failed to contact the child's parents. The court reversed stating:

> ***The duty to notify a child's parents belonged to the "person taking a child into custody," i.e., Officers Hale and Parish, and [*12] their supervisor, Officer Miller in this case. It was their responsibility to see to it that notice of appellant's arrest, with a statement of the reason for taking him into custody, was promptly given to appellant's parents and the official designated by the juvenile court. These officers were apparently oblivious to the fact they had such a duty, and they did not perform as required.***[32]

The court, citing ***Comer,*** held that the child's statement should have been suppressed for failure to comply with the requirements of Section 52.02 and 52.025. Under ***Pham***, when a child is taken into custody at school, the person taking the child into custody must notify the parents. That responsibility can not be delegated to the school or probation official, but must be made by the person taking the child into custody.

In ***Hill v. State,*** the child was arrested shortly before 9:25 a.m., but his mother was not contacted until 1:45 p.m., 4 hours and 20 minutes later. The detective never

attempted to contact anyone, testifying he was busy working the crime scenes, collecting evidence, and taking the child's statement. The court found that while the four hour and twenty minute delay standing alone might not warrant reversal pursuant to section 52.02(b), the impact of the delay was enhanced by the fact that the juvenile was in the process of deciding whether or not to waive important constitutional rights. It is also noteworthy that his mother was reached by telephone on the very first attempt immediately after the child's confession had been obtained following his on-again off-again attempts to claim his constitutional rights. There was scant direct evidence in the record of any efforts to contact her or anyone else until after the confession was obtained. Under these circumstances the court held that this was not prompt notification under §52.02(b) of the Family Code.[33]

6. DWI and the Intoxilyzer Room

When an officer has reasonable grounds to believe a child who is operating a motor vehicle has a detectable amount of alcohol in his system the officer can take a statutory detour to an intoxilyzer room. The officer does not have to have probable cause to believe a child is DWI to take that child to a place to obtain a breath sample. If the child is operating a motor vehicle and the officer detects ***any amount of alcohol*** in the child's system he can take the child to the adult intoxilyzer room.[34]

Subsection (d) of 52.02, allows for a child to submit to the taking of a breath specimen or refuse to submit to the taking of a breath specimen without the concurrence of an attorney, but only if the request made of the child to give the specimen and the child's response to that request is videotaped.[35] An officer who follows the procedure for taking the breath test for an adult may not get it right. The statute requires that the request by the officer and the consent or refusal by the child must be on the videotape. If it is not on the videotape, the officer must have the concurrence of an attorney regarding the child's consent to the test.

B. Juvenile Processing Office

Section 52.02, however, does provide for an exception. The officer ***may*** first take the child to "a juvenile processing office designated under Section 52.025." That is an option for the officer, not a requirement. It is, in essence, a seventh option (there is also an eighth option - See Subsection 6 below; DWI and the Intoxilyzer Room). The taking of a juvenile to a juvenile processing office, however, does not dispense with the requirement that, subsequently, the officer, "without unnecessary delay, "do one of the six possibilities listed in §52.02(a).[36]

The processing office is a temporary location that allows an officer to do certain specific things. The options in §52.02(a) are permanent options, while the juvenile

processing office is a temporary option (no longer than six hours). If the officer decides to take the child to a juvenile processing office, he must eventually take the child to one of the options in §52.02(a). One office cannot be both a juvenile processing office and one of options listed in §52.02(a).[37]

52.025. Designation of Juvenile Processing Office

(a) The juvenile court may designate an office or a room, which may be located in a police facility or sheriff's offices, as the juvenile processing office for the temporary detention of a child taken into custody under Section 52.01 of this code. The office may not be a cell or holding facility used for detentions other than detentions under this section. The juvenile court by written order may prescribe the conditions of the designation and limit the activities that may occur in the office during the temporary detention.

(b) A child may be detained in a juvenile processing office only for:

(1) the return of the child to the custody of a person under Section 52.02(a)(1);

(2) the completion of essential forms and records required by the juvenile court or this title;

(3) the photographing and fingerprinting of the child if otherwise authorized at the time of temporary detention by this title;

(4) the issuance of warnings to the child as required or permitted by this title; or

(5) the receipt of a statement by the child under Section 51.095(a)(1), (2), (3), or (5).

(c) A child may not be left unattended in a juvenile processing office and is entitled to be accompanied by the child's parent, guardian, or other custodian or by the child's attorney.

(d) A child may not be detained in a juvenile processing office for longer than six hours.

There is no mandatory requirement that a child be taken to a juvenile processing office. It is only an option (to do certain specified tasks) before control of the child is permanently relinquished to another by the officer. The juvenile processing office is the only temporary option (other than a DUI suspect) an officer has before utilizing the six permanent options presented in §52.02(a). [38]

In ***Anthony v. State***, the 4th Court in San Antonio ruled that a statement was illegally obtained and could not be admitted to support a criminal conviction because the officers did not contact the juvenile officer or take the required step of processing defendant in an area specifically utilized for juveniles.[39]

In ***In re R.R.***, a Corpus Christi Court of Appeals case, officers took the juvenile directly to the police station, but because no evidence showed that the juvenile was detained in an office designated as the "juvenile processing office," the confession was illegally obtained and, therefore, inadmissible.[40]

But see also, ***Williams v. State***, where the officer picked up Williams at the Bexar County jail because he had given a false name to the arresting officer. The officer who picked up Williams determined that he was a child and took the child to the homicide office to take the child's statement. The homicide office was not a designated juvenile processing office. The juvenile processing office that was normally used was being remodeled and under construction. A second juvenile processing office was locked and unavailable. The court stated that the purpose for requiring juveniles to be interrogated in specially designated areas is to protect them from exposure to adult offenders and the stigma of criminality. Because no one else was in the homicide office at the time Williams made his statement, this purpose was fulfilled. To hold that Williams's statement was inadmissible under these circumstances would be to place form above substance. The court also noted...

> ***...the interest in achieving the purpose of sections 52.02 and 52.025 is somewhat diminished in this case, given that Williams had already been exposed to adult offenders and the stigma of criminality when he was booked into the Bexar County Jail as a result of his own misrepresentations.***

1. Juvenile Court Designation

Under §52.025, the juvenile board has the responsibility for designating the juvenile processing office. Whether such a designation has been made and, if so, whether the police have remained within the bounds of the designation, can determine the admissibility of any statements obtained. If the juvenile board has not designated a juvenile processing office or an office or official under §52.02(a)(2), the police, unless they immediately release the child to parents, must bring the child directly to the designated detention facility and may not take him or her to the police station for any purpose. The juvenile board has the responsibility to specify the conditions of police custody and length of time a child may be held before release or delivery to the designated place of detention. However, under §52.025 the maximum length of detention in a juvenile processing office is six hours. If a child is taken to a police facility that has not been designated as a juvenile processing office, or if the terms of the designation are not observed, the detention becomes illegal and any statement or confession given by the child while so detained may be excluded from evidence.

2. The Processing Office

There can be multiple juvenile processing office designations within each county.[41] Generally, every law enforcement agency which may take a child into custody should have a juvenile processing office. No special formality is required, but the best practice would have a representative of the juvenile court, if not the judge

himself or herself, inspect the office or room for compliance with the provisions of this section. If the room or office is, and will be, in compliance with the provisions of this section, the court should issue an order certifying the room or office along with any other restrictions the court deems appropriate. The certification of the room or office should have some specificity.

A general designation such as "the police station" or "the sheriffs' office" located at 111 Main, is insufficient. Section 52.025(a) refers to ***an office or room*** which may be located in a police facility or sheriffs' office. Courts have held that a designation of the entire police station was unlawful and not in compliance with the statute.[42]

3. Parental Presence

Section 52.025(c) states:

> **(c) A child may not be left unattended in a juvenile processing office and is *entitled to be accompanied by the child's parent, guardian, or other custodian* or by the child's attorney [emphasis added].**

Like Section 52.02, the provisions of Section 52.025 must be strictly adhered to. A two hour delay in notification of parents by officers who took the child to a processing office to take statement invalidated confession.

> ***... If the arresting officers had promptly notified appellant's parents of his arrest approximately two hours before his confession, there would have been time for them to get to the juvenile processing office at 1200 Travis before the confession. n4 As in Comer, we cannot say with any degree of confidence that if appellant had access to his parents or his attorney, he would still have chosen to confess to the crime.***[43]

In ***In The Matter of C.R.,*** the court held that by requiring the arresting authority to give notice of the arrest to a parent, the legislature gave the choice of whether or not to be present to the parent. The court further stated that the legislature may well have concluded that juveniles are more susceptible to pressure from officers and investigators and that, as a result, justice demands they have available to them the advice and counsel of an adult who is on their side and acting in their interest.[44] Section 52.025(c) takes that intent one step further. The entitlement to have a parent present in the processing office is not lessened because an officer is attempting to obtain a statement from a child. Section 51.095 governs how to proceed in the taking of a statement of a child in custody, but Section 52.025 governs how to proceed if the child is taken to a processing office, including if the child is being taken there for the purposes of obtaining a statement. An officer who has taken a child into custody and who wishes to take the child's statement must notify the child's parent of the arrest,

fully comply with Section 51.095, and if the child is taken to a processing office, notify the child of his right to have his parent present. Even then, under ***Li*** the officer must be very careful to comply with Section 52.02 or the statement may be inadmissible.

Whose responsibility is it to inform him of this right? The child may be at the processing office for a short period of time and to allow the officer to complete paperwork. Even then, the statute entitles the child to have a parent or guardian present.

The decisions in ***Comer*** and ***Le*** appear to require strict adherence to the requisites of §52.02 and §52.025. Parents should be notified of a child's arrest and the child should be advised of his right to have his parent or guardian present in the processing office, and if the child wishes to have them there, reasonable attempts should be made to have them there.

Many questions can be raised about the interpretation of this statute. Can the parent or guardian claim the right for the child? Can an officer refuse the child's request to have his parent or guardian present? I do not believe so. I have found no Texas authority which entitles a parent or guardian to be present during the taking of a statement. But, in some jurisdictions courts have held that a minor's request, made during custodial interrogation, to see his parents constituted an invocation of the minor's Fifth Amendment right to remain silent.[45] While a statement need not be taken at a juvenile processing office, if it is, the requirements of §52.025 must be complied with.

4. The Six Hour Rule

Texas Family Code §52.025(d):
A child may not be detained in a juvenile processing office for longer than six hours.

Since the purpose of a juvenile processing office is to accomplish limited objectives a time limit was imposed. Six hours was selected since under Federal law a detention of a juvenile in an adult detention facility for less than six hours need not be reported to federal monitoring agencies.[46]

In ***In the Matter of C.L.C.,*** the child was detained for nine hours in the Juvenile processing office, however, he had signed his statement only four hours after he had been detained. The Court said that the purpose of the six-hour restriction was to ensure that coercion, or even a coercive atmosphere, is not used in obtaining a juvenile's confession. Juveniles detained in excess of the parameters in §52.025 might

be unduly taxed and willing to make a confession in order to escape the interrogation and without giving full consideration to the ramifications of their admissions.[47]

In ***Vega v. State,*** an unpublished opinion, the Corpus Christi Court of Appeals utilized similar reasoning stating:

> ***We believe that the record is unclear as to whether Vega was detained longer than six hours, but that the record reflects that Vega gave officers his statement within six hours from the time that he arrived at the juvenile detention area in the sheriff's office. Consequently, we conclude that Vega was lawfully detained at the time he made his statement.***[48]

These cases appear to say that a violation of the six hour rule does not necessarily invalidate a confession, if the confession was completed within the required time.

C. Causal Connection and Taint Attenuation Analysis

In ***Gonzales v. State,***[49] police complied with all the requirements of §51.095 [requirement for admissibility of confessions] and §52.02(a) [restrictions for law enforcement officer to the initial seizure and prompt release or commitment of the juvenile offender], but failed to notify the child's parents of his custody as required by §52.02(b). The Court of Appeals disallowed the confession for failure to promptly notify the parents of the child's arrest as required. The Court of Criminal Appeals, however, reversed and remanded for consideration of a causal connection between the failure to notify the parent (upon taking a child into custody) and the receipt of the confession.[50]

The Court held that §51.095 is considered an independent exclusionary statute. It sets out what must be done before the statement of a juvenile will be admissible. The reasonable inference is that if the stated conditions are not met, the statement of the child will not be admissible.[51] However, the violation of §52.02(b) does not implicate the provisions of §51.095 and there is no clear legislative intent to suppress a statement under that section when a violation is detected. The Court through §51.17 of the Family Code, invoked Chapter 38 of the Code of Criminal Procedure and found that if evidence is to be excluded because of a §52.02(b) violation, it must be excluded through the operation of Article 38.23(a) of the Code of Criminal Procedure.

Article 38.23(a) C.C.P. is an exclusionary rule and provides:

> ***"no evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas ...shall be admitted in evidence."***

The Court of Criminal Appeals has previously established:

> ***evidence is not "obtained ...in violation" of a provisions of law if there is no causal connection between the illegal conduct and the acquisition of the evidence.***[52]

While the juvenile's parents were not timely notified of respondent's custody, the lower court failed to conduct a causal connection analysis to determine its affect upon the taking of the statement. Utilizing the standard set out in ***Comer,*** the Court of Criminal Appeals remanded the case to the lower Court so that it may ascertain "with any degree of confidence that," had the appellant's parents been notified timely... " he would still have chosen to confess his crime."[53]

Along with the causal connection analysis a court should also conduct a taint attenuation analysis before excluding a confession because of a §52.02 violation. In ***Comer***, before reversing the case for failing to transport a juvenile "forthwith" to the custody of the juvenile custody facility, the Court of Criminal Appeals conducted a taint attenuation analysis, utilizing the four factors from **Bell v. State,** 724 S.W.2d 780 (Tex. Crim. App. 1986). Comer, 776 S.W.2d at 196-97.

Those factors are:

(1) the giving of Miranda warnings;
(2) the temporal proximity of the arrest and the confession;
(3) the ...presence of intervening circumstances; and
(4) the purpose and flagrancy of the official misconduct.

D. Failure to Raise Error at Trial

The court of appeals are divided as to whether or not an attorney waives error regarding §52.02 if he does not raise and preserve error at the trial level.

1. Is Waiver

In order to preserve a complaint concerning the admission of evidence for appellate review, the complaining party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling he desired the court to make and obtained a ruling.[54] A motion which states one legal theory cannot be used to support a different legal theory on appeal.[55] In ***Hill v. State,*** the Appellant urged several grounds for the suppression of his confession. Neither his written motion and legal memoranda, nor the evidence adduced at the hearing included a motion for suppression on the basis that the confession was obtained while Appellant

was detained at a place not designated a juvenile processing center under section 52.025.[56]

> ***There is scant evidence in the record of the suppression hearing that the Tyler Police Department-or any part of it-is a designated juvenile processing center. However, the State had no burden to establish that fact because Appellant did not include such contention in his motion to suppress. See Contreras, 998 S.W.2d at 659 (holding it is the juvenile's burden to raise noncompliance with such statutory requirements.)***
>
> ***We hold that Appellant waived the issue of whether the Tyler Police Department was a designated juvenile processing office under sections 52.02(a) and 52.025 of the Family Code.***[57]

In ***Vega v. State,*** an unpublished opinion from the Court of Appeals out of Corpus Christi, the court rejected respondent's argument that his parents were not notified as required by the statute because respondent did not urge any failure of his parents to be notified as a basis for his motion to suppress, either in writing or in argument, nor did he object to his statement's admission on that basis. The Court held that nothing was preserved for review as to that issue.[58]

In ***Childs v. State***, the child lied to the officers regarding his age. The court found that it was appellant's affirmative action in misleading officers as to his identity and age that led to the taint of his statement.[59] The court stated:

> ***"...the appellant's own action in expressly claiming that he was an adult, in deceiving the police and failing to inform them of his right name and age, affirmatively and expressly waived his rights to be treated as a juvenile during the taking of his second statement."***[60]

In ***In the Matter of D.M.***, appellant was arrested and charged as an adult. It was later discovered that he had concealed his true age from authorities. On appeal he argued that, because he was treated as an adult he was not afforded the protections provided him under the Family Code. The court disagreed:

> ***"Conformably, it cannot be reasonably said that one, who negates the operation of the Texas Family Code guarantees by misrepresenting his age, is entitled to claim the benefit of the guarantees during the period of his misrepresentation."***[61]

2. Is Not Waiver

In ***In re C. O. S.***, 988 S.W.2d 760, 767 (Tex. 1999), the court held that the failure of the juvenile court to provide statutorily required action may be raised for the

first time on appeal unless the juvenile expressly waived the statutory requirements. The court held that there are three categories of rights and requirements used in determining whether error may be raised for the first time on appeal. The first set of rights are those that are considered so fundamental that implementation of these requirements is not optional and cannot, therefore, be waived or forfeited by the parties. The second category of rights are those that must be implemented by the system unless expressly waived. These rights are "not forfeitable," meaning they cannot be lost by inaction, but are "waivable" if the waiver affirmatively, plainly, freely, and intelligently made. These include rights or requirements embodied in a statute that direct a trial court in a specific manner. The third set of rights are those that the trial court has no duty to enforce unless requested. The law of procedural default applies to this last category.[62]

In ***G.A.T.***, the court found that a juvenile suspect's inaction in not asserting his right to be taken to a juvenile processing area does not waive the right.[63]

V. CONCLUSION

Children, beginning at a very young age, are instructed and taught to listen and cooperate with people who stand in authority over them. To respect their elders and always tell the truth. As a society, we attempt to teach these principles to our children. We do so by design, to allow people in authority to control and discipline them in our absence. For a child who has learned respect, an unpretentious request by a person in authority in a situation of great consequence may be as effective as a direct order. We as parents are aware of it, teachers and school administrators are aware of it, and law enforcement is aware of it. The legislature and the courts have attempted to keep us from taking advantage of it. They require parental notification when a child is taken into custody. They entitle the child to have a parent present, when in custody of a law enforcement officer, if the child is not immediately released or placed in detention, and most importantly, they have a right to have a neutral magistrate review and explain to them, outside the presence of any law enforcement, exactly what is happening and their constitutional and statutory rights, prior to giving a written statement.

GUIDELINES FOR WRITTEN STATEMENT WHILE IN CUSTODY

1. Once the child is in custody, the officer must promptly give notice to the child's parent or guardian of the arrest and the reason for the arrest (reasonable attempts). [§52.02(b)(1)]

2. If the arrest is for suspicion of DWI, the officer may take the child to a place to obtain a specimen of the child's breath or blood (as provided by Ch. 724, Transportation Code), and perform intoxilyzer processing and videotaping in an adult processing office. [§52.02(a) & §52.02(c)]

The child may refuse or consent (without an attorney), but the request and the child's response must be videotaped. [§52.02(d)]

2a. If the arrest is not for suspicion of DWI, the officer may temporarily take the child to an approved "Juvenile Processing Office" (JPO). [§52.02(a)]

While there, the officer may complete essential forms and records and may also photograph and fingerprint the child (must have probable cause the child has committed an offense). [§52.025(b)(2) & §52.025(b)(3)]

The child must not be left alone and is entitled to having his parent present (if requested) [52.025(c)].

The child may not remain in a JPO for longer than 6 hours. [52.025(d)]

3. Before interviewing the child concerning an offense, in the JPO the magistrate must warn the child of his rights outside the presence of any officer or prosecutor. [§51.095(a)(1)(A) & §51.095(a)(1)(B)(i)]

The magistrate must be sure that the child's waiver is voluntary. [§51.095(a)(1)(B)(ii)]

4. After the magistrate determines that the child wants to give a statement, the officer in a JPO may interview the child and reduce his statement to writing. Do not have the child sign the statement.

5. The officer must return the child to the Magistrate (in a JPO). Once again, outside the presence of any officer or prosecutor the magistrate must determine that the child understands the contents of the statement and that he still wishes to give the statement.

The child must sign the statement in the presence of the magistrate and the magistrate must certify that the child is doing so voluntarily. [§51.095(a)(1)(B)(i) & §51.095(a)(1)(B)(ii) & §51.095(a)(1)(D)]

6. The officer must then do one of the following:
   (1) Release the child to the parent or guardian. [§52.02(a)(1)]
   (2) Release the child to the Juvenile Court or official designated by the Juvenile Court if there is PC that the child committed an offense. [§52.02(a)(2)]
   (3) Release the child at a detention facility designated by the juvenile board. [§52.02(a)(3)]
   (4) Release the child to a secure detention facility designated for temporary detention of juvenile offenders. [§52.02(a)(4)]
   (5) Take the child to a medical facility if the child is in need of prompt treatment. [§52.02(a)(5)]
   (6) Release the child without a referral to juvenile court if the law enforcement agency has established guidelines for such a disposition. [§52.02(a)(6) & §52.03]

MAGISTRATE'S WARNINGS FOR JUVENILE STATEMENTS (Sec. 51.095)

Re: Statement of _____, a juvenile.

I, the below listed magistrate of the State of Texas, on _____, 200__, gave the above named juvenile the following warnings as required by Section 51.095 of the Texas Family Code:

1. You have the right to remain silent and not make any statement at all and that any statement you make may be used against you;

2. You have the right to have an attorney present to advise you either prior to or during any questioning;

3. If you are unable to employ an attorney, you have a right to have an attorney appointed to counsel you before or during any interviews with peace officers or attorneys representing the state;

4. You have the right to terminate any interviews at any time.

[If the warnings or the statement are being given in a juvenile processing office as set out by § 52.025 of the Texas Family Code, include the following:]

5. You are entitled to be accompanied by your parent, guardian, or other custodian, or by your attorney.

☐ Child understand the above rights.

☐ Child wishes to give up or waive the above rights.

☐ Child does not understand the above rights.

☐ Child does not wish to waive or give up his rights.

THESE WARNINGS GIVEN on _____, 200___, at _____ o'clock, ___.M., in _____ County, Texas.

_____
Magistrate

STATEMENT OF JUVENILE (Sec. 51.095, FC)

My name is _____, and I am _____ years of age. I was born in _____, State of _____ on _____, 200__. I live at _____, Texas with _____. My telephone number is _____. I can also be reached at telephone number _____. I am in the _____ grade at _____ School.

Prior to making the following statement I was informed by _____ that:

1. I have the right to remain silent and not make any statement at all and that any statement I make may be used against me;

2. I have the right to an attorney present to advise me either prior to any questioning or during any questioning;

3. If I am unable to employ an attorney, that I have the right to have an attorney appointed to counsel me before or during any interviews with peace officers or attorneys representing the state;

4. If I am in a juvenile processing office, I am entitled to be accompanied by my parent, guardian, or other custodian, or by my attorney.

5. I have the right to terminate any interviews at any time.

_____
Signature of Juvenile

[TEXT OF STATEMENT]

The above statement is a voluntary statement signed in the presence of the magistrate and with no law enforcement officer or prosecuting attorney present.

Signed on the _____ day of _____, 200__, at _____o'clock _____.M.

_____ _____
Signature of Juvenile Magistrate

MAGISTRATE'S CERTIFICATION OF JUVENILE'S STATEMENT (Sec. 51.095, FC) (1 of 2)

After administering the warnings, the child gave a statement and was returned, I examined the juvenile and made the following observations:

☐ Claims to be _____ years of age and reasonably appears to be of that age;

☐ (Can)(cannot) read the _____ language; and
(a) demonstrated to me that (he)(she) could do so; OR
(b) I read the attached warning and statement aloud to the juvenile.

☐ Is a citizen of _____;

☐ Advised me that (he)(she) has completed the _____ grade in school, and is now in the _____ grade in school;

☐ Was not threatened or promised anything by law enforcement officers or any other agents of the State of Texas;

☐ Does not appear to be under the influence of drugs or intoxicating beverages, and informs me that (he)(she) is not under the influence of drugs or alcohol;

☐ Does not appear to have been abused by law enforcement officers, or anyone else, and upon inquiry denies that any type of abuse has occurred;

☐ Shows no signs of psychiatric problems which might be readily apparent, and upon inquiry by the undersigned, the juvenile claims no history of psychiatric treatment or problems;

☐ Appears to understand the meaning of the warnings given and had no questions about the warnings, except as may be described as follows, if any:

_____

_____

☐ Understands that the offense charged is _____ (offense and degree of offense);

☐ Understands what the attached statement says, and agrees that the statement is (his)(her) version of the facts surrounding the said offense, and that the statement is true;

☐ Made the statement voluntarily and of (his)(her) own free will without any improper inducements or prohibited conduct by any law enforcement officers or any other persons;

☐ Additional observations that I have made during the course of interviewing the said juvenile are as follows, if any:

_____

_____

MAGISTRATE'S CERTIFICATION OF JUVENILE'S STATEMENT (Sec. 51.095, FC) (2 of 2)

Only after receiving the proper warning and being examined by the undersigned magistrate did the juvenile, _____, sign the attached statement.

Based on the foregoing determinations, I, the undersigned Magistrate, do hereby certify as follows:

☐ I have determined that the child understands the nature and content of the statement, and has knowingly, intelligently, and voluntarily waived the rights set out in the warning given pursuant to Section 51.095 of the Texas Family Code.

☐ I am convinced that the child understands the nature and content of the statement, and that the child is signing the statement voluntarily.

☐ The statement was signed by the child in my presence with no law enforcement officer or prosecuting attorney present.

☐ _____, a (bailiff) (law enforcement officer), who did not carry a weapon in the presence of the child, was present because I determined that the said (bailiff) (law enforcement officer) was necessary for my personal safety and that of other court personnel.

THIS CERTIFICATION made by the undersigned magistrate on _____, 200___, at _____ o'clock, ___.M., in _____ County, Texas.

_____
Magistrate's Name (print or type)

_____
Magistrate's Signature

_____
Office Held

TABLE OF AUTHORITIES

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2. Robert O. Dawson, Tex. Juv. Law 282 (5th ed. 2000) (published by Tex. Juv. Probation Comm'n).
3. *Diaz v. State,* 61 S.W.3d 525,527 (Tex. App.–San Antonio 2001, no pet.).
4. *Alvarado v. State,* 912 S.W.2d 199, 211 (Tex. Crim. App.1995).
5. *Darden v. State,* 629 S.W.2d 46, 51 (Tex. Crim. App.1982).
6. *Fare v. Michael C.,* 442 U.S. at 707, 725 (1979).
7. *E.A.W. v. State*, 547 S.W.2d 63 (Tex. Civ. App.–Waco 1977, no pet.).
8. Tex. Fam. Code Ann. § 51.095(a) (West 2002).
9. *Vega v. State,* No. 13-99-435-CR, (Tex. App.–Corpus Christi 2001) (unpublished) (also available at 2001 Tex. App. Lexis 7364)
10. Tex. Fam. Code Ann. §51.095(e) (West 2002).
11. *Diaz v. State,* Tex.App. Lexis 5319, No. 04-00-00025-CR, (Tex. App.–San Antonio 2001).
12. Tex. Fam. Code Ann. §51.095(a)(1)(c) (West 2002).
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14. Robert O. Dawson, Tex. Juv. Law 288 (5th ed. 2000) (published by Tex. Juv. Probation Comm'n).
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16. *Pham v. State,* 36 S.W.3d 199, (Tex. App.–Houston [1st Dist.] Dec., 2000).
17. Tex. Fam. Code Ann. § 52.025(c) (West 2002).
18. *Id.* at § 52.025(b)(5).
19. Tex. Fam. Code Ann. § 51.095 (a)(5) (West 2002).
20. *Roquemore v. State, 60* S.W.3d 862 (Tex. Crim. App.2001).
21. *Roquemor v. State,* 60 S.W.3d 862 (Tex. Crim. App.2001).
22. *Comer v. State,* 776 S.W.2d 191 (Tex. Crim. App. 1989).
23. *Le v. State,* 993 S.W.2d 650, 655 (Tex. Crim. App. 1999).
24. *Roquemore v. State*, 11 S.W.3d 395, 400 (Tex. App.–Houston [1st Dist.] 2000, pet. granted).
25. *In the Matter of D.M.G.H.,* 553 S.W.2d 827 (Tex. App.–El Paso 1977).
26. *In re G.A.T.*, 16 S.W .3d 818, 825 (Tex. App.–Houston [14th Dist.] 2000, pet. denied).
27. *Contreras v. State*, ___S.W.3d ___, No. 1682-99-CR, 2001 Tex. Crim. App. LEXIS 58 (Tex. Crim. App. June 27, 2001) [Motion for rehearing on petition for discretionary review denied, (Sep. 12, 2001)].
28. *Contreras v. State,* ___S.W.3d ___, No. 1682-99-CR, 2001 Tex. Crim. App. LEXIS 58 (Tex. Crim. App. June 27, 2001). [Motion for rehearing on petition for discretionary review denied, (Sep. 12, 2001)].
29. *Gonzales v. State*, 9 S.W.3d 267 (Tex. App.–Houston [1st Dist.] 1999, pet. granted)
30. *State v. Simpson*, 51 S.W.3d 633 (Tex. App.–Tyler 2000) *j. vacated by* 74 S.W.3d 408 (Tex. Crim. App. 2002). On the State's petition for discretionary review, the Court of Criminal Appeals vacated the court of appeals judgment and remanded the case for the court of appeals to determine whether a causal connection existed between the Family Code violation and the making of the statement.
31. *In the Matter of C. R.*, 995 S.W.2d 778 (Tex. App.- Austin 1999, pet. denied).
32. *Pham v. State,* 36 S.W.3d 199, (Tex. App.–Houston [1st Dist.] Dec. 28, 2000), *j. vacated by* 72 S.W.3d 346 (Tex. Crim. App. 2002). On the State's petition for discretionary review, the Court of Criminal Appeals vacated the court of appeals judgment and remanded the case for the court of appeals to determine whether a causal connection existed between the Family Code violation and the making of the statement.

33. *Hill v. State*, 78 S.W.3d 374 (Tex. App.– Tyler 2001, pet. ref'd).
34. Tex. Fam. Code Ann. § 52.02(c) (West 2002).
35. *Id.* at § 52.02(d).
36. *Le v. State,* 993 S.W.2d 650 (Tex. Crim. App. 1999).
37. *Le,* 993 S.W.2d at 656.
38. *Le,* 993 S.W.2d at 656.
39. *Anthony v. State*, 954 S.W.2d 132, 135 (Tex. App.–San Antonio 1997, no pet.).

40. *In re R.R.*, 931 S.W.2d 11, 14 (Tex. App.–Corpus Christi 1996, no writ).
41. Attorney General Opinion No. LO 93-38.
42. *Anthony v. State,* 954 S.W.2d 132 (Tex. App.–San Antonio 1997).
43. *Pham v. State,* 36 S.W.3d 199, (Tex. App.–Houston [1st Dist.] Dec., 2000).
44. *In the Matter C.R.*, 995 S.W.2d at 784.
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49. *Gonzales v. State,* 67 S.W.3d 910, 912 (Tex. Crim. App. 2002)
50. *Gonzales,* 67 S.W.3d at 914.
51. *Gonzales,* 67 S.W.3d at 914.
52. *Gonzales,* 67 S.W.3d at 914.
53. *Gonzales,* 67 S.W.3d at 913 n.8.
54. Tex. Rules of Appellate Procedure 33.1 (West 2002).
55. *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995).
56. *Hill v. State*, 78 S.W.3d 374 (Tex. App.–Tyler 2001, pet. ref'd).
57. *Hill*, 78 S.W.3d at 387.
58. *Vega v. State,* No. 13-99-435-CR, (Tex. App.– Corpus Christi 2001) (unpublished) (also available at 2001 Tex. App. Lexis 7364).
59. *Childs v. State*, 21 S.W.3d 631, (Tex. App.– Houston [14th Dist] June, 2000).
60. *Childs,* 21 S.W.3d at 639.
61. *In the Matter of D.M.*, 611 S.W.2d 880 (Tex. App.–Amarillo 1980, no writ).
62. *In re C. O. S.*, 988 S.W.2d 760, 767 (Tex. Sup. Ct, 1999).

63. *In re G.A.T.*, 16 S.W.2d at 818.

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Expunction

OBJECTIVES

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

1. Determine whether the Court has jurisdiction to order expungement under CCP 55 or 45.055.
2. Identify those offenses that are eligible to be expunged.
3. Apply the appropriate statute to the offense and determine if petitioner is entitled to expungement.
4. Organize those steps necessary to ensure expungement.

EXPUNCTIONS

You Have It Now

What do you need to know?

- When does it apply to your court
- What statutes apply to you
- How to ensure you are doing it right

WHAT STATUTES APPLY ?

- Chapter 45.0216 CCP-records of children
- Section 106.12 Alcohol Beverage Code
- Section 161.453 H&S- tobacco
- Chapter 45.055- CCP- failure to attend school
- Chapter 55 of CCP-criminal records

WHEN DOES IT APPLY TO YOU ?

- Article 45.0216-CCP - Yes
- Section 106.12- ABC - Yes
- Section 161.453-H&S - tobacco - Yes
- Article 45.055- failure attend school – Yes
- Article 55.01 CCP – No

Chapter 45.0216 CCP

Includes the offenses under Penal Code:

- Sec.8.07(a)(4); fine only misdemeanors except public intoxication or;
- Sec. 8.07(a)(5) a violation of penal ordinance of political subdivision

Chapter 45.0216 CCP

- Sworn written request
- Not more than one offense
- On or after 17th birthday
- Only one conviction under sec. 8.07(a)(4) or (5) of the Penal Code
- Court "shall" order if conditions met
- No fees or court costs

Section 106.12 ABC minor alcohol offenses

- Sworn written request
- Only one violation
- Must be 21 years of age
- Court "shall" order if conditions met

Chapter 45.055 CCP failure attend school

- On or after 18 years of age
- Written sworn request
- Only one violation
- Court can conduct hearing
- Court "shall" order if conditions met
- No fees or costs

Section 161.255 Health & Safety

- Must apply for expunction
- Tobacco awareness required
- Court shall order expunction

Chapter 55 CCP

- Must be filed in District Court
- Includes all other record expunctions

Expunctions

- Procedure
- Effect of expunction
- Violation of order
- Right to expunction

REMEMBER

- Not automatic; must ask for it
- No fees or costs
- There are exceptions
- Must order expunction if conditions met
- Everything else is in District Court

APPLICATION FOR EXPUNGEMENT ALCOHOLIC BEVERAGE (Sec. 106.12, ABC)

IN THE MATTER OF	§	**IN THE MUNICIPAL COURT**
	§	**CITY OF** _____
_____	§	_____**COUNTY, TEXAS**

Now, comes _____ convicted of the offense of _____ _____ on the _____ day of _____, 200__ in the _____ Municipal Court in Cause Number _____.

Petitioner is now at least the age of twenty-one (21) years. Petitioner, being duly sworn, states under oath that he/she has not been convicted of any other violation of the Alcoholic Beverage Code while under the age of 21.

Petitioner requests that all records of said conviction be expunged pursuant to **Section 106.12, ABC,** and the Court order expungement of all documents, records, and references thereof and release _____ from all disabilities resulting from said conviction. Petitioner further requests that said conviction may not be shown or made known in any manner for any purpose. Attached to this petition is a list of agencies, officials, and others who have records or files regarding this conviction.

_____
Defendant-Petitioner

Sworn and subscribed before me by _____, a credible person, on this _____ day of _____, 200___.

_____
(Deputy Clerk)(Clerk)(Notary Public in and for the State of Texas)

(*municipal court seal or notary public seal if sworn before a notary public*)

REV. 08/03

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF** _____
_____ **(Petitioner)**	§	_____**COUNTY, TEXAS**

On this date came on to be heard the application and motion for expungement filed in the above captioned cause. Having considered the pleadings and other documents on file herein, **the Court finds** that it has jurisdiction over the cause and the parties; and that all procedural and substantive requirements for expungement of the specified criminal records have been met pursuant to Section 106.12, Alcoholic Beverage Code.

Therefore, it is hereby Ordered, Adjudged and Decreed that:

(1) the application and motion for expungement filed in the above-captioned cause is GRANTED, and all records of the petitioner's arrest and conviction on or about _____, 200___, including the records of Cause No. _____ in the Municipal Court of the City of _____, Texas, are to be expunged; and all release, dissemination, or use of records pertaining to such arrest and prosecution is prohibited;

(2) the respondents listed herein shall return all records and files concerning the above specified arrest to this Court, or if removal is impracticable, obliterate all portions of the record or file that identify the petitioner, including all computer entries, and notify this Court of its action not later than _____, 200____;

(3) the respondents shall delete from their records all index references to the records and files that are subject to this expungement order;

(4) the respondent, the Municipal Court of the City of _____, Texas, shall not permit inspection of the Court records concerning this expungement proceeding by any person other than the petitioner or petitioner's attorney herein, and shall obliterate all public references to this proceeding;

(5) pursuant to Section 106.12, Alcoholic Beverage Code, after entry of this Order, the applicant shall be released from all disabilities resulting from the conviction, and the conviction may not be shown or made known for any purpose; further, the petitioner may deny the occurrence of the expunged arrest, prosecution, conviction, and this expungement order;

(6) the Department of Public Safety shall send a copy of this Order by certified mail, return receipt requested, to any central federal depository of criminal records that there is reason to believe has any of the records subject to this Order, together with an explanation to the effect of the order and a request that the records in possession of the depository, including any information with respect to this proceeding, be destroyed, deleted, or returned to the Court on or before _____, 200__;

(7) the Texas Alcoholic Beverage Commission shall send a copy of this Order by certified mail, return receipt requested, to each central and regional depository of criminal records that there is reason to believe has any of the records subject to this Order, together with an explanation of the effect of the order and a request that the records in possession of the depository, including any information with respect to this proceeding, be destroyed, deleted, or returned to the Court on or before _____, 200____;

(8) the Clerk of the Municipal Court of the City of _____, Texas, shall cause a copy of this Order to be delivered, by certified mail, return receipt requested, to the following agencies subject to this Order:

(a) Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, TX 78731

(b) Texas Department of Public Safety
P.O. Box 4087
Austin, TX 78773

(c) _____ County Juvenile Court

(include address)

(d) Sheriff's Department

(include address)

(e) _____ Police Department

(include address)

(f) _____ City Attorney's Office

(include address)

(g) _____ Alcohol Awareness Course Provider

(include address)

(h) _____Community Service Provider

(include address)

(i) Other: _____

_____

_____

Signed this _____ day of _____, 200___.

_____
Judge, Municipal Court

City of _____

_____ County, Texas

REV. 8/03

FAILURE TO ATTEND SCHOOL NOTICE OF EXPUNCTION RIGHTS (Arts. 45.054(e) and 45.055, CCP)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	_____ **COUNTY, TEXAS**

OFFICIAL NOTICE OF EXPUNCTION RIGHTS
FAILURE TO ATTEND SCHOOL PROCEEDINGS

ATTN: DEFENDANT AND PARENT:

Pursuant to Article 45.054(e) of the Code of Criminal Procedure, upon the commencement of Failure to Attend School proceedings, the Court must inform the individual who is the subject of the hearing and the individual's parent in open Court of the individual's expunction rights and provide the individual and the individual's parent with a written copy of Article 45.055 which reads as follows:

Art. 45.055. EXPUNCTION OF CONVICTION AND RECORDS IN FAILURE

(a) An individual convicted of not more than one violation of Section 25.094, Education Code, may, on or after the individual's 18th birthday, apply to the Court in which the individual was convicted to have the conviction and records relating to the conviction expunged.

(b) To apply for an expunction, the applicant must submit a written request that:

(1) is made under oath;

(2) states that the applicant has not been convicted of more than one violation of Section 25.094, Education Code; and

(3) is in the form determined by the applicant.

(c) The Court may expunge the conviction and records relating to the conviction without a hearing or, if facts are in doubt, may order a hearing on the application. If the Court finds that the applicant has not been convicted of more than one violation of Section 25.094, Education Code, the Court shall order the conviction, together with all complaints, verdicts, sentences, and other documents relating to the offense, including any documents in the possession of a school district or law enforcement agency, to be expunged from the applicant's record. After entry of the order, the applicant is released from all disabilities resulting from the conviction, and the conviction may not be shown or made known for any purpose. The Court shall inform the applicant of the Court's decision on the application.

(d) The Justice or Municipal Court may not require an individual who files an application under this article to pay any fee or Court costs for seeking expunction.

ISSUED AND RECEIVED BY THE UNDERSIGNED:

_____ _____
Signature of Municipal Judge Date

_____ _____
Signature of Defendant Date

_____ _____
Signature of Parent Date

REV. 8/03

APPLICATION FOR EXPUNGEMENT FAILURE TO ATTEND SCHOOL (Art. 45.055, CCP)

IN THE MATTER OF	§	**IN THE MUNICIPAL COURT**
	§	**CITY OF** _____
_____	§	_____**COUNTY, TEXAS**

Now, comes _____ convicted of the offense of _____ _____ on the _____ day of _____, 200__ in the _____ Municipal Court in Cause Number _____.

Petitioner is now at least the age of eighteen (18) years. Petitioner, being duly sworn, states under oath that he/she has not been convicted of any other violation of Section 25.094, Education Code.

Petitioner requests that all records of said conviction be expunged pursuant to **Article 45.055, Code of Criminal Procedure,** and the Court order expungement of all documents, records, and references thereof and release _____ from all disabilities resulting from said conviction. Petitioner further requests that said conviction may not be shown or made known in any manner for any purpose. Attached to this petition is a list of agencies, officials, and others who have records or files regarding this conviction.

_____
Defendant-Petitioner

Sworn and subscribed before me by _____, a credible person, on this _____ day of _____, 200___.

_____
(Deputy Clerk)(Clerk)(Notary Public in and for the State of Texas)

(*municipal court seal or notary public seal if sworn before a notary public*)

REV. 08/03

ORDER FOR EXPUNGEMENT OF RECORDS FAILURE TO ATTEND SCHOOL (Art. 45.055, CCP) (Page 1 of 2)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____ **(Petitioner)**	§	_____**COUNTY, TEXAS**

On this date came on to be heard the application and motion for expungement filed in the above captioned cause. Having considered the pleadings and other documents on file herein, **the Court finds** that it has jurisdiction over the cause and the parties; and that all procedural and substantive requirements for expungement of the specified criminal records have been met pursuant to Article 45.055, Code of Criminal Proceduree.

Therefore, it is hereby Ordered, Adjudged and Decreed that:

(1) the application and motion for expungement filed in the above-captioned cause is GRANTED, and all records of the petitioner's arrest and conviction on or about _____, 200___, including the records of Cause Number _____ in the Municipal Court of the City of _____, Texas, are to be expunged; and all release, dissemination, or use of records pertaining to such arrest and prosecution is prohibited;

(2) the respondents listed herein shall return all records and files concerning the above specified arrest to this Court, or if removal is impracticable, obliterate all portions of the record or file that identify the petitioner, including all computer entries, and notify this Court of its action not later than _____, 200____;

(3) the respondents shall delete from their records all index references to the records and files that are subject to this expungement order;

(4) the respondent, the Municipal Court of the City of _____, Texas, shall not permit inspection of the Court records concerning this expungement proceeding by any person other than the petitioner or petitioner's attorney herein, and shall obliterate all public references to this proceeding;

(5) pursuant to Article 45.055, Code of Criminal Procedure, after entry of this Order, the applicant shall be released from all disabilities resulting from the conviction, and the conviction may not be shown or made known for any purpose; further, the petitioner may deny the occurrence of the expunged arrest, prosecution, conviction, and this expungement order;

(6) the _____ School District shall destroy or remove any record or entry concerning this violation or conviction;

(7) the Clerk of the Municipal Court of the City of _____, Texas, shall cause a copy of this Order to be delivered, by certified mail, return receipt requested, to the following agencies subject to this Order:

(a) _____ School District

(include address)

(b) Juvenile Court of _____ County, Texas

(include address)

(c) Sheriff's Department

(include address)

(d) _____ Police Department

(include address)

(e) _____ City Attorney's Office

(include address)

(f) _____Community Service Provider

(include address)

(g) Other: _____

_____

_____

Signed this _____ day of _____, 200___.

_____
Judge, Municipal Court

City of _____

_____ County, Texas

REV. 8/03

APPLICATION FOR EXPUNGEMENT TOBACCO OFFENSES (Sec. 161.255, HSC)

IN THE MATTER OF	§	**IN THE MUNICIPAL COURT**
	§	**CITY OF** _____
_____	§	_____**COUNTY, TEXAS**

Now, comes _____ convicted of the offense of _____ _____ on the _____ day of _____, 200__ in the _____ Municipal Court in Cause Number _____.

Petitioner, being duly sworn, states under oath that he/she has completed the Tobacco Awareness course for the above violation.

Petitioner requests that all records of said conviction be expunged pursuant to **Section 161.255, HSC,** and the Court order expungement of all documents, records, and references thereof and release _____ from all disabilities resulting from said conviction. Petitioner further requests that said conviction may not be shown or made known in any manner for any purpose. Attached to this petition is a list of agencies, officials, and others who have records or files regarding this conviction.

_____
Defendant-Petitioner

Sworn and subscribed before me by _____, a credible person, on this _____ day of _____, 200___.

_____
(Deputy Clerk)(Clerk)(Notary Public in and for the State of Texas)

(*municipal court seal or notary public seal if sworn before a notary public*)

REV. 08/03

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____ **(Petitioner)**	§	_____**COUNTY, TEXAS**

On this date came on to be heard the application and motion for expungement filed in the above captioned cause. Having considered the pleadings and other documents on file herein, **the Court finds** that it has jurisdiction over the cause and the parties; and that all procedural and substantive requirements for expungement of the specified criminal records have been met pursuant to Section 161.255, Health and Safety Code.

Therefore, it is hereby Ordered, Adjudged and Decreed that:

(1) the application and motion for expungement filed in the above-captioned cause is GRANTED, and all records of the petitioner's arrest and conviction on or about _____, 200___, including the records of Cause Number _____ in the Municipal Court of the City of _____, Texas, are to be expunged; and all release, dissemination, or use of records pertaining to such arrest and prosecution is prohibited;

(2) the respondents listed herein shall return all records and files concerning the above specified arrest to this Court, or if removal is impracticable, obliterate all portions of the record or file that identify the petitioner, including all computer entries, and notify this Court of its action not later than _____, 200____;

(3) the respondents shall delete from their records all index references to the records and files that are subject to this expungement order;

(4) the respondent, the Municipal Court of the City of _____, Texas, shall not permit inspection of the Court records concerning this expungement proceeding by any person other than the petitioner or petitioner's attorney herein, and shall obliterate all public references to this proceeding;

(5) pursuant to Section 161.255, Health and Safety Code, after entry of this Order, the applicant shall be released from all disabilities resulting from the conviction, and the conviction may not be shown or made known for any purpose; further, the petitioner may deny the occurrence of the expunged arrest, prosecution, conviction, and this expungement order;

(6) the Clerk of the Municipal Court of the City of _____, Texas, shall cause a copy of this Order to be delivered, by certified mail, return receipt requested, to the following agencies subject to this Order:

(a) Texas Department of Public Safety
P.O. Box 4087
Austin, TX 78773

(b) Juvenile Court of _____ County, Texas

(include address)

(c) Sheriff's Department

(include address)

(d) _____ Police Department

(include address)

(e) _____ City Attorney's Office

(include address)

(f) _____ Tobacco Awareness Course Provider

(include address)

(g) _____Community Service Provider

(include address)

(h) Other: _____

_____

_____

Signed this _____ day of _____, 200___.

_____
Judge, Municipal Court

City of _____

_____ County, Texas

REV. 8/03

OFFICIAL NOTICE OF EXPUNCTION RIGHTS: PENAL OFFENSES

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	_____**COUNTY, TEXAS**

ATTENTION DEFENDANT AND PARENT:

Pursuant to Article 45.0216(e) of the Code of Criminal Procedure, upon conviction for a Penal Code offense or a violation of a penal ordinance, the Court must inform the child who is the subject of the hearing and the child's parent in open court of the child's expunction rights and provide the child and the child's parent with a written copy of Article 45.0216 which reads as follows:

Art. 45.0216. EXPUNCTION OF CERTAIN CONVICTION RECORDS OF CHILDREN

(a) In this article, "child" has the meaning assigned by Section 51.02, Family Code.[1]

(b) A person convicted of not more than one offense described by Section 8.07(a)(4) or (5), Penal Code,[2] *while the person was a child may, on or after the person's 17th birthday, apply to the Court in which the child was convicted to have the conviction expunged as provided by this article.*

(c) The person must make a written request to have the records expunged. The request must be under oath.

(d) The request must contain the person's statement that the person was not convicted while the person was a child of any offense described by Section 8.079(a)(4) or (5), Penal Code, other than the offense the person seeks to have expunged.

(e) The Judge shall inform the person any parent in open Court of the person's expunction rights and provide them with a copy of this article.

(f) If the Court finds that person was not convicted of any other offense described by Section 8.07(a)(4) or (5), Penal Code, while person was a child, the Court shall order the conviction, together with all complaints, verdicts, sentences, and prosecutorial and law enforcement records, and any other documents relating to the offense, expunged from the person's record. After entry of the order, the person is released from all disabilities resulting from the conviction and the conviction may not be shown or made known for any purpose.

(g) This article does not apply to any offense otherwise covered by:
(1) Chapter 106, Alcoholic Beverage Code;
(2) Chapter 161, Health and Safety Code; or
(3) Section 25.094, Education Code.

(h) Records of a person under 17 years of age relating to a complaint dismissed as provided by Article 45.051 or 45.052 may be expunged under this article.

(i) The justice or Municipal Court may not require a person who requests expungement under this article to pay any fee or Court costs.

(j) The procedures for expunction provided under this article are separate and distinct from the expunction procedures under Chapter 55.

ISSUED AND RECEIVED BY THE UNDERSIGNED:

_____
Signature of Municipal Judge Date

_____ _____
Signature of Defendant Date Signature of Parent Date

REV. 8/03

[1] A child means a person who is 10 years of age or older and under 17 years of age; or seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

[2] Class C misdemeanor Penal Code offenses and penal ordinance offenses.

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF** _____
_____ **(Petitioner)**	§	_____**COUNTY, TEXAS**

On this date came on to be heard the application and motion for expungement filed in the above captioned cause. Having considered the pleadings and other documents on file herein, **the Court finds** that it has jurisdiction over the cause and the parties; and that all procedural and substantive requirements for expungement of the specified criminal records have been met pursuant to Article 45.0216, Penal Code.

Therefore, it is hereby Ordered, Adjudged and Decreed that:

(1) the application and motion for expungement filed in the above-captioned cause is GRANTED, and all records of the petitioner's arrest and conviction on or about _____, 200___, including the records of Cause Number _____ in the Municipal Court of the City of _____, Texas, are to be expunged; and all release, dissemination, or use of records pertaining to such arrest and prosecution is prohibited;

(2) the respondents listed herein shall return all records and files concerning the above specified arrest to this Court, or if removal is impracticable, obliterate all portions of the record or file that identify the petitioner, including all computer entries, and notify this Court of its action not later than _____, 200____;

(3) the respondents shall delete from their records all index references to the records and files that are subject to this expungement order;

(4) the respondent, the Municipal Court of the City of _____, Texas, shall not permit inspection of the Court records concerning this expungement proceeding by any person other than the petitioner or petitioner's attorney herein, and shall obliterate all public references to this proceeding;

(5) pursuant to Article 45.0216, Code of Criminal Procedure, after entry of this Order, the applicant shall be released from all disabilities resulting from the conviction, and the conviction may not be shown or made known for any purpose; further, the petitioner may deny the occurrence of the expunged arrest, prosecution, conviction, and this expungement order;

(6) The Department of Public Safety shall send a copy of this Order by certified mail, return receipt requested, to any central federal depository of criminal records that there is reason to believe has any of the records subject to this Order, together with an explanation to the effect of the order and a request that the records in possession of the depository, including any information with respect to this proceeding, be destroyed, deleted, or returned to the Court on or before _____, 200___;

(7) the Clerk of the Municipal Court of the City of _____, Texas, shall cause a copy of this Order to be delivered, by certified mail, return receipt requested, to the following agencies subject to this Order:

(a) Juvenile Court of _____ County, Texas

(include address)

(b) Texas Department of Public Safety
P.O. Box 4087
Austin, TX 78773

(c) Sheriff's Department

(include address)

(d) _____ Police Department

(include address)

(e) _____ City Attorney's Office

(include address)

(f) _____Community Service Provider

(include address)

(g) Other: _____

_____

_____

Signed this _____ day of _____, 200___.

_____
Judge, Municipal Court

City of _____

_____ County, Texas

REV. 8/03

[redacted]

CAUSE NO. [redacted]

EX PARTE:

[redacted]

§ IN THE DISTRICT COURT

§ 177 JUDICIAL DISTRICT

§ OF HARRIS COUNTY, TEXAS

FILED
CHARLES BACARISSE
DISTRICT CLERK
2009 AUG -8 PM 3:21
BY
DEPUTY

PETITION FOR EXPUNCTION OF RECORDS

1. [redacted] Petitioner, requests that the Court issue an order expunging all criminal records arising from Petitioner being charged with Carrying A Prohibited Weapon, but was no billed by the Grand Jury.

F3 NO BILL

I.

Authority & Jurisdiction

2. This petition is brought pursuant to Article 55.01 of the Texas Code of Criminal Procedure. The court has jurisdiction because all facts giving rise to this petition occurred in Harris County, Texas.

II.

Identification Data

3. Petitioner's identification data are as follows:

Full Name: [redacted]
Date of Birth:
Race & Sex:
Address at time of arrest:

Texas DL No.:
Social Sec. No.:

TO HPD
9/25/03

M-Oct. 6 11:00
A/B. Oct. 2

III.

Facts

4. On or about [redacted], Houston Police Department arrested Petitioner and he was charged with the crime of Carrying a Prohibited Weapon.

5. The arrest detailed above gave rise to Cause Numbers [redacted] but was no billed by the Grand Jury on or about [redacted]. F NO BILL

6. The Grand Jury did not indict the Petitioner.

7. Petitioner was released by the court. The charge is no longer pending and never resulted in final conviction. The judge did not order community supervision pursuant to Article 42.12, Tex. Code Crim. Proc. No conditional discharge was ordered under Article 4.12 of the Texas Controlled Substances Act. Petitioner has not been convicted of a felony in the five years preceding the date of arrest.

8. The following police agencies have information concerning this charge:

Houston Police Department
P.O. Box 1562
Houston, Texas 77251

Harris County Sheriff's Department
1001 Preston, Suite 634
Houston, Texas 77002

Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773

Federal Bureau of Investigation
Ninth Street & Pennsylvania Avenue NW
Washington, DC 20535

Harris County District Attorney's Office
1201 Franklin
Houston, Texas 77002

Harris County District Clerk's Office
1201 Franklin
Houston, Texas 77002

Harris County Office of Court Services
1201 Franklin
Houston, Texas 77002

IV.

Texas Law

9. For the reasons shown in paragraphs four through seven, above, Petitioner is entitled to a court order which orders all of the police agencies listed, above, in paragraph eight, to expunge all records related to the subject arrest. Tex. Code Crim. P. Sec. 55, et. seq.

V.

Request for Relief

10. After proper notice, petitioner requests that the court:

(a) Set this lawsuit for hearing;

(b) Give notice of the hearing to interested state agencies in accordance with Article 55.02, Section 2, of the Texas Code of Criminal Procedure;

(c) Issue an order commanding the state agencies listed in paragraph eight, above, and all persons working for those agencies, to do the following things:

1) Remove and return to this Court all records and files concerning the subject arrest. In any event, and especially if removal and return is impractical, all references to Petitioner are to be obliterated from all records, whether such records be written or electronic. Precise written accounting for such obliteration is required by way of prompt follow-up written reporting to the Court.

2) Contact the National Crime Information Center (NCIC), the Identification Division of the Federal Bureau of Investigation (FBI), and any other centralized depository of crime information, whether state or federal, and then request removal and return of any and all records regarding the subject

[redacted]

CAUSE NO. [redacted]

EX PARTE:

[redacted]

§ IN THE DISTRICT COURT

§ 177th JUDICIAL DISTRICT

§ OF HARRIS COUNTY, TEXAS

ORDER SETTING SHOW CAUSE HEARING DATE
ON PETITION FOR EXPUNCTION OF RECORDS

It is ORDERED that a hearing on the above named and numbered Petition for Expunction of Records will be held on the _____ day of _____, 2003. At that time, the state will be asked to show cause why the records enumerated in the petition should not be expunged.

SIGNED on the _____ day of _____, 2003.

_____
PRESIDING JUDGE

BL-4
CASO

CAUSE NO. [redacted]

EX PARTE:

[redacted]

§ IN THE DISTRICT COURT

§ 177th JUDICIAL DISTRICT

§ OF HARRIS COUNTY, TEXAS

ORDER SETTING SHOW CAUSE HEARING DATE
ON PETITION FOR EXPUNCTION OF RECORDS

It is ORDERED that a hearing on the above named and numbered Petition for Expunction of Records will be held on the 6th day of October at 11:00 Am, 2003. At that time, the state will be asked to show cause why the records enumerated in the petition should not be expunged.

SIGNED on the 18 day of August, 2003.

PRESIDING JUDGE

IMAGED

NO. [redacted]

EX PARTE	§	**IN THE DISTRICT COURT**
	§	**OF**
	§	**HARRIS COUNTY, TEXAS**
[redacted]	§	**133RD JUDICIAL DISTRICT**

ORIGINAL ANSWER OF RESPONDENT, HOUSTON POLICE DEPARTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Houston Police Department, Respondent in the above-entitled cause, and in answer to Petitioner's Petition for Expunction of Records would respectfully show unto the Court the following:

Respondent enters a general denial as authorized by Rule 92 of the Texas Rules of Civil Procedure to the claims and allegations contained in Petitioner's Petition, and Respondent denies all and singular, each and every allegation contained in said Petition insofar as same undertakes to allege grounds for recovery herein; Respondent says the same are not true in whole or in part and demands strict proof thereof.

WHEREFORE, PREMISES CONSIDERED, Respondent, Houston Police Department prays that Petitioner be denied the expunction of any criminal records and files in its possession relating to Petitioner's arrests for various charges as listed in the Petition, that this cause be dismissed, that Respondent goes hence without day with its costs on behalf incurred, and that the Court grant such other and further relief, both general and special, at law and in equity, to which Respondent may show itself justly entitled

Respectfully submitted,

ANTHONY W. HALL, JR.
City Attorney

RONALD J. BEYLOTTE
Senior Assistant City Attorney

HORACE TEAGUE
Sr. Assistant City Attorney

By: Horace Teague
TBN 19752300
1400 Lubbock, Room 133
Houston, Texas 77002
(713) 247-5474
FAX (713) 247-8387

ATTORNEYS FOR RESPONDENT
HOUSTON POLICE DEPARTMENT

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of, October, 2003, a true and correct copy of the foregoing Original Answer of Respondent, Houston Police Department was delivered by certified mail, return receipt requested, Attorney of Record for Petitioner, Mr. Jed Silverman, 801 Congress, Suite 200, Houston, Texas 77002.

Horace Teague
HORACE TEAGUE

CITY OF HOUSTON

Legal Department

Lee P. Brown
Mayor

Anthony W. Hall, Jr.
City Attorney
Legal Department
P.O. Box 1562
Houston, Texas 77251-1562
City Hall Annex
900 Bagby, 4th Floor
Houston, Texas 77002

T. 713.247.2000
F. 713.247.1017
www.cityofhouston.gov

September 30, 2003

Certified Mail, RRR
Article No. 0001 8121 6926

Mr. Jed Silverman
801 Congress, Suite 200
Houston, Texas 77002

Re: Ex Parte [redacted] Cause No. [redacted] In the 133rd Judicial District Court of Harris County, Texas

Dear Mr. Silverman:

Enclosed please find a copy of the Original Answer of Respondent, Houston Police Department in the above-referenced cause.

Should you have any legal questions regarding this case, my phone number is 247-5474. For scheduling matters, you may contact the City's legal assistant, Mr. Stan Woodring, at 247-5584.

Sincerely,

Horace Teague
Sr. Assistant City Attorney

AC/nd
c:\Pleading\AC\Anscv1.sgl

Enclosure*******

PID UP 12/19/02

NO. [redacted]

EX PARTE	§	IN THE DISTRICT COURT FOR
	§	
[redacted]	§	THE 133RD JUDICIAL DISTRICT
	§	
	§	HARRIS COUNTY, TEXAS

AGREED ORDER OF EXPUNCTION

On this date came on to be heard the petition for expunction filed in the above-captioned cause. Having considered the pleadings and other documents on file herein, the Court finds that it has jurisdiction over the instant cause and the parties thereto; and that the respondents have been duly served with the petition; and that all procedural and substantive requirements for expunction of the below specified criminal records have been met.

Petitioner's name is [redacted]. Petitioner is a white male whose date of birth is [redacted]. His Texas driver's license number is [redacted] and his social security number is [redacted]. Petitioner's address at the time of arrest was [redacted].

Petitioner was arrested on or about [redacted] and charged with the Felony Offense of Carrying a Prohibited Weapon, in Cause No. [redacted] in the 177th District Court of Harris County, Texas. This case was no billed by the Grand Jury on or about [redacted]

THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that:

(1) the petition for expunction filed in the above-captioned cause is GRANTED, and all records of the petitioner's arrest in the above-stated cause including all records of petitioner's prosecution for this offense is expunged; and all release, dissemination or use of records pertaining to such arrest and prosecution is prohibited;

(2) the respondents shall return all records and files concerning the above-specified arrest to this Court, or if removal is impracticable, obliterate all portions of the records or files that identify the petitioner, including all computer entries, and notify the court of its action;

(3) the respondents shall delete from their records all index references to the records and files that are subject to this expunction order;

(4) the respondent district clerk shall not permit inspection of the court records concerning this expunction proceeding by any person other than the petitioner herein or petitioner's attorney, and shall obliterate all public references to this proceeding and maintain the file and all other records in an area not open to inspection;

(5) the Clerk shall deliver to the petitioner or petitioner's attorney, on request, all files and records returned to it pursuant to this order;

(6) the respondent district clerk shall destroy all such files and records returned to it pursuant to this order on the first anniversary of the date the order for expunction was issued unless the petitioner has requested the return of the records as provided above;

(7) pursuant to Article 55.03, Texas Code of Criminal Procedure, the petitioner may deny the occurrence of the expunged arrest and prosecution and this expunction order, except said petitioner, when questioned under oath in a criminal proceeding about said matters, may state only that the matter in question has been expunged;

(8) the Department of Public Safety shall send a copy of this order by certified mail, return receipt requested, to the appropriate central federal depository of criminal records that there is reason to believe has any of the records subject to this order, together with an explanation of the effect of the order and a request that the records in possession of the depository, including any information with respect to this proceeding, be destroyed, deleted or returned to the court; and

(9) the phrase "all records and files pertaining to the arrest" does not include records relating to the suspension or revocation of a driver's license, permit, or privilege to operate a motor vehicle except as provided in TEX. TRANSP. CODE ANN. § 524.015 and § 724.048 (Vernon Pamphlet 1996).

(10) the district clerk shall cause a copy of this order to be delivered, by certified mail, return receipt requested, to the following agencies subject to this order:

(a) Harris County Sheriff's Department
1301 Franklin
Houston, TX 77002

(b) Texas Department of Public Safety
Crime Records Service MSC 0234
P. O. Box 4143
Austin, TX 78765-4143

(c) Harris County District Attorney's Office
1201 Franklin, 6th Floor
Houston, TX 77002

(d) Houston Police Department
1200 Travis, 10th Floor
Houston, TX 77002-6000

(e) Harris County District Clerk's Office
1201 Franklin, 3rd Floor
Houston, TX 77002

(f) Harris County Office of Court Services
1201 Franklin, 12th Floor
Houston, TX 77002

Signed this _____ day of _____, 2003.

_____
JUDGE PRESIDING
133rd District Court
Harris County, Texas

Approved as to form and substance:

JED SILVERMAN
Attorney at Law
801 Congress, Suite 200
Houston, TX 77002
Telephone No.: (713) 526-1515
Facsimile No.: (713) 228-8710
SBN: 24013511
Attorney For Petitioner

CHARLES A. ROSENTHAL, JR., DISTRICT ATTORNEY

By: SCOTT A. DURFEE
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Code of Criminal Procedure

Art. 45.0216. Expunction of Certain Conviction Records of Children

(a) In this article, "child" has the meaning assigned by Section 51.02, Family Code.

(b) A person convicted of not more than one offense described by Section 8.07(a)(4) or (5), Penal Code, while the person was a child may, on or after the person's 17th birthday, apply to the court in which the child was convicted to have the conviction expunged as provided by this article.

(c) The person must make a written request to have the records expunged. The request must be under oath.

(d) The request must contain the person's statement that the person was not convicted while the person was a child of any offense described by Section 8.07(a)(4) or (5), Penal Code, other than the offense the person seeks to have expunged.

(e) The judge shall inform the person and any parent in open court of the person's expunction rights and provide them with a copy of this article.

(f) If the court finds that the person was not convicted of any other offense described by Section 8.07(a)(4) or (5), Penal Code, while the person was a child, the court shall order the conviction, together with all complaints, verdicts, sentences, and prosecutorial and law enforcement records, and any other documents relating to the offense, expunged from the person's record. After entry of the order, the person is released from all disabilities resulting from the conviction and the conviction may not be shown or made known for any purpose.

(g) This article does not apply to any offense otherwise covered by:

(1) Chapter 106, Alcoholic Beverage Code;

(2) Chapter 161, Health and Safety Code; or

(3) Section 25.094, Education Code.

(h) Records of a person under 17 years of age relating to a complaint dismissed as provided by Article 45.051 or 45.052 may be expunged under this article.

(i) The justice or municipal court may not require a person who requests expungement under this article to pay any fee or court costs.

(j) The procedures for expunction provided under this article are separate and distinct from the expunction procedures under Chapter 55.

Added by Acts 2001, 77th Leg., ch. 1297, Sec. 50, eff. Sept. 1, 2001.

Alcoholic Beverage Code

§ 106.12. EXPUNGEMENT OF CONVICTION OF A MINOR. (a) Any person convicted of not more than one violation of this code while a minor, on attaining the age of 21 years, may apply to the court in which he was convicted to have the conviction expunged.

(b) The application shall contain the applicant's sworn statement that he was not convicted of any violation of this code while a minor other than the one he seeks to have expunged.

(c) If the court finds that the applicant was not convicted of any other violation of this code while he was a minor, the court shall order the conviction, together with all complaints, verdicts, sentences, and other documents relating to the offense, to be expunged from the applicant's record. After entry of the order, the applicant shall be released from all disabilities resulting from the conviction, and the conviction may not be shown or made known for any purpose.

Acts 1977, 65th Leg., p. 515, ch. 194, § 1, eff. Sept. 1, 1977. Amended by Acts 1981, 67th Leg., p. 258, ch. 107, § 13, eff. Sept. 1, 1981; Acts 1985, 69th Leg., ch. 285, § 11, eff. Sept. 1, 1986; Acts 1985, 69th Leg., ch. 462, § 12, eff. Sept. 1, 1986.

Health & Safety Code

§ 161.255. EXPUNGEMENT OF CONVICTION. An individual convicted of an offense under Section 161.252 may apply to the court to have the conviction expunged. If the court finds that the individual satisfactorily completed the tobacco awareness program or tobacco-related community service ordered by the court, the court shall order the conviction and any complaint, verdict, sentence, or other document relating to the offense to be expunged from the individual's record and the conviction may not be shown or made known for any purpose.

Added by Acts 1997, 75th Leg., ch. 671, § 3.01, eff. Jan. 1, 1998.

Code of Criminal Procedure

Art. 45.055. Expunction of Conviction and Records in Failure to Attend School Cases

(a) An individual convicted of not more than one violation of Section 25.094, Education Code, may, on or after the individual's 18th birthday, apply to the court in which the individual was convicted to have the conviction and records relating to the conviction expunged.

(b) To apply for an expunction, the applicant must submit a written request that:

(1) is made under oath;

(2) states that the applicant has not been convicted of more than one violation of Section 25.094, Education Code; and

(3) is in the form determined by the applicant.

(c) The court may expunge the conviction and records relating to the conviction without a hearing or, if facts are in doubt, may order a hearing on the application. If the court finds that the applicant has not been convicted of more than one violation of Section 25.094, Education Code, the court shall order the conviction, together with all complaints, verdicts, sentences, and other documents relating to the offense, including any documents in the possession of a school district or law enforcement agency, to be expunged from the applicant's record. After entry of the order, the applicant is released from all disabilities resulting from the conviction, and the conviction may not be shown or made known for any purpose. The court shall inform the applicant of the court's decision on the application.

(d) The court may not require an individual who files an application under this article to pay any fee or court costs for seeking expunction.

Added by Acts 2001, 77th Leg., ch. 1514, Sec. 9, eff. Sept. 1, 2001. Subsec. (d) amended by Acts 2003, 78th Leg., ch. 137, Sec. 15, eff. Sept. 1, 2003.

Family Code

§ 261.315. REMOVAL OF CERTAIN INVESTIGATION INFORMATION FROM RECORDS. (a) At the conclusion of an investigation in which the department determines that the person alleged to have abused or neglected a child did not commit abuse or neglect, the department shall notify the person of the person's right to request the department to remove information about the person's alleged role in the abuse or neglect report from the department's records.

(b) On request under Subsection (a) by a person whom the department has determined did not commit abuse or neglect, the department shall remove information from the department's records concerning the person's alleged role in the abuse or neglect report.

(c) The board shall adopt rules necessary to administer this section.

Added by Acts 1997, 75th Leg., ch. 1022, § 75, eff. Sept. 1, 1997.

Government Code

§ 411.083. DISSEMINATION OF CRIMINAL HISTORY RECORD INFORMATION. (a) Criminal history record information maintained by the department is confidential information for the use of the department and, except as provided by this subchapter, may not be disseminated by the department.

(b) The department shall grant access to criminal history record information to:

(1) criminal justice agencies;

(2) noncriminal justice agencies authorized by federal statute or executive order or by state statute to receive

criminal history record information;

(3) the person who is the subject of the criminal history record information;

(4) a person working on a research or statistical project that:

(A) is funded in whole or in part by state funds;
or

(B) meets the requirements of Part 22, Title 28, Code of Federal Regulations, and is approved by the department;

(5) an individual or an agency that has a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice under that agreement, if the agreement:

(A) specifically authorizes access to information;

(B) limits the use of information to the purposes
for which it is given;

(C) ensures the security and confidentiality of the information; and

(D) provides for sanctions if a requirement imposed under Paragraph (A), (B), or (C) is violated;

(6) a county or district clerk's office; and

(7) the Office of Court Administration of the Texas Judicial System.

(c) The department may disseminate criminal history record information under Subsection (b)(1) only for a criminal justice purpose. The department may disseminate criminal history record information under Subsection (b)(2) only for a purpose specified in the statute or order. The department may disseminate criminal history record information under Subsection (b)(4) or (b)(5) only for a purpose approved by the department and only under rules adopted by the department. The department may disseminate criminal history record information under Subsection (b)(6) only to the extent necessary for a county or district clerk to perform a duty imposed by law to collect and report criminal court disposition information. Criminal history record information disseminated to a clerk under Subsection (b)(6) may be used by the clerk only to ensure that information reported by the clerk to the department is accurate and complete. The dissemination of information to a clerk under Subsection (b)(6) does not affect the authority of the clerk to disclose or use information submitted by the clerk to the department. The department may disseminate criminal history record information under Subsection (b)(7) only to the extent necessary for the office of court administration to perform a duty imposed by law to compile court statistics or prepare reports. The office of court administration may disclose criminal history record information obtained from the department under Subsection (b)(7) in a statistic compiled by the office or a report prepared by the office, but only in a manner that does not identify the person who is the subject of the information.

(d) The department is not required to release or disclose criminal history record information to any person that is not in compliance with rules adopted by the department under this subchapter or rules adopted by the Federal Bureau of Investigation that relate to the dissemination or use of criminal history record

information.

Added by Acts 1993, 73rd Leg., ch. 790, § 35, eff. Sept. 1, 1993. Amended by Acts 2001, 77th Leg., ch. 474, § 4, eff. Sept. 1, 2001.

Code of Criminal Procedure

CHAPTER 55. EXPUNCTION OF CRIMINAL RECORDS

Art. 55.01. Right to Expunction

(a) A person who has been placed under a custodial or noncustodial arrest for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if:

(1) the person is tried for the offense for which the person was arrested and is:

(A) acquitted by the trial court, except as provided by Subsection (c) of this section; or

(B) convicted and subsequently pardoned; or

(2) each of the following conditions exist:

(A) an indictment or information charging the person with commission of a felony has not been presented against the person for an offense arising out of the transaction for which the person was arrested or, if an indictment or information charging the person with commission of a felony was presented, the indictment or information has been dismissed or quashed, and:

(i) the limitations period expired before the date on which a petition for expunction was filed under Article 55.02; or

(ii) the court finds that the indictment or information was dismissed or quashed because the presentment had been made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe the person committed the offense or because it was void;

(B) the person has been released and the charge, if any, has not resulted in a final conviction and is no longer pending and there was no court ordered community supervision under Article 42.12 for any offense other than a Class C misdemeanor; and

(C) the person has not been convicted of a felony in the five years preceding the date of the arrest.

(b) Except as provided by Subsection (c) of this section, a district court may expunge all records and files relating to the arrest of a person who has been arrested for commission of a felony or misdemeanor under the procedure established under Article 55.02 of this code if the person is:

(1) tried for the offense for which the person was arrested;

(2) convicted of the offense; and

(3) acquitted by the court of criminal appeals.

(c) A court may not order the expunction of records and files relating to an arrest for an offense for which a person is subsequently acquitted, whether by the trial court or the court of criminal appeals, if the offense for which the person was acquitted arose out of a criminal episode, as defined by Section 3.01, Penal Code, and the person was convicted of or remains subject to prosecution for at least one other offense occurring during the criminal episode.

(d) A person is entitled to have any information that identifies the person, including the person's name, address, date of birth, driver's license number, and social security number, contained in records and files relating to the arrest of another person expunged if:

(1) the information identifying the person asserting the entitlement to expunction was falsely given by the person arrested as the arrested person's identifying information without the consent of the person asserting the entitlement; and

(2) the only reason for the information identifying the person asserting the entitlement being contained in the arrest records and files of the person arrested is that the information was falsely given by the person arrested as the arrested person's identifying information.

Added by Acts 1977, 65th Leg., p. 1880, ch. 747, Sec. 1, eff. Aug. 29, 1977.

Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, Sec. 1, eff. Aug. 27, 1979; Acts 1989, 71st Leg., ch. 803, Sec. 1, eff. Sept. 1, 1989; Subsec. (2) amended by Acts 1991, 72nd Leg., ch. 14, Sec. 284(53), eff. Sept. 1, 1991. Amended by Acts 1993, 73rd Leg., ch. 900, Sec. 7.02(a), eff. Sept. 1, 1993; Acts 1999, 76th Leg., ch. 1236, Sec. 1, eff. Aug. 30, 1999; Subsec. (a) amended by Acts 2001, 77th Leg., ch. 1021, Sec. 1, eff. Sept. 1, 2001; Subsec. (d) added by Acts 2001, 77th Leg., ch. 945, Sec. 1, eff. June 14, 2001; Subsec. (a) amended by Acts 2003, 78th Leg., ch. 1236, Sec. 1, eff. Sept. 1, 2003.

Art. 55.02. Procedure for Expunction

Sec. 1. At the request of the defendant and after notice to the state, the trial court presiding over the case in which the defendant was acquitted, if the trial court is a district court, or a district court in the county in which the trial court is located shall enter an order of expunction for a person entitled to expunction under article 55.01(a)(1)(a) not later than the 30th day

after the date of the acquittal. Upon acquittal, the trial court shall advise the defendant of the right to expunction. The defendant shall provide to the district court all of the information required in a petition for expunction under Section 2(b). The attorney for the defendant in the case in which the defendant was acquitted, if the defendant was represented by counsel, or the attorney for the state, if the defendant was not represented by counsel, shall prepare the order for the court's signature.

Text of sec. 2, subsec. (a) as amended by Acts 2003, 78th Leg., ch. 339, Sec. 2

Sec. 2. (a) A person who is entitled to expunction of records and files under Article 55.01(a)(1)(B) or 55.01(a)(2) or a person who is eligible for expunction of records and files under Article 55.01(b) may file an ex parte petition for expunction in a district court for the county in which:

(1) the petitioner was arrested; or

(2) the offense was alleged to have occurred.

Text of sec. 2, subsec. (a) as amended by Acts 2003, 78th Leg., ch. 1236, Sec. 2

Sec. 2. (a) A person who is entitled to expunction of records and files under Article 55.01(a) or (d) or a person who is eligible for expunction of records and files under Article 55.01(b) may file an ex parte petition for expunction in a district court for the county in which:

(1) the petitioner was arrested;

(2) the person who falsely identified himself or herself as the petitioner was arrested, if the petitioner relies on an entitlement under Article 55.01(d); or

(3) the offense was alleged to have occurred.

(b) The petition must be verified and shall include the following or an explanation for why one or more of the following is not included:

(1) the petitioner's:

(A) full name;

(B) sex;

(C) race;

(D) date of birth;

(E) driver's license number;

(F) social security number; and

(G) address at the time of the arrest;

(2) the offense charged against the petitioner;

(3) the date the offense charged against the petitioner was alleged to have been committed;

(4) the date the petitioner was arrested;

(5) the name of the county where the petitioner was arrested and if the arrest occurred in a municipality, the name of the municipality;

(6) the name of the agency that arrested the petitioner;

(7) the case number and court of offense; and

(8) a list of all law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, and other officials or agencies or other entities of this state or of any political subdivision of this state and of all central federal depositories of criminal records that the petitioner has reason to believe have records or files that are subject to expunction.

(c) The court shall set a hearing on the matter no sooner than thirty days from the filing of the petition and shall give reasonable notice of the hearing to each official or agency or other entity named in the petition by certified mail, return receipt requested, and such entity may be represented by the attorney responsible for providing such agency with legal representation in other matters.

(d) If the court finds that the petitioner is entitled to expunction of any records and files that are the subject of the petition, it shall enter an order directing expunction.

(e) Repealed by Acts 2003, 78th Leg., ch. 339, Sec. 7.

Sec. 2a. (a) A person who is entitled to expunction of information contained in records and files under Article 55.01(d) may file an application for expunction with the attorney representing the state in the prosecution of felonies in the county in which the person resides.

(b) The application must be verified, include authenticated fingerprint records of the applicant, and include the following or an explanation for why one or more of the following is not included:

(1) the applicant's full name, sex, race, date of birth, driver's license number, social security number, and address at the time the person who falsely identified himself or herself as the applicant was arrested;

(2) the following information regarding the arrest:

(A) the date of arrest;

(B) the offense charged against the person arrested;

(C) the name of the county or municipality in which the arrest occurred; and

(D) the name of the arresting agency; and

(3) a statement that:

(A) the applicant is not the person arrested and for whom the arrest records and files were created; and

(B) the applicant did not give the person arrested consent to falsely identify himself or herself as the applicant.

(c) After verifying the allegations in an application received under Subsection (a), the attorney representing the state shall:

(1) include on the application information regarding the arrest that was requested of the applicant but was unknown by the applicant;

(2) forward a copy of the application to the district court for the county;

(3) attach to the copy a list of all law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, and other officials or agencies or other entities of this state or of any political subdivision of this state and of all central federal depositories of criminal records that are reasonably likely to have records or files containing information that is subject to expunction; and

(4) request the court to enter an order directing expunction based on an entitlement to expunction under Article 55.01(d).

(d) On receipt of a request under Subsection (c), the court shall, without holding a hearing on the matter, enter a final order directing expunction.

Sec. 3. (a) In an order of expunction issued under this article, the court shall require any state agency that sent information concerning the arrest to a central federal depository to request the depository to return all records and files subject to the order of expunction. The person who is the subject of the expunction order or an agency protesting the expunction may appeal the court's decision in the same manner as in other civil cases.

(b) The order of expunction entered by the court shall have attached and incorporate by reference a copy of the judgment of acquittal and shall include:

(1) the following information on the person who is the subject of the expunction order:

(A) full name;

(B) sex;

(C) race;

(D) date of birth;

(E) driver's license number; and

(F) social security number;

(2) the offense charged against the person who is the subject of the expunction order;

(3) the date the person who is the subject of the expunction order was arrested;

(4) the case number and court of offense; and

(5) the tracking incident number (TRN) assigned to the individual incident of arrest under Article 60.07(b)(1) by the Department of Public Safety.

(c) When the order of expunction is final, the clerk of the court shall send a certified copy of the order by certified mail, return receipt requested, to the Crime Records Service of the Department of Public Safety and by hand delivery or certified mail, return receipt requested, to each official or agency or other entity of this state or of any political subdivision of this state designated by the person who is the subject of the order. The clerk of the court must receive a receipt for each order delivered by hand under this subsection. The Department of Public Safety shall notify any central federal depository of criminal records by any means, including electronic transmission, of the order with an explanation of the effect of the order and a request that the depository, as appropriate, either:

(1) destroy or return to the court the records in possession of the depository that are subject to the order, including any information with respect to the order; or

(2) comply with Section 5(f) of this article pertaining to information contained in records and files of a person entitled to expunction under Article 55.01(d).

(d) All returned receipts received by the clerk from notices of the hearing and copies of the order shall be maintained in the file on the proceedings under this chapter.

Sec. 4. (a) If the state establishes that the person who is the subject of an expunction order is still subject to conviction for an offense arising out of the transaction for which the person was arrested because the statute of limitations has not run and there is

reasonable cause to believe that the state may proceed against the person for the offense, the court may provide in its order that the law enforcement agency and the prosecuting attorney responsible for investigating the offense may retain any records and files that are necessary to the investigation. In the case of a person who is the subject of an expunction order on the basis of an acquittal, the court may provide in the expunction order that the law enforcement agency and the prosecuting attorney retain records and files if:

(1) the records and files are necessary to conduct a subsequent investigation and prosecution of a person other than the person who is the subject of the expunction order; or

(2) the state establishes that the records and files are necessary for use in:

(A) another criminal case, including a prosecution, motion to adjudicate or revoke community supervision, parole revocation hearing, mandatory supervision revocation hearing, punishment hearing, or bond hearing; or

(B) a civil case, including a civil suit or suit for possession of or access to a child.

(b) Unless the person who is the subject of the expunction order is again arrested for or charged with an offense arising out of the transaction for which the person was arrested or unless the court provides for the retention of records and files under Subsection (a) of this section, the provisions of Articles 55.03 and 55.04 of this code apply to files and records retained under this section.

Sec. 5. (a) Except as provided by Subsection (f), on receipt of the order, each official or agency or other entity named in the order shall:

(1) return all records and files that are subject to the expunction order to the court or, if removal is impracticable, obliterate all portions of the record or file that identify the person who is the subject of the order and notify the court of its action; and

(2) delete from its public records all index references to the records and files that are subject to the expunction order.

(b) Except in the case of a person who is the subject of an expunction order on the basis of an acquittal or an expunction order based on an entitlement under Article 55.01(d), the court may give the person who is the subject of the order all records and files returned to it pursuant to its order.

(c) Except in the case of a person who is the subject of an expunction order based on an entitlement under Article 55.01(d), if an order of expunction is issued under this article, the court records concerning expunction proceedings are not open for inspection by anyone except the person who is the subject of the order unless the order permits retention of a record under Section 4 of this article and the person is again arrested for or charged with an offense arising out of the transaction for which the person was

arrested or unless the court provides for the retention of records and files under Section 4(a) of this article. The clerk of the court issuing the order shall obliterate all public references to the proceeding and maintain the files or other records in an area not open to inspection.

(d) Except in the case of a person who is the subject of an expunction order on the basis of an acquittal or an expunction order based on an entitlement under Article 55.01(d), the clerk of the court shall destroy all the files or other records maintained under Subsection (c) not earlier than the 60th day after the date the order of expunction is issued or later than the first anniversary of that date unless the records or files were released under Subsection (b).

(d-1) Not later than the 30th day before the date on which the clerk destroys files or other records under Subsection (d), the clerk shall provide notice by mail, electronic mail, or facsimile transmission to the attorney representing the state in the expunction proceeding. If the attorney representing the state in the expunction proceeding objects to the destruction not later than the 20th day after receiving notice under this subsection, the clerk may not destroy the files or other records until the first anniversary of the date the order of expunction is issued or the first business day after that date.

(e) The clerk shall certify to the court the destruction of files or other records under Subsection (d) of this section.

(f) On receipt of an order granting expunction to a person entitled to expunction under Article 55.01(d), each official, agency, or other entity named in the order:

(1) shall:

(A) obliterate all portions of the record or file that identify the petitioner; and

(B) substitute for all obliterated portions of the record or file any available information that identifies the person arrested; and

(2) may not return the record or file or delete index references to the record or file.

Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, Sec. 1, eff. Aug. 27, 1979; Sec. 1(b) amended by Acts 1989, 71st Leg., ch. 803, Sec. 2, eff. Sept. 1, 1989; Sec. 3(a) amended by Acts 1989, 71st Leg., ch. 803, Sec. 3, eff. Sept. 1, 1989; Sec. 5(d), (e) added by Acts 1989, 71st Leg., ch. 803, Sec. 4, eff. Sept. 1, 1989; Sec. 3(a) amended by Acts 1991, 72nd Leg., ch. 380, Sec. 1, eff. Aug. 26, 1991; Acts 1999, 76th Leg., ch. 1236, Sec. 2, eff. Aug. 30, 1999; Sec. 2(a), (b) amended by and Sec. 2(e) added by Acts 2001, 77th Leg., ch. 945, Sec. 2, eff. June 14, 2001; Sec. 3(c) amended by Acts 2001, 77th Leg., ch. 1021, Sec. 2, eff. Sept. 1, 2001; Sec. 5 amended by Acts 2001, 77th Leg., ch. 945, Sec. 3, eff. June 14, 2001; Sec 1 amended by Acts 2003, 78th Leg., ch. 404, Sec. 1, eff. Sept. 1, 2003; Sec. 2(a) amended by Acts 2003, 78th Leg., ch. 339,

Sec. 2, eff. Sept. 1, 2003; Acts 2003, 78th Leg., ch. 1236, Sec. 2, eff. Sept. 1, 2003; Sec. 2(e) amended by Acts 2003, 78th Leg., ch. 339, Sec. 7, eff. Sept. 1, 2003; Sec. 2(a) added by Acts 2003, 78th Leg., ch. 339, Sec. 3, eff. Sept. 1, 2003; Sec. 3(a), 3(b) amended by Acts 2003, 78th Leg., ch. 404, Sec. 2, eff. Sept. 1, 2003; Sec. 3(c) amended by Acts 2003, 78th Leg., ch. 339, Sec. 4, eff. Sept. 1, 2003; Sec. 1 amended by Acts 2003, 78th Leg., ch. 404, Sec. 1, eff. Sept. 1, 2003; Sec. 3(a), 3(b) amended by Acts 2003, 78th Leg., ch. 404, Sec. 2, eff. Sept. 1, 2003; Sec. 5(d) amended by Acts 2003, 78th Leg., ch. 1126, Sec. 1, eff. June 20, 2003; Sec. 5(d-1) added by Acts 2003, 78th Leg., ch. 1126, Sec. 1, eff. June 20, 2003.

Art. 55.03. Effect of Expunction

When the order of expunction is final:

(1) the release, dissemination, or use of the expunged records and files for any purpose other than a purpose described by Section 411.083(a) or (b)(1), (2), or (3), Government Code, is prohibited;

(2) except as provided in Subdivision 3 of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and

(3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Added by Acts 1977, 65th Leg., p. 1880, ch. 747, Sec. 1, eff. Aug. 29, 1977.

Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, Sec. 1, eff. Aug. 27, 1979; Acts 1999, 76th Leg., ch. 1236, Sec. 3, eff. Aug. 30, 1999; Acts 2001, 77th Leg., ch. 1021, Sec. 3, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 1236, Sec. 3, eff. Sept. 1, 2003.

Art. 55.04. Violation of Expunction Order

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Sec. 2. A person who knowingly fails to return or to obliterate identifying portions of a record or file ordered expunged under this chapter commits an offense.

Sec. 3. An offense under this article is a Class B misdemeanor.

Added by Acts 1977, 65th Leg., p. 1880, ch. 747, Sec. 1, eff. Aug. 29, 1977.

Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, Sec. 1, eff. Aug. 27, 1979.

Art. 55.05. Notice of Right to Expunction

On release or discharge of an arrested person, the person responsible for the release or discharge shall give him a written explanation of his rights under this chapter and a copy of the provisions of this chapter.

Added by Acts 1977, 65th Leg., p. 1880, ch. 747, Sec. 1, eff. Aug. 29, 1977.

Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, Sec. 1, eff. Aug. 27, 1979.

Art. 55.06. License Suspensions and Revocations

Records relating to the suspension or revocation of a driver's license, permit, or privilege to operate a motor vehicle may not be expunged under this chapter except as provided in Section 524.015, Transportation Code, or Section 724.048 of that code.

Added by Acts 1993, 73rd Leg., ch. 886, Sec. 16, eff. Jan. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 62, Sec. 3.08, eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 1236, Sec. 4, eff. Aug. 30, 1999.

Penal Code

CHAPTER 3. MULTIPLE PROSECUTIONS

§ 3.01. DEFINITION. In this chapter, "criminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:

(1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or

(2) the offenses are the repeated commission of the same or similar offenses.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1987, 70th Leg., ch. 387, § 1, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994.

§ 3.02. CONSOLIDATION AND JOINDER OF PROSECUTIONS. (a) A defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode.

(b) When a single criminal action is based on more than one charging instrument within the jurisdiction of the trial court, the state shall file written notice of the action not less than 30 days prior to the trial.

(c) If a judgment of guilt is reversed, set aside, or vacated, and a new trial ordered, the state may not prosecute in a single criminal action in the new trial any offense not joined in the former prosecution unless evidence to establish probable guilt for that offense was not known to the appropriate prosecuting official at the time the first prosecution commenced.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994.

§ 3.03. SENTENCES FOR OFFENSES ARISING OUT OF SAME CRIMINAL EPISODE. (a) When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.

(b) If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences may run concurrently or consecutively if each sentence is for a conviction of:

(1) an offense:

(A) under Section 49.08; or

(B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense under Section 49.08; or

(2) an offense:

(A) under Section 21.11, 22.011, 22.021, 25.02, or 43.25 committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section; or

(B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense listed in Paragraph (A) committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is charged with violations of the same section more than once or is charged with violations of more than one section.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994; Acts 1995, 74th Leg., ch. 596, § 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 667, § 2, eff. Sept. 1, 1997.

§ 3.04. SEVERANCE. (a) Whenever two or more offenses

have been consolidated or joined for trial under Section 3.02, the defendant shall have a right to a severance of the offenses.

(b) In the event of severance under this section, the provisions of Section 3.03 do not apply, and the court in its discretion may order the sentences to run either concurrently or consecutively.

(c) The right to severance under this section does not apply to a prosecution for offenses described by Section 3.03(b)(2) unless the court determines that the defendant or the state would be unfairly prejudiced by a joinder of offenses, in which event the judge may order the offenses to be tried separately or may order other relief as justice requires.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994; Acts 1997, 75th Leg., ch. 667, § 3, eff. Sept. 1, 1997.

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TEXAS MUNICIPAL COURTS EDUCATION CENTER

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Judgments and Non-contested Cases

OBJECTIVES

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

1. Determine the roles of the judge and the clerk in processing and handling defendants who do not want to contest their cases.
2. Determine what paperwork clerks are required to prepare for the judge when a defendant does not contest a case.
3. Determine the best procedures for clerks to process defendants appearing by mail or at the court's administration offices. and
4. Identify legal issues when defendants do not appear before the judge but are processed by court personnel.

NON-CONTESTED CASES AND JUDGMENTS

Topics Discussed

- Appearances
- Municipal court judgments required
- What is a judgment
- Requirements of judgments
- Jail Credit
- When judgment required
- Who prepares judgments
- Waiver of fine and costs
- Enhancements

Appearances

- Open Court
- Delivery of plea to court
- Delivery of fine to court
- Mail plea to court
- Mail fine to court

Appearances

- Plea (no contest or guilty & waiver of jury trial)
  - Open Court
    - Judge accepts plea
    - Clerk prepares judgment
    - Judge signs judgment
      - Judge determines how defendant satisfies judgment

Appearances

- Pleas (no contest or guilty & waiver of jury trial)
  - Delivered to court
    - Clerk processes plea
    - Clerk prepares judgment
    - Judge signs judgment
  - Mailed to court
    - Clerk processes plea
    - Clerk prepares judgment
    - Judge signs judgment

Appearances

- Fine
  - Only due after judge enters judgment
    - Art. 27.14, C.C.P. allows pre-payment
  - Paid after appearance in open court
  - Delivered to court
    - No contest plea & waiver of jury trial
  - Mailed to court
    - No contest plea and waiver of jury trial

Judgments Required

Municipal court judgments required by Article 42.01, Section 3, C.C.P.

What is a Judgment Art. 42.01, C.C.P.

- Written declaration of court
- Signed by trial judge
- Showing conviction (or acquittal)
- Basis of sentence

Art. 42.01, C.C.P.

- Title, Case #, Court
- Offense charged
- Case was called and parties appeared
- Name of prosecutor and defense attorney
- Waiver of right to jury & counsel, if waived

Art. 42.01, C.C.P.

- Evidence/plea
- Jury verdict, if jury trial
- Date of judgment and sentence
- If an acquittal, defendant discharged
- Jail credit

Jail Credit

- Required to be given
  - Art. 45.041(c), C.C.P.
  - Art. 42.03, C.C.P.
- Not less than $50 for period of time specified in judgment
  - Art. 45.048, C.C.P.
- Period of time
  - From 8 to 24 hours

Article 42.019. C.C.P.

- Motor Fuel Theft
  - Enter an affirmative finding in judgment
  - If second conviction, enter a special affirmative finding in judgment

Municipal Court Judgments Art. 45.041, C.C.P.

- Judgment and sentence
- Fine, costs, payment orders
- Restitution
- Other sanctions authorized by law
- Jail credit
- Made in open court

Municipal Court Judgments

- Required when:
  - Defendant pleads guilty or nolo contendere
  - Defendant mails in pre-judgment payment to court
  - Defendant delivers pre-judgment payment to court
  - Defendant found guilty after trial

Municipal Court Judgments

- Required when:
  - Defendant found not guilty after trial
  - Prosecutor makes motion to dismiss after court grants motion
  - Court grants motion to quash complaint
  - Defendant completes or fails to complete DSC

Municipal Court Judgments

- Required when:
  - Defendant completes or fails to complete terms of deferred disposition
  - Judge dismisses expired registration, expired DL, expired inspection certificate

Municipal Court Judgments

- Required before:
  - Court can report traffic convictions
  - Judge issues a *capias pro fine*

Municipal Court Judgments

- Must be dated
  - Time payment fee due if all of fine, costs, or restitution not paid by 30th day after judgment
  - Do not count day of judgment
    - Count calendar days
    - Count last day (30th)
    - If 30th day lands on weekend or holiday, go to next working day of court.

Judgments

- Notations on court's docket do not constitute a valid judgment (*Ex parte Winford* 85 S.W. 1146 (Tex. Crim. App. 1905)
- Defective judgments in municipal court can void commitment orders (*Ex parte Leachman*)

Who Prepares Art. 42.01, Sec. 2, C.C.P.

- Judge may order
  - Prosecutor
  - Defense Attorney
  - Court Clerk

Judgments

- Waiver of fine and costs (Article 43.091, C.C.P.)
  - Defendant defaults
  - Defendant is indigent
  - Defendant unable to satisfy judgment by use of methods in Article 43.09, C.C.P. because it would be an undue hardship

Enhancements

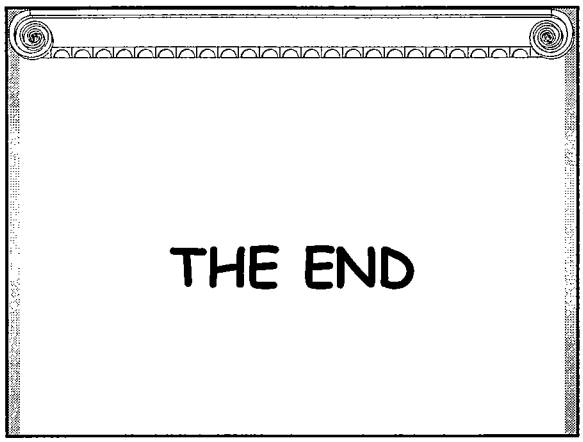
- Only prosecutor may enhance charge
- Prosecutor must be able to prove prior conviction
  - Present court with certified copy of prior valid judgment (s)
- If charge not enhanced, court handles as a first time offense

Municipal Court Offenses That May Be Enhanced

- Alcoholic Beverage Code offenses involving minors
- Failure to Maintain Financial Responsibility
- No Driver's License
- Privileged Parking
- Disorderly Conduct
- Public Intoxication
- Deceptive Business Practices
- Criminal Mischief

Judgments

- NO JUDGMENT, no conviction
- NO JUDGMENT, no reporting traffic convictions
- NO JUDGMENT, no *capias pro fine*
- NO JUDGMENT, no enhancements
- NO JUDGMENT, no payment of fine can be required


THE END

NON-CONTESTED CASES AND JUDGMENTS

TABLE OF CONTENTS

Non-Contested Cases and Judgments

A. Appearances

Appearance is the formal proceeding by which a defendant submits himself or herself to the jurisdiction of the court. Other than the defendant, only an attorney hired to represent the defendant may appear for the defendant.

1. Methods of Appearance

Defendants may make an appearance:

- in open court in person or by counsel,
- in person at the court, and
- by mail.

If a defendant appears in person or by mail on or before the answer date on the citation, the court may not require the defendant to make an appearance in court.

> **Code of Criminal Procedure Art. 27.14. Plea of Guilty or Nolo Contendere in Misdemeanor**
>
> (a) A plea of "guilty" or a plea of "nolo contendere" in a misdemeanor case may be made either by the defendant or his counsel in open court; in such case, the defendant or his counsel may waive a jury, and the punishment may be assessed by the court either upon or without evidence, at the discretion of the court.
>
> (b) A defendant charged with a misdemeanor for which the maximum possible punishment is by fine only may, in lieu of the method provided in Subsection (a) of this article, mail or deliver in person to the court a plea of "guilty" or a plea of "nolo contendere" and a waiver of jury trial. The defendant may also request in writing that the court notify the defendant, at the address stated in the request, of the amount of an appeal bond that the court will approve. If the court receives a plea and waiver before the time the defendant is scheduled to appear in court, the court shall dispose of the case without requiring a court appearance by the defendant. The court shall notify the defendant either in person or by certified mail, return receipt requested, of the amount of any fine assessed in the case and, if requested by the defendant, the amount of an appeal bond that the court will approve. The defendant shall pay any fine assessed or give an appeal bond in the amount stated in the notice before the 31st day after receiving the notice.
>
> (c) In a misdemeanor case for which the maximum possible punishment is by fine only, payment of a fine or an amount accepted by the court constitutes a finding of guilty in open court as though a plea of nolo contendere had been entered by the defendant and constitutes a waiver of a jury trial in writing.
>
> (d) If written notice of an offense for which maximum possible punishment is by fine only or of a violation relating to the manner, time, and place of parking has been prepared, delivered, and filed with

the court and a legible duplicate copy has been given to the defendant, the written notice serves as a complaint to which the defendant may plead "guilty," "not guilty," or "nolo contendere." If the defendant pleads "not guilty" to the offense, a complaint shall be filed that conforms to the requirements of Chapter 45 of this code, and that complaint serves as an original complaint. A defendant may waive the filing of a sworn complaint and elect that the prosecution proceed on the written notice of the charged offense if the defendant agrees in writing with the prosecution, signs the agreement, and files it with the court.
Acts 1965, 59th Leg., p. 317, ch. 722, Sec. 1, eff. Jan. 1, 1966. Amended by Acts 1967, 60th Leg., p. 1738, ch. 659, Sec. 18, eff. Aug. 28, 1967; Acts 1977, 65th Leg., p. 2143, ch. 858, Sec. 1, eff. June 16, 1977; Acts 1979, 66th Leg., p. 450, ch. 207, Sec. 1, eff. Sept. 1, 1979; Acts 1983, 68th Leg., p. 1257, ch. 273, Sec. 1, eff. Sept. 1, 1983; Acts 1985, 69th Leg., ch. 87, Sec. 1, eff. Sept. 1, 1985.

Code of Criminal Procedure, Art. 45.022. Plea of Guilty or Nolo Contendere
Proof as to the offense may be heard upon a plea of guilty or a plea of nolo contendere and the punishment assessed by the court.
Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Renumbered from Vernon's Ann.C.C.P. art. 45.34 and amended by Acts 1999, 76th Leg., ch. 1545, Sec. 20, eff. Sept. 1, 1999.

2. Mail Box Rule

If a defendant does not appear by the answer date on the citation, the court must wait an additional ten working days. If a defendant mails the plea and/or payment on or before he or she was to appear, the plea or payment is timely presented to the court if the court receives the plea and or money on or before the 10th working day that the plea or payment was due.

Code of Criminal Procedure, Art. 45.013. Filing With Clerk by Mail
(a) Notwithstanding any other law, for the purposes of this chapter a document is considered timely filed with the clerk of a court if:
(1) the document is deposited with the United States Postal Service in a first class postage prepaid envelope properly addressed to the clerk on or before the date the document is required to be filed with the clerk; and
(2) the clerk receives the document not later than the 10th day after the date the document is required to be filed with the clerk.
(b) A legible postmark affixed by the United States Postal Service is prima facie evidence of the date the document is deposited with the United States Postal Service.
(c) In this article, "day" does not include Saturday, Sunday, or a legal holiday.
Added by Acts 1999, 76th Leg., ch. 1545, Sec. 10, eff. Sept. 1, 1999.

B. Pleas (Adult Defendants)

1. Who May Request a Plea

Only a judge may request a plea. (Exception: a magistrate can request a plea when a person is arrested on a fine-only out-of-county arrest warrant.)

2. How Made

Pleas of guilty and nolo contendere must be made intelligently and voluntarily.

3. Pleas

- Guilty – a formal admission of guilt. The defendant is confessing that he or she committed the crime.
- Nolo Contendere – a Latin phrase meaning "I will not contest it." The plea has similar legal effect as pleading guilty, the defendant does not admit or deny the charges, but the court will enter a finding of guilty and assess a fine and costs.
  - Payment of the fine is a plea of nolo contendere.
- The difference between a plea of guilty and a plea of nolo contendere:
  - A guilty plea can be used against defendant in a civil lawsuit.
  - A nolo contendere plea cannot be used against a defendant in a civil lawsuit.

C. Waiver of Jury Trial

- Defendants pleading guilty or nolo contendere must waive the right to a jury trial.
- Waiver must be in writing.
- Payment of fine constitutes a written waiver of jury trial.

> **Code of Criminal Procedure, Art. 45.025. Defendant May Waive Jury**
> The accused may waive a trial by jury in writing. If the defendant waives a trial by jury, the justice or judge shall hear and determine the cause without a jury.
> Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Renumbered from Vernon's Ann.C.C.P. art. 45.24 and amended by Acts 1999, 76th Leg., ch. 1545, Sec. 23, eff. Sept. 1, 1999.

D. Judgment

- A judgment is the final legal decision of the court. It is the written declaration of the court and signed by the trial judge. The final decision of the judge may be that the defendant is not guilty or it may be that the defendant is guilty.
- A defendant may offer to pay a fine (from the minimum fine schedule), but until the judge accepts the amount offered by the defendant and enters a judgment, there is no conviction.
- After a defendant appears by mail or in person at the court and pays a fine from the suggested minimum fine schedule, the clerk must give the case to the judge to accept the payment and enter judgment. The payment constitutes a plea of nolo

contendere and a written waiver of jury trial. After the judge does this, the clerk may then enter the judgment in the docket.

- The judgment must specify the period of time given for jail time credit.
- If the offense involved the theft of gasoline, the judgment must state an affirmative finding that the defendant has committed the theft of gasoline.
- In municipal court if the judgment is guilty, the defendant is required to pay a fine and costs and in some cases submit to other sanctions. Article 45.041, C.C.P. provides that the judge may direct the defendant to:
  - pay the entire fine and costs when sentence is pronounced;
  - pay the entire fine and costs at some later date; or
  - pay a specified portion of the fine and costs at designated intervals;
  - if applicable, to make restitution to any victim of the offense in an amount not to exceed $500; and
  - to satisfy any other sanction authorized by law.
- The clerk's responsibility is to prepare the judgment for the judge's signature and to properly maintain the records and make sure the financial accounting of transactions is accurate and properly recorded.

E. Extensions and Time Payment

1. Authority to Grant

Only the judge has the authority to grant extensions and time payment. The clerk may process the judge's orders.

2. Amount of Time to Pay

- If defendant appears in open court, the judge may grant an extension, payment at intervals, or require payment immediately.
- If a defendant appears by mail or in person at the court to plead guilty or nolo contendere and requests the amount of fine and the amount of an appeal bond, the court must give the defendant notice of the amount of fine and of the appeal bond. The defendant has up to 31 days to pay the fine or file and appeal bond with the court. The notice may be hand delivered or mailed certified mail with return receipt requested.
  - On or after the 31st day, the judge may grant more time to pay.

> **Code of Criminal Procedure, Art. 42.01. Judgment**
> **Sec. 1.** A judgment is the written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant. The sentence served shall be based on the information contained in the judgment. The judgment should reflect:
> 1. The title and number of the case;
> 2. That the case was called and the parties appeared, naming the attorney for the state, the defendant, and the attorney for the defendant, or, where a defendant is not represented by counsel, that the defendant

knowingly, intelligently, and voluntarily waived the right to representation by counsel;

3. The plea or pleas of the defendant to the offense charged;

4. Whether the case was tried before a jury or a jury was waived;

5. The submission of the evidence, if any;

6. In cases tried before a jury that the jury was charged by the court;

7. The verdict or verdicts of the jury or the finding or findings of the court;

8. In the event of a conviction that the defendant is adjudged guilty of the offense as found by the verdict of the jury or the finding of the court, and that the defendant be punished in accordance with the jury's verdict or the court's finding as to the proper punishment;

9. In the event of conviction where death or any punishment is assessed that the defendant be sentenced to death, a term of confinement or community supervision, or to pay a fine, as the case may be;

10. In the event of conviction where the imposition of sentence is suspended and the defendant is placed on community supervision, setting forth the punishment assessed, the length of community supervision, and the conditions of community supervision;

11. In the event of acquittal that the defendant be discharged;

12. The county and court in which the case was tried and, if there was a change of venue in the case, the name of the county in which the prosecution was originated;

13. The offense or offenses for which the defendant was convicted;

14. The date of the offense or offenses and degree of offense for which the defendant was convicted;

15. The term of sentence;

16. The date judgment is entered;

17. The date sentence is imposed;

18. The date sentence is to commence and any credit for time served;

19. The terms of any order entered pursuant to Article 42.08 of this code that the defendant's sentence is to run cumulatively or concurrently with another sentence or sentences;

20. The terms of any plea bargain;

21. Affirmative findings entered pursuant to Subdivision (2) of Subsection (a) of Section 3g of Article 42.12 of this code;

22. The terms of any fee payment ordered under Articles 37.072 and 42.151 of this code;

23. The defendant's thumbprint taken in accordance with Article 38.33 of this code;

24. In the event that the judge orders the defendant to repay a reward or part of a reward under Articles 37.073 and 42.152 of this code, a statement of the amount of the payment or payments required to be made;

25. In the event that the court orders restitution to be paid to the victim, a statement of the amount of restitution ordered and:

(A) the name of the victim and the permanent mailing address of the victim at the time of the judgment; or

(B) if the court determines that the inclusion of the victim's name and address in the judgment is not in the best interest of the victim, the name and address of a person or agency that will accept and forward restitution payments to the victim;

26. In the event that a presentence investigation is required by Section 9(a), (b), (h), or (i), Article 42.12 of this code, a statement that the presentence investigation was done according to the applicable provision; and

27. In the event of conviction of an offense for which registration as a sex offender is required under Chapter 62, a statement that the registration requirement of that chapter applies to the defendant and a statement of the age of the victim of the offense.

Sec. 2. The judge may order the prosecuting attorney, or the attorney or attorneys representing any defendant, or the court clerk under the supervision of an attorney, to prepare the judgment, or the court may prepare the same.

Sec. 3. The provisions of this article shall apply to both felony and misdemeanor cases.

Sec. 4. The Office of Court Administration of the Texas Judicial System shall promulgate a standardized felony judgment form that conforms to the requirements of Section 1 of this article.

Sec. 5. In addition to the information described by Section 1 of this article, the judgment should reflect affirmative findings entered pursuant to Article 42.013 of this code.

Sec. 6. In addition to the information described by Section 1 of this article, the judgment should reflect affirmative findings entered pursuant to Article 42.014 of this code.

Sec. 7. In addition to the information described by Section 1, the judgment should reflect affirmative findings entered pursuant to Article 42.015.

Sec. 8. In addition to the information described by Section 1, the judgment should reflect affirmative findings entered pursuant to Article 42.017.

Code of Criminal Procedure, Art. 45.041. Judgment

(a) The judgment and sentence, in case of conviction in a criminal action before a justice of the peace or municipal court judge, shall be that the defendant pay the amount of the fine and costs to the state.

(b) The justice or judge may direct the defendant:

(1) to pay:

(A) the entire fine and costs when sentence is pronounced;

(B) the entire fine and costs at some later date; or

(C) a specified portion of the fine and costs at designated intervals;

(2) if applicable, to make restitution to any victim of the offense in an amount not to exceed $500; and

(3) to satisfy any other sanction authorized by law.

(c) The justice or judge shall credit the defendant for time served in jail as provided by Article 42.03. The credit shall be applied to the amount of the fine and costs at the rate provided by Article 45.048.

(d) All judgments, sentences, and final orders of the justice or judge shall be rendered in open court.

3. Time Payment Fee

Clerks must collect a $25 fee from a defendant convicted and ordered to pay a fine, court costs or restitution who pays any part of the fine, costs or restitution on or after the 31st day after the date of judgment. This fee cannot be collected until the 31st day after judgment.

Local Government Code § 133.103. TIME PAYMENT FEE.

(a) A person convicted of an offense shall pay, in addition to all other costs, a fee of $25 if the person:

(1) has been convicted of a felony or misdemeanor; and

(2) pays any part of a fine, court costs, or restitution on or after the 31st day after the date on which a judgment is entered assessing the fine, court costs, or restitution.

(b) The treasurer shall send 50 percent of the fees collected under this section to the comptroller. The comptroller shall deposit the fees received to the credit of the general revenue fund.

(c) The treasurer shall deposit 10 percent of the fees collected under this section in the general fund of the county or municipality for the purpose of improving the efficiency of the administration of justice in the county or municipality. The county or municipality shall prioritize the needs of the judicial officer who collected the fees when making expenditures under this subsection and use the money deposited to provide for those needs.

(d) The treasurer shall deposit the remainder of the fees collected under this section in the general revenue account of the county or municipality.

Added by Acts 2003, 78th Leg., ch. 209, § 62(a), eff. Jan. 1, 2004.

F. Payment of Fine and Costs

1. Jail Time Credit

- Judge must give jail credit.
- Jail credit includes time served from the time of arrest to conviction and time served after conviction.
- The credit is not less than $100 for a period of time specified in the judgment. The period specified in the judgment must be at least 8 hours but not more than 24 hours.

Code of Criminal Procedure Art. 42.03. Sec. 2(a) Pronouncing sentence; time; credit for time spent in jail between arrest and sentence or pending appeal

Sec. 2. (a) In all criminal cases the judge of the court in which the defendant was convicted shall give the defendant credit on his sentence for the time that the defendant has spent in jail in said cause, other than confinement served as a condition of community supervision, from the time of his arrest and confinement until his sentence by the trial court.

Code of Criminal Procedure, Art. 45.048. Discharged from Jail

(a) A defendant placed in jail on account of failure to pay the fine and costs shall be discharged on habeas corpus by showing that the defendant:

(1) is too poor to pay the fine and costs; or

(2) has remained in jail a sufficient length of time to satisfy the fine and costs, at the rate of not less than $50 for each period of time served, as specified by the convicting court in the judgment in the case.

(b) A convicting court may specify a period of time that is not less than eight hours or more than 24 hours as the period for which a defendant who fails to pay the fines and costs in the case must remain in jail to satisfy $50 of the fine and costs.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1981, 67th Leg., p. 2648, ch. 708, Sec. 3, eff. Aug. 31, 1981. Renumbered from Vernon's Ann.C.C.P. art. 45.53 and amended by Acts 1999, 76th Leg., ch. 1545, Sec. 48, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 872, Sec. 1, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 209, Sec. 65(a), eff. Jan. 1, 2004.

2. Payment by Credit Card

- Governing body of a municipality must authorize the collection of fines and costs by a credit card or electronic means.
- Credit card means a card, plate, or similar device used to make purchases on credit. Payment by electronic means is defined as payment by telephone or computer but does not include payment in person or by mail. (Sections 132.002(b)-132.004 L.G.C.)
- Chapter 132, L.G.C. also authorizes a municipality to provide, through the Internet, access to information or collection of payments for taxes, fines, fees, court costs, or other charges. A fee to recover costs for providing access may be charged only if providing the access through the Internet would not be feasible without the imposition of the charge. If the city contracts with a vendor to provide the service, any fee charged by the vendor must be approved by the city. Payments collected by a vendor are to be promptly submitted to the city. Currently Chapter 552, G.C., which is the Public Information Act, makes an exception to public information for debit and credit card numbers of private individuals collected by the city. On September 1, 2001, this exception was extended to corporations or associations that do business with the city using a debit or credit card. (Section 132.007, L.C.G.)

- Before a court can collect payments by credit card or through the Internet, the governing body of a municipality must authorize the collection. If the governing body authorizes the court to collect payments by credit card, the municipality may authorize:
  - collection of a fee for processing the payment by credit card; or
  - collection without requiring collection of a fee.
- The governing body of a municipality must set the processing fee in an amount that is reasonably related to the expense incurred by the municipal official in processing the payment by credit card. However, the governing body may not set the processing fee in an amount that exceeds five percent of the amount of the fee, fine, court cost, or other charge being paid.
- If, for any reason, a payment by credit card is not honored by the credit card company on which the funds are drawn, the county or municipality may collect a service charge from the person who owes the fee, fine, court costs, or other charge. The service charge is in addition to the original fee, fine, court cost, or other charge and is for the collection of that original amount. The amount of the service charge is the same amount as the fee charged for the collection of a check drawn on an account with insufficient funds.

Local Government Code Chapter 132. Payment Of Fees And Other Costs By Credit Card Or Electronic Means In Municipalities And Counties

§ 132.001. DEFINITIONS. In this chapter:

(1) "Credit card" means a card, plate, or similar device used to make purchases on credit or to borrow money.

(2) "Payment by electronic means" means payment by telephone or computer but does not include payment in person or by mail.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1997, 75th Leg., ch. 148, § 5, eff. Sept. 1, 1997.

§ 132.002. PAYMENT OF FEES OR COSTS BY CREDIT CARD OR ELECTRONIC MEANS.

(a) The commissioners court of a county may authorize a county or precinct officer who collects fees, fines, court costs, or other charges on behalf of the county or the state to accept payment by credit card of a fee, fine, court costs, or other charge. The commissioners court may also authorize a county or precinct officer to collect and retain a fee for processing the payment by credit card.

(b) The governing body of a municipality may authorize a municipal official who collects fees, fines, court costs, or other charges to:

(1) accept payment by credit card of a fee, fine, court cost, or other charge; and

(2) collect a fee for processing the payment by credit card.

(c) The governing body of a municipality may authorize the acceptance of payment by credit card without requiring collection of a fee.

(d) The commissioners court may authorize a county or precinct officer who collects fees, fines, court costs, or other charges on behalf of the county or the state to accept payment by electronic means of a fee, fine, court costs, or other charge. The commissioners court may also authorize a county or precinct officer to collect and retain a handling fee for processing the payment by electronic means.

(e) A commissioners court may authorize the acceptance of payment by credit card or by electronic means without requiring collection of a fee.
Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1997, 75th Leg., ch. 148, § 6, eff. Sept. 1, 1997; Acts 2001, 77th Leg., ch. 569, § 1, eff. June 11, 2001.

§ 132.003. PROCESSING OR HANDLING FEE.

(a) The commissioners court shall set a processing fee in an amount that is reasonably related to the expense incurred by the county or precinct officer in processing the payment by credit card. However, the court may not set the processing fee in an amount that exceeds five percent of the amount of the fee, court cost, or other charge being paid.

(b) The governing body of a municipality shall set the processing fee in an amount that is reasonably related to the expense incurred by the municipal official in processing the payment by credit card. However, the governing body may not set the processing fee in an amount that exceeds five percent of the amount of the fee, fine, court cost, or other charge being paid.

(c) If the commissioners court authorizes collection of a handling fee under Section 132.002(c), the fee shall be set:

(1) at a flat rate that does not exceed $5 for each payment transaction; or

(2) at a rate that is reasonably related to the expense incurred by the county or precinct officer in processing a payment by electronic means and that does not exceed five percent of the
amount of the fee, court cost, or other charge being paid.

(d) In addition to the fee set under Subsection (a), the commissioners court of a county may authorize a county or precinct officer to collect on behalf of the county from a person making payment by credit card an amount equal to the amount of any transaction fee charged to the county by a vendor providing services in connection with payments made by credit card. The limitation prescribed by Subsection (a) on the amount of a fee does not apply to a fee collected under this subsection.
Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1997, 75th Leg., ch. 148, § 7, eff. Sept. 1, 1997; Acts 2001, 77th Leg., ch. 126, § 1, eff. May 15, 2001.

§ 132.004. SERVICE CHARGE.

If, for any reason, a payment by credit card is not honored by the credit card company on which the funds are drawn, the county or municipality may collect a service charge from the person who owes the fee, fine, court cost, or other charge. The service charge is in addition to the original fee, fine, court cost, or other charge and is for the collection of that original amount. The amount of the service charge is the same amount as the fee charged for the collection of a check drawn on an account with insufficient funds.
Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

§ 132.005. ENCUMBRANCE OF CREDIT CARDS; FEE.

A county or municipality may contract with a company that issues credit cards to collect and seize credit cards issued by the company that are outdated or otherwise unauthorized. The county or municipality
may charge the company a fee for the return of the credit cards.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

§ 132.006. DISPOSITION OF FEES AND CHARGES.

(a) The county or precinct officer collecting a fee or charge under this chapter shall deposit the fee or charge in the general fund of the county.

(b) The municipal official collecting a fee or charge under this chapter shall deposit the fee or charge in the general fund of the municipality.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

§ 132.007. INFORMATION, SERVICES, AND PAYMENT THROUGH THE INTERNET.

(a) A county or municipality may provide through the Internet:

(1) access to information;

(2) collection of payments for taxes, fines, fees, court costs, or other charges; or

(3) other county and municipal services authorized by law.

(b) A county or municipality may charge a reasonable fee for providing access, collecting payments, or providing services authorized by this section.

(c) A county or municipality that provides access to information or provides services through the Internet under Subsection (a)(1) or (3):

(1) may only charge a fee for the access or service if the fee is designed to recover the costs directly and reasonably incurred in providing the access or service; and

(2) may charge the fee only if the governing body of the county or municipality determines that providing access to the information or providing the service through the Internet would not be feasible without the imposition of the charge.

(d) A county or municipality may contract with a vendor to provide access, collect payments, or provide services authorized by Subsection (a). A vendor must promptly submit to the county or municipality all payments collected on behalf of the county or municipality under this section. The county or municipality must approve any fee charged by a vendor under a contract authorized by this subsection.

Added by Acts 2001, 77th Leg., ch. 94, § 1, eff. May 11, 2001. Amended by Acts 2003, 78th Leg., ch. 1304, § 1, eff. Sept. 1, 2003.

3. Payment by Community Service

- A court may require a defendant who is indigent or who defaults in payment of a fine and cost to discharge all or part of the fine and costs by performing community service. (Article 45.049, C.C.P.)
- A community supervision and corrections department or a court-related services office may provide administrative duties and other services necessary for placement in community service programs.
- The judge is required to specify the number of hours the defendant is required to work in an order requiring community service.
- The community service work must be for a governmental entity or a nonprofit organization, which provides services to the general public that enhance social welfare and the general well-being of the community. The governmental entity or nonprofit organization that accepts a defendant ordered to perform community

service must agree to supervise the defendant's work performance and report on the defendant's work to the judge.

- A judge may not order more than 16 hours per week of community service unless the judge determines that requiring the defendant to work additional hours does not create a hardship on the defendant or the defendant's dependents. A defendant is considered to have discharged $100 of fines or costs for each eight hours of community service performed.
- A municipal court judge, officer, or employee of the city is not liable for damages arising from an act or failure to act in connection with manual labor performed by a defendant if the act or failure to act was:
  - performed pursuant to court order; and
  - not intentional, willfully or wantonly negligent, or performed with conscious indifference or reckless disregard for the safety of others.
- Generally, court clerks are responsible for coordinating community service. Coordination includes developing a method of keeping track of defendants performing community service and when their service is to be completed, making certain that the defendant returns proper documentation of completion of community service and properly recording community service orders and completion of the service.

Code of Criminal Procedure, Art. 45.049. Community Service in Satisfaction of Fine or Costs

(a) A justice or judge may require a defendant who fails to pay a previously assessed fine or costs, or who is determined by the court to have insufficient resources or income to pay a fine or costs, to discharge all or part of the fine or costs by performing community service. A defendant may discharge an obligation to perform community service under this article by paying at any time the fine and costs assessed.

(b) In the justice's or judge's order requiring a defendant to participate in community service work under this article, the justice or judge must specify the number of hours the defendant is required to work.

(c) The justice or judge may order the defendant to perform community service work under this article only for a governmental entity or a nonprofit organization that provides services to the general public that enhance social welfare and the general well-being of the community. A governmental entity or nonprofit organization that accepts a defendant under this article to perform community service must agree to supervise the defendant in the performance of the defendant's work and report on the defendant's work to the justice or judge who ordered the community service.

(d) A justice or judge may not order a defendant to perform more than 16 hours per week of community service under this article unless the justice or judge determines that requiring the defendant to work additional hours does not work a hardship on the defendant or the defendant's dependents.

(e) A defendant is considered to have discharged not less than $50 of fines or costs for each eight hours of community service performed under this article.

(f) A sheriff, employee of a sheriff's department, county commissioner, county employee, county judge, justice of the peace, municipal court judge, or officer or employee of a political subdivision other than a county is not liable for damages arising from an act or failure to act in connection with manual labor performed by a defendant under this article if the act or failure to act:

(1) was performed pursuant to court order; and

(2) was not intentional, wilfully or wantonly negligent, or performed with conscious indifference or reckless disregard for the safety of others.

Added by Acts 1993, 73rd Leg., ch. 298, Sec. 1, eff. May 27, 1993. Renumbered from Vernon's Ann.C.C.P. art. 45.521 and amended by Acts 1999, 76th Leg., ch. 1545, Sec. 49, eff. Sept. 1, 1999; Subsec. (e) amended by Acts 2003, 78th Leg., ch. 209, Sec. 66(a), eff. Jan. 1, 2004.

4. Waiver of Fine and Costs

A municipal judge may waive payment of a fine or costs when a defendant defaults if the judge determines that the defendant is indigent and each alternative method of discharging the fine or cost under Article 43.09, C.C.P. (community service) would impose an undue hardship on the defendant. (Article 43.091, C.C.P.)

Code of Criminal Procedure, Art. 43.091. Waiver of Payment of Fines and Costs for Indigent Defendants in Justice or Municipal Court

A municipal court, regardless of whether the court is a court of record, or a justice court may waive payment of a fine or cost imposed on a defendant who defaults in payment if the court determines that:

(1) the defendant is indigent; and

(2) each alternative method of discharging the fine or cost under Article 43.09 would impose an undue hardship on the defendant.

Added by Acts 2001, 77th Leg., ch. 1111, Sec. 2, eff. Sept. 1, 2001.

G. Alternative Sentencing

Only the judge may grant the taking of a driving safety course or deferred disposition. Clerks may process the paperwork.

JUDGMENT FORMS

Table of Contents

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF** _____
_____	§	_____**COUNTY, TEXAS**

On this the ____day of _____, 200___, the Defendant in the above numbered and entitled cause appeared (by attorney) (in person) (by mail) and entered a plea of (guilty) (no contest) (not guilty) and waived a jury trial; and the Court, finds the Defendant (guilty) of the offense of _____.

☐ The Defendant, being found **guilty** and assessed a fine of $_____, is therefore **Ordered and Adjudged** by the Court that the State of Texas, for the use and benefit of the City of _____, Texas, do have and recover from the Defendant the fine in the amount of $_____, plus any and all costs required to be paid.

☐ The Defendant is hereby **Ordered** to pay the fine and costs:
- ☐ immediately.
- ☐ by _____.
- ☐ at designated intervals. See the attached payment plan incorporated as part of this judgment.

☐ *(If sentence in addition to payment of fine is authorized)* It is further **Ordered** that the Defendant shall _____ _____ no later than _____, 200_____.

☐ The Defendant is hereby **Ordered** to pay restitution in the amount of _____ to the victim in this case. Said restitution to be paid by _____.

It is further Ordered and Adjudged, if the Defendant fails to comply with the orders of this judgment, the Defendant shall be committed to the custody of the Chief of Police of the City of _____, Texas until said fine and costs are fully paid. In the event the Defendant defaults in the discharge of this judgment, pursuant to Article 45.048(b), Code of Criminal Procedure, the Court specifies that the Defendant remain in jail:

_____ hours (*not less than eight or more than 24*) to earn.
_____ (*minimum Dollar amount $50**) to satisfy the fine and costs.

It is further Ordered and Adjudged by the Court that execution may issue against the property of the said Defendant for the amount of such fine and costs.

_____
Judge, Municipal Court Date

(municipal court seal) City of _____,
_____ County, Texas

*Effective 1/04
REV. 8/03

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	_____**COUNTY, TEXAS**

On this the ____day of _____, 200___, the Defendant in the above numbered and entitled cause appeared (by attorney) (in person) and entered a plea of not guilty and waived a jury trial; and the Court, having heard the evidence and arguments, finds the Defendant **not guilty** of the offense of _____.

The Defendant, being found **not guilty**, is immediately discharged from all further liability for the offense that the Defendant has herein been tried, and the Defendant may go hence without payment of costs.

It is therefore Ordered and Adjudged, the Defendant, being found **not guilty**, is immediately discharged from all further liability for the offense alleged in this cause and the Defendant may go hence without payment of costs.

_____
Judge, Municipal Court Date

(municipal court seal) City of _____,

_____ County, Texas

REV. 8/03

DISMISSAL BY THE COURT

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

DISMISSAL

☐ On this the _____ day of _____, 200____, the Defendant appeared in the above numbered and styled cause and presented evidence of remedying a defect. Therefore, the above numbered and styled cause is dismissed on the Defendant's motion for the reason:

- ☐ Defendant presented evidence of remedied expired driver's license within 10 working days. (Sec. 521.026, TC)
- ☐ Defendant presented evidence of remedied expired inspection certificate within 10 working days, and the inspection certificate has not been expired for more than 60 days. (Sec. 548.605, TC)
- ☐ Defendant presented evidence of remedied expired registration within 10 working days after the day of the offense. (Sec. 502.407, TC)
- ☐ It is also ordered that the Defendant pay a $10 fee.

☐ On this the _____ day of _____, 200____, the Defendant appeared in the above numbered and styled cause and presented evidence of a valid defense to the prosecution. Therefore, the above numbered and styled cause is dismissed on the State's motion for the reason:

- ☐ Defendant presented evidence of valid financial responsibility that was valid at the time of arrest. (Sec. 601.193, TC)
- ☐ Defendant presented evidence of a valid Texas driver's license that was valid at the time of arrest. (Sec. 521.025, TC)
- ☐ Defendant presented evidence of a valid Texas inspection certificate that was valid at the time of arrest. (Sec. 548.602, TC)

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____,

_____ County, Texas

Editor's Note: With the few exceptions referenced in the first portion of this form and under the provisions detailed in the Deferred Proceedings, local trial courts generally do not have the authority to unilaterally dismiss charges without a prosecutor's motion. The second portion of this form illustrates the limited instances where a statutory defense to prosecution exists. With few exceptions denoted in case law, a dismissal by a trial court requires a written motion by the prosecution and the consent of the presiding judge (Art. 32.02, Code of Criminal Procedure). Such a motion and order to dismiss can be found in the Prosecutor Forms portion of this publication.
REV. 8/03

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

On this the ____ day of _____, 200___, the Defendant in the above numbered and entitled cause appeared in person and entered a plea of not guilty and demanded a jury trial; and the jury, having heard the evidence and arguments, found the Defendant:

☐ Not guilty of the offense of _____. **It is therefore Ordered and Adjudged** by the Court that the Defendant is not guilty of the offense and is discharged.

☐ Guilty of the offense of _____ and assessed a fine of $_____.

☐ The Defendant being found guilty, the Court assesses a fine of $_____.

☐ It is therefore **Ordered and Adjudged** by the Court that the State of Texas, for the use and benefit of the City of _____, Texas do have and recover from the Defendant the fine in the amount of $_____, plus any and all costs required to be paid.

☐ The Defendant is **hereby Ordered** to pay the fine and costs:
- ☐ immediately.
- ☐ by _____.
- ☐ at designated intervals. See the attached payment plan incorporated as part of this judgment.

☐ The Defendant is hereby **Ordered** to pay restitution in the amount of _____ to the victim in this case. Said restitution to be paid by _____.

It is further Ordered that if the Defendant fails to comply with the orders of this judgment that the Defendant shall be committed to the custody of the Chief of Police of the City of _____, Texas until the said fine and costs are fully discharged. In the event the Defendant defaults in the discharge of this judgment, pursuant to Article 45.048(b), Code of Criminal Procedure, the Court specifies that the Defendant remain in jail:

_____ hours (*not less than eight or more than 24*) to earn.

_____ (*minimum Dollar amount $50**) to satisfy the fine and costs.

It is further Ordered and Adjudged by the Court that execution may issue against the property of the Defendant for the amount of the fine and costs.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____

_____ County, Texas

*Effective 1/04

REV. 8/03

JUDGMENT – DRIVING SAFETY COURSE/MOTORCYCLE OPERATOR TRAINING SAFETY PROGRAM GRANTED (Art. 45.0511, CCP)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

On this the ____day of _____, 200___, the Defendant in the above numbered and entitled cause appeared (by attorney) (in person) (by mail) and entered a plea of (guilty) (no contest) and waived a jury trial; and the Court finds the Defendant guilty of the offense of _____. The Defendant, having been found guilty, is assessed a fine of $_____ plus any and all costs required to be paid.

The Defendant, having elected to take a driving safety course on or before the answer date on the citation, the Court finds that the Defendant meets the requirements for taking a driving safety course, the imposition of this judgment is hereby deferred for a period of 90 days and the Defendant is hereby granted the right to take a (driving safety course) (motorcycle operator training course). The Defendant is ordered to pay immediately all Court costs and fees required by statute or ordinance in the amount of $_____.

The Defendant is required to complete the course by and present evidence to this Court of (a uniform certificate of completion of the driving safety course) (a verification of completion of the motorcycle operator training course) by _____, 200___. Furthermore, when presenting evidence of course completion, the Defendant is order to present a copy of the Defendant's driving record as maintained by the Department of Public Safety showing that the Defendant has not completed an approved driving safety course or motorcycle operator training course, as applicable, within the 12 months preceding the date of the offense and an affidavit stating that the Defendant was not taking a driving safety course or motorcycle operator training course, as applicable, under this article on the date the request to take the course was made and has not completed such a course that is not shown on the Defendant's driving record within the 12 month preceding the date of the offense.

(municipal court seal)

_____
Judge, Municipal Court Date
City of _____
_____County, Texas

. . . . . .

FINAL JUDGMENT

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

☐ On this the ____ day of _____, 200__, on the above numbered and entitled cause

☐ The judgment is **Ordered** removed and the case dismissed on the grounds that the Defendant presented evidence of successful completion of a driving safety course/the motorcycle operator training course and presented the ordered driving record and affidavit under Art. 45.0511, C.C.P.

☐ The Defendant, having not complied with the Court's order set forth above, having been given notice of a show cause hearing, and having failed to show cause why he/she failed to comply with the Court's order, is **Ordered** to pay the fine assessed in the amount of $_____. If the Defendant fails to comply with the orders of this Judgment, the Defendant shall be committed to the custody of the Chief of Police of the City of _____, Texas until said fine and costs are fully paid. In the event the Defendant defaults in the discharge of this judgment, pursuant to Article 45.048(b), Code of Criminal Procedure, the Court specifies that the Defendant remain in jail:

_____ hours (*not less than eight or more than 24*) to earn.
_____ (*minimum Dollar amount $50*) to satisfy the fine and costs.

It is further Ordered and Adjudged by the Court that execution may issue against the property of the said Defendant for the amount of such fine and costs.

(municipal court seal)

_____
Judge, Municipal Court Date
City of _____
_____County, Texas

*Effective 1/04

REV. 8/03

JUDGMENT – FINAL DISPOSITION OF DEFERRED DISPOSITION (Art. 45.051, CCP)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

☐ On this the ____ day of _____, 200__, on the above numbered and entitled cause

- ☐ The Defendant, not complying with the terms of deferred disposition, is **Ordered** to pay the fine assessed in the amount of $_____.
- ☐ The Defendant, not complying with the terms of the deferred disposition, the cash bond posted by the Defendant is **Ordered** forfeited to pay the fine assessed in the amount of $_____.
- ☐ It is **Ordered** dismissed on the grounds that the Defendant presented evidence of successful completion of the terms of the deferred disposition.
- ☐ It is **Ordered** that the Defendant pay a special expense fee in the amount of $_____.
- ☐ It is **Ordered** that the cash bond to secure payment of the fine posted by Defendant in the amount of $_____ shall be refunded.

☐ If the Defendant fails to comply with the orders of this Judgment, the Defendant shall be committed to the custody of the Chief of Police of the City of _____, Texas until said fine and costs are fully paid. In the event the Defendant defaults in the discharge of this judgment, pursuant to Article 45.048(b), Code of Criminal Procedure, the Court specifies that the Defendant remain in jail:

_____ hours (*not less than eight or more than 24*) to earn.
_____ (*minimum Dollar amount $50**) to satisfy the fine and costs.

It is further Ordered and Adjudged by the Court that execution may issue against the property of the said Defendant for the amount of such fine and costs.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____

_____County, Texas

*Effective 1/04

REV. 8/03

JUDGMENT – DRIVING UNDER THE INFLUENCE OF ALCOHOL BY MINOR – GUILTY (Sec. 106.041, ABC)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

On this the ____day of _____, 200___, the Defendant in the above numbered and entitled cause appeared in person and entered a plea of (guilty) (no contest) and waived a jury trial; and the Court, having heard the evidence and arguments, finds the Defendant guilty of the offense of Driving Under the Influence of Alcohol by a Minor, Section 106.041, Alcoholic Beverage Code.

☐ The Defendant, being found guilty and assessed a fine of $_____, is therefore **Ordered and Adjudged** by the Court that the State of Texas, for the use and benefit of the City of _____, Texas do have and recover from the Defendant the fine in the amount of $_____, plus any and all costs required to be paid.

☐ The Defendant is hereby **Ordered** to pay the fine and costs:
- ☐ immediately.
- ☐ by _____.
- ☐ at designated intervals. See the attached payment plan incorporated as part of this judgment.

☐ **It is further Ordered** that the Defendant present to the Court evidence of completion of an alcohol awareness course no later than _____, 200__. *(Enter a date that is within 90 days of the date of final conviction. Sec. 106.115(c), ABC)*

☐ The Court further finds that the Defendant is younger than 18 years of age and that _____ is the (parent)(guardian) of the Defendant. *(Optional)* **It is therefore Ordered** that _____ attend the above-mentioned alcohol awareness course with the Defendant and present to the Court evidence of completion of the course no later than _____, 200__.

☐ The Defendant is **further Ordered** to return to this Court no later than _____, 200__ with evidence that the Defendant has completed _____ hours of community service at _____.

If the Defendant fails to comply with the orders of this judgment, the Defendant shall be committed to the non-secure custody of the Chief of Police of the City of _____, Texas; and **it is further Ordered and Adjudged** by the Court that execution may issue against the property of the said Defendant for the amount of such fine and costs.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____

_____ County, Texas

☐ The Court finds that Defendant completed the alcohol awareness program within 90 days as ordered by this Court.

It is therefore **Ordered** that the fine ordered to be paid on _____, 200____ is reduced to _____ which is not less than half of the initial of fine assessed.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____

_____ County, Texas

Editor's Note: If the Defendant is 17 or older, attach a Judgment/Jail Credit Addendum.
REV. 8/03

JUDGMENT – DRIVING UNDER THE INFLUENCE OF ALCOHOL BY MINOR – NOT GUILTY (Sec. 106.041, ABC)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

On this the ____day of _____, 200___, the Defendant in the above numbered and entitled cause appeared in person and entered a plea of not guilty and (waived) (demanded) a jury trial; and the (Court) (jury), having heard the evidence and arguments, finds the Defendant (not guilty) (guilty) of the offense of Driving Under the Influence of Alcohol by a Minor, Section 106.041, Alcoholic Beverage Code.

☐ The Defendant, being found not guilty, is immediately discharged from all further liability for the offense that the Defendant has herein been tried, and the Defendant may go hence without payment of costs.

☐ The Defendant, being found guilty and assessed a fine of $_____, is therefore **Ordered and Adjudged** by the Court that the State of Texas, for the use and benefit of the City of _____, Texas do have and recover from the Defendant the fine in the amount of $_____, plus any and all costs required to be paid.

☐ The Defendant is hereby **Ordered** to pay the fine and costs:
- ☐ immediately.
- ☐ by _____
- ☐ at designated intervals. See the attached payment plan incorporated as part of this judgment.

It is further Ordered that the Defendant present to the Court evidence of completion of an alcohol awareness course no later than _____, 200__. *(Enter a date that is within 90 days of the date of final conviction. Sec. 106.115(c), ABC)*

☐ The Court further finds that the Defendant is younger than 18 years of age and that _____ is the (parent)(guardian) of the Defendant. (*Optional*) **It is therefore Ordered** that _____ attend the above-mentioned alcohol awareness course with the Defendant and present to the Court evidence of completion of the course no later than _____, 200__.

The Defendant is **further Ordered** to return to this Court no later than _____, 200__ with evidence that the Defendant has completed _____ hours of community service at _____.

If the Defendant fails to comply with the orders of this judgment, the Defendant shall be committed to the non-secure custody of the Chief of Police of the City of _____, Texas; and **it is further Ordered and Adjudged** by the Court that execution may issue against the property of the said Defendant for the amount of such fine and costs.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____

_____ County, Texas

☐ The Court finds that Defendant completed the alcohol awareness program within 90 days as ordered by this Court.

It is therefore **Ordered** that the fine ordered to be paid on _____, 200____ is reduced to _____ which is not less than half of the initial of fine assessed.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____

_____ County, Texas

Editor's Note: If the Defendant is 17 or older, attach a Judgment/Jail Credit Addendum.

REV. 8/03

JUDGMENT/JAIL CREDIT ADDENDUM (For Persons Age 17 and Older)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	_____**COUNTY, TEXAS**

On the _____ of _____, 200___, Defendant failed to pay the fine and costs in the amount of _____ as ordered in the judgment of the above noted Cause Number. **It is therefore Ordered and Adjudged** that the Defendant shall be committed to the custody of the Chief of Police of the City of _____, Texas until said fine and costs are fully paid. Pursuant to Article 45.048(b), Code of Criminal Procedure, the Court specifies that the Defendant remain in jail:

_____ hours (*not less than eight or more than 24*) to earn.
_____ (*minimum Dollar amount $50**) to satisfy the fine and costs.

It is further Ordered and Adjudged by the Court that execution may issue against the property of the said Defendant for the amount of such fine and costs.

This Order shall be attached and incorporated as part of the original judgment.

_____
Judge, Municipal Court Date
City of _____
_____ County, Texas

(municipal court seal)

*Effective 1/04

REV. 8/03

JUDGMENT – POSSESSION, PURCHASE, CONSUMPTION, OR RECEIPT OF CIGARETTES OR TOBACCO PRODUCT BY MINOR – GUILTY for Offenses Occurring on or after January 1, 1998 (Secs. 161.252 and 161.253, HSC)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

On this the ____day of _____, 200___, the Defendant in the above numbered and entitled cause appeared in person and entered a plea of (guilty) (no contest) and waived a jury trial; and the Court, having heard the evidence and arguments, finds the Defendant guilty of the offense of _____.

☐ The Defendant being found guilty and assessed a fine of $_____, is therefore **Ordered and Adjudged** by the Court that the State of Texas for the use and benefit of the City of _____, Texas do have and recover from the Defendant the fine in the amount of $_____, plus any and all costs required to be paid.

☐ **It is further Ordered,** that the Defendant pay all costs; however, the execution of this sentence (fine) is suspended and the Defendant is **Ordered** to present to this Court evidence of completion of a tobacco awareness program approved by the Commissioner of Health no later than _____, 200__. *(Completion date)*

☐ **The Court further finds** that the _____ is the (parent)(guardian) of the Defendant.{*Optional*} **It is therefore Ordered** that _____ attend the above-mentioned tobacco awareness program with the Defendant and present to the Court evidence of completion of the program no later than _____, 200__. *(Enter same completion date as for Defendant.)*

☐ **The Court finds** that access to an approved tobacco awareness program is not readily available. **It is therefore Ordered** that the Defendant pay the Court cost; however, execution of this sentence is suspended and the Defendant is **Ordered** to return to this Court no later than _____, 200__ with evidence that the Defendant has completed_____ hours of tobacco related community service at _____.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____
_____ County, Texas

JUDGMENT

☐ The Defendant, having completed the (tobacco awareness program) (tobacco-related community service), is immediately discharged from all further liability for the above offense, and the Defendant may go hence without payment of the fine.

☐ The Defendant having failed to complete (a tobacco awareness program) (tobacco-related community service) as ordered by this Court, it is therefore **Ordered and Adjudged** by the Court that the Defendant pay the fine:

- ☐ immediately.
- ☐ by _____.
- ☐ at designated intervals. See the attached payment plan incorporated as part of this judgment.

☐ *(Case filed as a subsequent offense)* The Defendant having completed the (tobacco awareness program)(tobacco-related community service) as ordered by this Court, it is **Ordered and Adjudged** by the Court the Defendant pay (the fine initially assessed)(the amount of _____ which is not less than one-half of the fine assessed):

- ☐ immediately.
- ☐ by _____.
- ☐ at designated intervals. See the attached payment plan incorporated as part of this judgment.

If the Defendant fails to comply with the orders of this judgment, the Defendant shall be committed to the non-secure custody of the Chief of Police of the City of _____, Texas; and **it is further Ordered and Adjudged** by the Court that execution may issue against the property of the said Defendant for the amount of such fine and costs.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____
_____ County, Texas

Editor's Note: If the Defendant is 17 or older, attach a Judgment/Jail Credit Addendum.

JUDGMENT – POSSESSION, PURCHASE, CONSUMPTION, OR RECEIPT OF CIGARETTES OR TOBACCO PRODUCT BY MINOR – NOT GUILTY for offenses occurring on or after January 1, 1998 (Secs. 161.252 and 161.253, HSC)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

On this the ____day of _____, 200___, the Defendant in the above numbered and entitled cause appeared in person and entered a plea of not guilty and (waived) (demanded) a jury trial; and the (Court) (jury), having heard the evidence and arguments, finds the Defendant (not guilty) (guilty) of the offense of _____.

☐ The Defendant, being found not guilty, is immediately discharged from all further liability for the offense that the Defendant has herein been tried, and the Defendant may go hence without payment of costs.

☐ The Defendant being found guilty and assessed a fine of $_____, is therefore **Ordered and Adjudged** by the Court that the State of Texas for the use and benefit of the City of _____, Texas do have and recover from the Defendant the fine in the amount of $_____, plus any and all costs required to be paid.

☐ **It is further Ordered,** that the Defendant pay all costs; however, the execution of this sentence (fine) is suspended and the Defendant is **Ordered** to present to this Court evidence of completion of a tobacco awareness program approved by the Commissioner of Health no later than _____, 200__. *(Completion date)*

☐ **The Court further finds** that the _____ is the (parent)(guardian) of the Defendant. *{Optional}* **It is therefore Ordered** that _____ attend the above-mentioned tobacco awareness program with the Defendant and present to the Court evidence of completion of the program no later than _____, 200__. *(Enter same completion date as for Defendant.)*

☐ **The Court finds** that access to an approved tobacco awareness program is not readily available. **It is therefore Ordered** that the Defendant pay the Court cost; however, execution of this sentence is suspended and the Defendant is **Ordered** to return to this Court no later than _____, 200__ with evidence that the Defendant has completed _____ hours of tobacco related community service at _____.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____
_____ County, Texas

JUDGMENT

☐ The Defendant, having completed the (tobacco awareness program) (tobacco-related community service), is immediately discharged from all further liability for the above offense, and the Defendant may go hence without payment of the fine.

☐ The Defendant having failed to complete (a tobacco awareness program) (tobacco-related community service) as ordered by this Court, it is therefore **Ordered and Adjudged** by the Court that the Defendant pay the fine:
- ☐ immediately.
- ☐ by _____.
- ☐ at designated intervals. See the attached payment plan incorporated as part of this judgment.

☐ (Case filed as a subsequent offense) The Defendant having completed the (tobacco awareness program)(tobacco-related community service) as ordered by this Court, it is **Ordered and Adjudged** by the Court the Defendant pay (the fine initially assessed)(the amount of _____ which is not less than one-half of the fine assessed):
- ☐ immediately.
- ☐ by _____.
- ☐ at designated intervals. See the attached payment plan incorporated as part of this judgment.

If the Defendant fails to comply with the orders of this judgment, the Defendant shall be committed to the non-secure custody of the Chief of Police of the City of _____, Texas; and **it is further Ordered and Adjudged** by the Court that execution may issue against the property of the said Defendant for the amount of such fine and costs.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____
_____ County, Texas

Editor's Note: If the Defendant is 17 or older, attach a Judgment/Jail Credit Addendum.
REV. 8/03

JUDGMENT – PURCHASE OF ALCOHOL BY MINOR, ATTEMPT TO PURCHASE ALCOHOL BY MINOR, CONSUMPTION BY MINOR, MINOR IN POSSESSION OF ALCOHOL, MISREPRESENTATION OF AGE BY MINOR – GUILTY (Secs. 106.071 and 106.115, ABC)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	_____**COUNTY, TEXAS**

On this the ____day of _____, 200___, the Defendant in the above numbered and entitled cause appeared in person and entered a plea of (guilty) (no contest) and waived a jury trial; and the Court, having heard the evidence and arguments, finds the Defendant guilty of the offense of _____.

☐ The Defendant being found guilty and assessed a fine of $_____, is therefore **Ordered and Adjudged** by the Court that the State of Texas, for the use and benefit of the City of _____, Texas do have and recover from the Defendant the fine in the amount of $_____, plus any and all costs required to be paid.

☐ The Defendant is **hereby Ordered** to pay the fine and costs:
- ☐ immediately.
- ☐ by _____.
- ☐ at designated intervals. See the attached payment plan incorporated as part of this judgment.

It is further Ordered that the Defendant present to the Court evidence of completion of an alcohol awareness program at _____ no later than _____, 200__. *(Enter a date that is within 90 days of the date of final conviction. Sec. 106.115(c), ABC)*

☐ The Court further finds that the Defendant is younger than 18 years of age and that _____ is the (parent)(guardian) of the Defendant. (*Optional*) **It is therefore Ordered** that _____ attend the above-mentioned alcohol awareness course with the Defendant and present to the Court evidence of completion of the course no later than _____, 200___.

The Defendant is **further Ordered** to return to this Court no later than _____, 200__ with evidence that the Defendant has completed _____ hours of community service at _____.

The Department of Public Safety is hereby **Ordered** to: (*select one)*

☐ suspend the Defendant's driver's license no. _____ for _____ days effective the 11th day after the date of this judgment.

☐ deny the issuance of a driver's license or permit to the Defendant for _____ days effective the 11th day after the date of this judgment.

If the Defendant fails to comply with the orders of this judgment, the Defendant shall be committed to the non-secure custody of the Chief of Police of the City of _____, Texas; and **it is further Ordered and Adjudged** by the Court that execution may issue against the property of the said Defendant for the amount of such fine and costs.

_____
Judge, Municipal Court Date

(municipal court seal) City of _____

_____ County, Texas

☐ The Court finds that Defendant completed the alcohol awareness program within 90 days as ordered by this Court. It is therefore **Ordered** that the fine ordered to be paid on _____, 200____ is reduced to _____ which is not less than half of the initial of fine assessed.

_____
Judge, Municipal Court

(municipal court seal) City of _____

_____ County, Texas

Editor's Note: If the Defendant is 17 or older, attach a Judgment/Jail Credit Addendum.

REV. 8/03

JUDGMENT – PURCHASE OF ALCOHOL BY MINOR, ATTEMPT TO PURCHASE ALCOHOL BY MINOR, CONSUMPTION BY MINOR, MINOR IN POSSESSION OF ALCOHOL, MISREPRESENTATION OF AGE BY MINOR – NOT GUILTY (Secs. 106.071 and 106.115, ABC)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

On this the ____day of _____, 200___, the Defendant in the above numbered and entitled cause appeared in person and entered a plea of not guilty and (waived) (demanded) a jury trial; and the (Court) (jury), having heard the evidence and arguments, finds the Defendant (not guilty) (guilty) of the offense of _____.

☐ The Defendant, being found not guilty, is immediately discharged from all further liability for the offense that the Defendant has herein been tried, and the Defendant may go hence without payment of costs.

☐ The Defendant being found guilty and assessed a fine of $_____, is therefore **Ordered and Adjudged** by the Court that the State of Texas, for the use and benefit of the City of _____, Texas do have and recover from the Defendant the fine in the amount of $_____, plus any and all costs required to be paid.

☐ The Defendant is **hereby Ordered** to pay the fine and costs:
- ☐ immediately.
- ☐ by _____.
- ☐ at designated intervals. See the attached payment plan incorporated as part of this judgment.

It is further Ordered that the Defendant present to the Court evidence of completion of an alcohol awareness program at _____ no later than _____, 200__. *(Enter a date that is within 90 days of the date of final conviction. Sec. 106.115(c), ABC)*

☐ The Court further finds that the Defendant is younger than 18 years of age and that _____ is the (parent)(guardian) of the Defendant. (*Optional*) **It is therefore Ordered** that _____ attend the above-mentioned alcohol awareness course with the Defendant and present to the Court evidence of completion of the course no later than _____, 200___.

The Defendant is **further Ordered** to return to this Court no later than _____, 200__ with evidence that the Defendant has completed _____ hours of community service at _____.

The Department of Public Safety is hereby **Ordered** to: (*select one)*

☐ suspend the Defendant's driver's license no. _____ for _____ days effective the 11th day after the date of this judgment.

☐ deny the issuance of a driver's license or permit to the Defendant for _____ days effective the 11th day after the date of this judgment.

If the Defendant fails to comply with the orders of this judgment, the Defendant shall be committed to the non-secure custody of the Chief of Police of the City of _____, Texas; and **it is further Ordered and Adjudged** by the Court that execution may issue against the property of the said Defendant for the amount of such fine and costs.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____

_____ County, Texas

☐ The Court finds that Defendant completed the alcohol awareness program within 90 days as ordered by this Court. It is therefore **Ordered** that the fine ordered to be paid on _____, 200____ is reduced to _____ which is not less than half of the initial of fine assessed.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____

_____ County, Texas

Editor's Note: If the Defendant is 17 or older, attach a Judgment/Jail Credit Addendum. REV. 8/03

ORDER OF DRIVER'S LICENSE SUSPENSION FOR FAILURE TO COMPLETE ALCOHOL AWARENESS PROGRAM (Sec. 106.115(d)(1), ABC)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

On the _____ of _____, 20____, Defendant failed to present to this Court evidence of attendance at an alcohol awareness program as ordered in the judgment of the above noted Cause Number. **It is therefore Ordered** that the Department of Public Safety shall (suspend)(deny issuance of) the Defendant's driver's license for _____days.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____

_____ County, Texas

ORDER OF DRIVER'S LICENSE SUSPENSION FOR FAILURE TO COMPLETE COMMUNITY SERVICE
(Sec. 106.115(d)(1), ABC)

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

On the _____ of _____, 20____, Defendant failed to present to this Court evidence of completion of the community service as ordered in the judgment of the above noted Cause Number. **It is therefore Ordered** that the Department of Public Safety shall (suspend)(deny issuance of) the Defendant's driver's license for _____days.

_____
Judge, Municipal Court Date

(municipal court seal)

City of _____

_____ County, Texas