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Case Law and Attorney General Opinion Update

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The following decisions and opinions were issued between the dates of October 1, 2012 and October 1, 2013.

I. Constitutional Issues

A. 4th Amendment

1. DNA Sampling

Buccal swab to obtain defendant's DNA during routine booking procedure after arrest for serious felony was reasonable under the 4th Amendment.

Maryland v. King, 133 S. Ct. 1958 (2013)

In 2003, a man concealing his face and armed with a gun broke into a woman's home in Salisbury, Maryland. He raped her. The police were unable to identify or apprehend the assailant based on any detailed description or other evidence they then had, but they did obtain from the victim a sample of the perpetrator's DNA. In 2009, Alonzo King was arrested in Wicomico County, Maryland and charged with first- and second-degree assault for menacing a group of people with a shotgun. As part of a routine booking procedure for serious offenses, his DNA sample was taken by applying a cotton swab or filter paper—known as a buccal swab—to the inside of his cheeks. The DNA was found to match the DNA taken from the Salisbury rape victim. King was tried and convicted for the rape. Additional DNA samples were taken from him and used in the rape trial, but there seems to be no doubt that it was the DNA from the cheek sample taken at the time he was booked in 2009 that led to his first having been linked to the rape and charged with its commission.

The Court of Appeals of Maryland, on review of King's rape conviction, ruled that the DNA taken when King was booked for the 2009 charge was an unlawful seizure because obtaining and using the cheek swab was an unreasonable search of the person. It set the rape conviction aside. The U.S. Supreme Court granted review.

In a 5-4 decision, the U.S. Supreme Court, in an opinion by Justice Kennedy, held that when officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the 4th Amendment.

The Maryland DNA Collection Act authorizes law enforcement to collect DNA samples from an individual charged with a crime of violence (e.g., murder, rape,

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About This Issue

TMCA Recognizes 2013 Judge and Clerk of the Year

The Honorable Judge Maria E. Casanova of Houston was selected by the Texas Municipal Courts Association (TMCA) to receive the Association's Outstanding Jurist Award of the Year. Judge Casanova received the special judicial recognition award at the TMCA Annual Meeting held in San Antonio, July 11-13, 2013. A proclamation filed by Senator Sylvia Garcia was read by TMCA President, Brian Holman, in recognition of Judge Casanova's achievements to the crowd of over 100 TMCA members and guests who had gathered for the evening's events.

The award recognized Judge Casanova for her contribution to the fair and impartial administration of justice. Judge Casanova has served for the past 20 years as a municipal judge for the City of Houston. During this time, she has gained the respect and appreciation of many colleagues, friends, and those she has mentored. Recognized for various accomplishments, Judge Casanova was credited with developing an Administrative Violations Court. The newly organized Administrative Court created a more cost effective and efficient system. The process resourcefully organized all stakeholders involved, including multiple inspectors from various city departments toward resolving a pending case. Other areas of recognition included her involvement in the development of a newly automated case management system, "CSMART," a pilot implementation citation process and the consolidation of court policies and procedures. Another project led by Judge Casanova was implementing specialized "high volume" court dockets. High volume criminal filings such as illegal gaming are given their own dockets, thus being more efficient and less time consuming.

Outside of courtroom activities, she recently assisted with the planning and development of the newly opened Sobering Center in the City of Houston. As an educator, the Judge is a regular instructor for the Houston Police Cadet Academy and mentors new attorneys and law school students. She also holds CLE workshops for the Houston Bar on practicing in municipal court.

Houston Presiding Judge Barbara Hartle stated, "Judge Casanova is well deserving of this award. She is a leader among leaders; not only in her professional life but her civic life as well."

Deborah Dixon, a Senior Customer Service Representative for the Fort Worth Municipal Court, received the Association's Court Support Staff Member of the Year Award. She, too, received the award in San Antonio in July.

Ms. Dixon has served the City of Fort Worth for 30 years. In addition to her loyal and dedicated employment in public service, Ms. Dixon is accredited as being one of the cornerstones for the success of the city's new Southwest Municipal Court. She continues to serve as a mentor, educator, and supervisor for numerous docket clerks and has done so during her decades of service. It is not rare to receive feedback from attorneys and citizens

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first-degree assault, kidnapping, arson, sexual assault, and a variety of other serious crimes), an attempt to commit a crime of violence, a burglary, or an attempt to commit a burglary. Once taken, the DNA sample may not be processed or placed in a database before the individual is arraigned (unless the individual consents). At arraignment, the judicial officer ensures there is probable cause to detain the arrestee on a qualifying serious offense. If there is no probable cause, the DNA sample is destroyed. It is also destroyed if the criminal action does not result in a conviction or is reversed or vacated without the possibility of a new trial or the individual is given an unconditional pardon. Finally, the information added to the DNA database can only be used for identification of the suspect.

Justice Kennedy noted that the buccal swab procedure is quick and painless and the standardization of the CODIS database, which connects DNA laboratories at the local, state, and national level, and which standardizes the points of comparison, allows for extreme accuracy. All 50 states require the collection of DNA from felony convicts, and King did not dispute the validity of that practice. Using a buccal swab inside a person's cheek to obtain a DNA sample is a search under the 4th Amendment. However, the intrusion is negligible. Consequently, the need for a warrant is greatly diminished. In cases like the one before the Court, because King was already in valid police custody for a serious offense supported by probable cause, the search is analyzed by reference to reasonableness, not individualized suspicion, and reasonableness is determined by weighing the promotion of legitimate governmental interests against the degree to which the search intrudes upon an individual's privacy. In this balance of reasonableness, great weight is given to both the significant government interest at stake in the identification of arrestees and DNA identification's unmatched potential to serve that interest.

The DNA Collection Act, challenged in this case, serves a well-established, legitimate government interest: the need of law enforcement officers to process and identify persons and possessions taken into custody in a safe and accurate way. The majority listed five reasons why identity is important. First, identity is important because suspects often lie about it and their criminal history. Second, knowing a suspect's identity helps cut down on risks to the staff or the existing detainee population. Third, the state's interest in making sure a person accused of a crime is available for trial enhances the state's need to establish the suspect's identity. Fourth, knowing an arrestee's past conduct helps police assess the danger an arrestee poses to the public. Finally, identification of an arrestee as the perpetrator of some heinous crime can have the effect of freeing a person wrongfully imprisoned for the same offense.

Justice Scalia, dissenting, notably joined by Justice Ginsberg, Justice Sotomayor, and Justice Kagan, opined that the 4th Amendment prohibits baseless searches, particularly when the purpose of the search is to investigate a crime. Under the DNA Collection Act, the purpose of taking a buccal swab is to identify the defendant as the perpetrator of another crime. Justice Scalia likened this type of search to a general warrant (a kind of writ used by the British and despised by the Founders) not grounded upon a sworn oath of a specific infraction. Moreover, the delay associated with actually using the DNA samples undermined the theory that they were necessary to identify the defendant. Consequently, the dissent would hold that the search was unreasonable under the 4th Amendment without a warrant.

Commentary: *King* prompts reflection on Texas statutes governing the collection of DNA samples. Do you think that providing DNA specimen should be allowed as a condition of release on bond? More importantly, did you know that magistrates in Texas already have such authority and in some cases a duty? A provision of law passed in 2001, Article 17.47(a) of the Code of Criminal Procedure, states that a magistrate may require as a condition of release on bail or bond that the defendant provide to a local law enforcement agency one or more specimens for the purpose of creating a DNA record under Subchapter G, Chapter 411, of the Government Code (a nonexistent subchapter). In other instances, mostly involving allegations of sexual offenses, Article 17.47(b) makes providing a DNA sample a mandatory condition of bond. While the decision in *King* would seem to condone the collection of such specimen, the fact that it can occur after magistration seems inconsistent with comparisons of taking DNA specimens to the taking of fingerprints. Furthermore, it would be curious if the U.S. Supreme Court would find unbridled discretionary authority of Texas magistrates to order the creation of a DNA record for any offense in which a person may be arrested to be reasonable. (Of the five preceding reasons set out by the Court in *King* only the third and fourth seem applicable to such cases.) Even then, the creation of DNA records as a condition of release on bond hardly seems consistent with the purpose of bail: to ensure the appearance of the accused before the proper court.

2. Search Warrants

Natural metabolization of alcohol in the blood stream does not present a per se exigency that justifies an exception to the 4th Amendment's warrant requirement for nonconsensual blood testing.

Missouri v. McNeely, 133 S. Ct. 1552 (2013)

At 2 a.m., a highway patrol officer observed Tyler McNeely speeding and crossing the center line. After stopping him, the officer noticed several signs of intoxication, and McNeely acknowledged that he had consumed "a couple of beers." McNeely performed poorly on the field sobriety tests and the officer placed him under arrest. When McNeely refused to provide a breath specimen, the officer took McNeely to a nearby hospital for blood testing. After transporting McNeely to a local hospital, the arresting officer explained to McNeely that, under Missouri's law, the refusal to consent to a blood test would lead to the revocation of his driver's license and that a refusal could be used against him at a future proceeding. McNeely continued to refuse, and the officer directed a hospital technician to forcibly take his blood. McNeely objected at trial, claiming that his 4th Amendment rights were violated by the nonconsensual blood draw. The record on appeal did not suggest that the officer faced an emergency in which he could not practicably obtain a search warrant. The state supreme court affirmed the trial court's ruling to suppress the blood evidence. The State petitioned for review in the U.S. Supreme Court.

In a 5-4-4-1 decision, Justice Sotomayor, writing for the majority, held that the natural dissipation of alcohol from the blood of a DWI suspect is not, standing alone, a sufficient exigent circumstance to justify a warrantless blood draw under the "exigent circumstances exception" to the 4th Amendment warrant requirement. The natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, but does not do so categorically. In rejecting a *per se* exigency rule, the Court adopted a totality of the circumstances test to determine whether exigent circumstances existed. Relying on *Schmerber v. California*, 384 U.S. 757 (1966), the majority explained that the law requires looking at the totality of the circumstances when deciding whether the exigent circumstances exception to the warrant requirement applies. In *Schmerber*, the warrantless blood draw was justified not only by the elimination of alcohol from the body, but because Schmerber had been involved in an automobile crash and had been taken to the hospital for treatment. The officer in *Schmerber* could have reasonably believed that he was confronted with an emergency, in which the delay necessary to obtain the warrant, under the circumstances, threatened the destruction of evidence. Furthermore, the destruction of evidence concern was considered in conjunction with the time necessary to take the suspect to the hospital, investigate the crash, and seek out a magistrate for a warrant.

Justice Kennedy, in a concurring opinion, wrote that the Court in due course may find it appropriate and necessary to consider a case permitting it to provide more guidance than it undertakes to give in this instance in light of the specific facts of this case.

Chief Justice Roberts concurred in part and dissented in part. According to the Roberts' opinion, the blood draw in this case was not justified based solely upon the metabolization of evidence. However, as discussed above, Roberts, Breyer, and Alito would adopt a *per se* rule that metabolization of blood evidence coupled with an inability to get a warrant provides exigent circumstances. Justice Sotomayor and three other justices rejected this bright line approach because it would lead to odd consequences and distort law enforcement incentives.

Justice Thomas, in a lone dissent, opined that the destruction of evidence provided a sufficient exigent circumstance to justify the warrantless blood draw. The rapid destruction of evidence acknowledged by every member of the Court occurs in *every* situation where police have probable cause to arrest a drunk driver. That implicates the exigent-circumstances doctrine.

Commentary: At a time in which "no refusal" and "mandatory draw" are increasingly integrated into public policy regarding DWI enforcement, *McNeely* gives reason to pause and reflect on local DWI enforcement practices. Furthermore, it requires even the most informed criminal law practitioner to re-read *Schmerber*. While there are certainly a lot of grounds for future argumentation, what seems debatable is that *McNeely* puts *Schmerber* in a new light.

There is a lot of understandable chatter about *McNeely*. Readers are urged to remember that *McNeely* is a rejection of Missouri's attempt to carve out a categorical exception to the search warrant requirement. It is *not* a categorical rejection of all state laws containing mandatory draw provisions (e.g., in Texas, Section 724.012, Transportation Code). At the same time, however, police legal advisors and prosecutors are completely justified in not over-relying on statutes like Section 724.012. Despite numerous exceptions, Texas law has long preferred (and in many instances requires) the procurement of a warrant. While it may seem that such exceptions tend to eclipse this proclivity in Texas law, *McNeely* lends credence to the mantra, "when in doubt, get a search warrant." This particularly seems true in what the Court describes as "routine DWI cases." Inevitably, Section 724.012 will be challenged and percolate up to the Court of Criminal Appeals. Odds are that provisions of Section 724.012 that codify additional exigent facts stand to fair better than provisions pertaining to DWI with a child passenger

or felony DWI. Also inevitable are more requests to attorney magistrates and magistrates in counties without a municipal court of record for blood warrants.

The rule in *Michigan v. Summers*, 452 U.S. 692 (1981), is limited to the immediate vicinity of the premises to be searched and does not apply where an occupant is detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question.

Bailey v. United States, 133 S. Ct. 1031 (2013)

In the interest of officer safety, completing a search, and preventing flight, the *Summers* rule permits officers executing a search warrant to detain the occupants of a premises while a proper search is conducted. Here, while the search team executed the search warrant at the residence, detectives followed the defendant's car for about a mile after it pulled out of the residence driveway before pulling the car over in a parking lot by a fire station. The majority found *Summers* inapplicable, while the dissent found that the police had good reason to permit the occupants to leave the premises and stop them a few blocks from the house. According to the majority, the line should be drawn at "immediate vicinity," whereas the dissent would draw the line on the basis of what is "reasonably practicable."

Telephonic administration of oath for search warrant affidavit did not invalidate search warrant.

Clay v. State, 391 S.W.3d 94 (Tex. Crim. App. 2013)

In an 8-1 decision, written by Judge Price, the Court of Criminal Appeals, affirming the court of appeals, held that to permit the administration of the oath over the telephone—at least under the circumstances of the present case—did not impermissibly enlarge upon the statutory language of Article 18.01(b) of the Code of Criminal Procedure. Article 18.01(b) simply requires a "sworn affidavit." While Texas case law has historically defined an affidavit to be a writing sworn to "before" the oath-administering authority, most of those cases pre-date the advent of most modern electronic means of communication, and none expressly addresses the question whether an oath administered over the telephone qualifies as an oath "before" the magistrate. The last edition of *Black's Law Dictionary* to have included a definition of the word "before" provides: "In the presence of; under the official purview of; as in a magistrate's jurat, '*before* me personally appeared,' etc." The Court states,"[t]his definition suggests that there may exist circumstances under which a search warrant affiant could validly present himself 'before' an issuing magistrate—that is to say, 'under the official purview of' that issuing magistrate—without the necessity of presenting himself corporally." *Clay* at 103 (emphasis added). According to the majority of the Court, what is more important than the swearing to the oath in the presence of a magistrate is that the oath be administered with sufficient care to preserve the same or an equivalent solemnizing function to that which corporal presence accomplishes. Until the Legislature modernizes the law, the question of whether the circumstances of an individual telephonic warrant application will suffice to satisfy the solemnizing function of the oath requirement under Article 18.01(b) will have to be resolved on a case-by-case basis.

In a dissenting opinion, Judge Meyers compared the Court's opinion to a relatively recent case relating to where the Transportation Code requires a front license plate to be located. He wrote, "If the legislature had meant to allow warrants to be sworn to by telephone, it would have said so. The majority here is doing exactly what the majority did in *Spence v. State*, 325 S.W.3d 646 (Tex. Crim. App. 2010), by broadening a statute beyond what the legislature intended. The majority here correctly points out that the Court should construe the statutory language and not enlarge upon it, and that only the legislature can amend or supplement the statute to specifically regulate the process of obtaining a search warrant by electronic means." *Clay* at 104.

Commentary: This is hardly a strongly worded endorsement for the practice of administering a warrant affidavit over the telephone. It nonetheless comes as a surprise. The opinion, unlike the court of appeals decision, barely bothers to consider that, in this instance, the magistrate knew the voice of the affiant peace officer. Rather, through a series of qualifying comments, the majority opinion basically says that the administration of the oath by phone is not necessarily prohibited by the Code of Criminal Procedure. In fact, it may possibly be ok although not expressly stated in the Code of Criminal Procedure. Granted, there is no requirement under the 4th Amendment that such an oath be administered in person. Nevertheless, this opinion is hardly assuring. Perhaps someone in the Legislature will read this as an invitation to modernize Article 18.01.

3. Drug Dogs

Using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the 4th Amendment.

Florida v. Jardines, 133 S. Ct. 1409 (2013)

In a 5-4 decision, Justice Scalia, writing for the majority,

held that a drug dog alert occurring on a front porch does not establish probable cause for a search warrant if at the time of the alert its presence exceeds the implied license to walk up to a front door and knock.

Acting on an unverified tip from Crime Stoppers that marijuana was being grown in Jardines' home, the officers used a trained police dog, Franky, to explore the area around the home in hopes of discovering incriminating evidence. They were gathering information in an area belonging to Jardines and immediately surrounding his house — its curtilage, which enjoyed protection as part of the home itself. They gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner. The officers entered the boundaries of the curtilage, the front porch being a classic example of a constitutionally protected area. While an officer not armed with a warrant could approach a home and knock, because any private citizen might do so, introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence was something else. There was no customary invitation to do that. That the officers learned what they learned only by physically intruding on defendant's property to gather evidence was enough to establish that a 4th Amendment search occurred.

In a concurring opinion, Justice Kagan, joined by Justice Ginsburg and Justice Sotomayor, opined that the case could be resolved by applying precedent in *Kyllo v. United States*, 533 U.S. 27 (2001), holding that the warrantless use of a thermal imaging device to detect heat sources within a home constitutes an unreasonable search and seizure under the 4th Amendment. Franky, in this case, was analogous to the non-commercially available thermal imaging device in *Kyllo.*

Justice Alito, joined by Chief Justice Roberts and Justice Breyer, dissenting, opined that the Court's decision is based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo-American jurisprudence. The law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time. This license is not limited to persons who intend to speak to an occupant or who actually do so. Mail carriers, persons delivering packages and flyers, solicitors, hawkers, peddlers, and police officers asking incriminating questions are examples of individuals who may lawfully approach a front door. According to the dissent, the real law of trespass provides no support for the Court's holding, described as a newly struck counterfeit.

In light of the totality of the circumstances, the drug dog alert provided probable cause to search a validly stopped car absent evidence of performance history, training, or certification records.

Florida v. Harris, 133 S. Ct. 1050 (2013)

Officer Wheetley pulled over Harris for a traffic violation. Observing Harris to be nervous and having an open beer can, Wheetley sought consent to search Harris' truck. When Harris refused, Wheetley executed a sniff test with Aldo, his trained narcotics dog. Aldo alerted at the driver's-side door handle, leading Wheetley to conclude that he had probable cause for a search. The search turned up nothing Aldo was trained to detect, but rather pseudoephedrine and other ingredients used in making methamphetamine. Harris was arrested and charged with illegal possession of those ingredients. In a subsequent stop while Harris was out on bail, Aldo again alerted on Harris' truck but nothing of interest was found. At a suppression hearing, Wheetley testified about his and Aldo's extensive training in drug detection. Harris' attorney did not contest the quality of that training, focusing instead on Aldo's certification and performance in the field, particularly in the two stops of Harris' truck. The trial court denied the motion to suppress, but the Florida Supreme Court reversed. It held that a wide array of evidence was always necessary to establish probable cause, including field-performance records showing how many times the dog has falsely alerted. If an officer like Wheetley failed to keep such records, he could never have probable cause to think the dog a reliable indicator of drugs.

In a unanimous opinion by Justice Kagan, the U.S. Supreme Court reversed the state supreme court, holding that because (1) training and testing records supported Aldo's reliability in detecting drugs and (2) Harris failed to undermine that evidence, Wheetley had probable cause to search. No matter how much other proof the State offered on Aldo's reliability, the state supreme court would have found that the absence of field performance records precluded finding probable cause. The Court stated that this is the antithesis of a totality of the circumstances test. The state supreme court treated records of Aldo's field performance as the gold standard in evidence when in most cases they had relatively limited import. A dog could alert to a car in which no drugs were found because the drugs were too well hidden or present in quantities too small to locate. The State introduced substantial evidence of Aldo's training and his proficiency in finding drugs. While Aldo's certification had expired, Wheetley and Aldo trained four hours each week on exercises designed to keep their skills sharp. Wheetley testified, and written records confirmed, that in those settings, Aldo always performed at the highest level. Harris had not challenged in the trial court any aspect

of Aldo's training. Wheetley later surmised that Harris cooked and used methamphetamine on a regular basis and Aldo likely responded to odors Harris had transferred to the car's handle where Aldo alerted.

Defendant had standing to challenge the search of his aunt's backyard and seizure of his dogs therein because he had permission to enter and keep his dogs in the backyard, which he did on a daily basis. The plain view doctrine did not justify the warrantless search because officers did not have a lawful right to go into the backyard within the residence's curtilage.

State v. Betts, 397 S.W.3d 198 (Tex. Crim. App. 2013)

An officer had reasonable suspicion to prolong defendant's detention during a traffic stop for the purpose of getting a drug dog where there was no factual dispute that the officer conducted a criminal history check revealing a recent drug arrest and the defendant was subsequently nervous with hands shaking and responded "no" when asked if she had ever been in trouble before.

Hamal v. State, 390 S.W.3d 302 (Tex. Crim. App. 2012)

4. Reasonable Suspicion

The taking of photographs of patrons in their swim suits at a public swimming pool did not give rise to reasonable suspicion justifying an investigative detention.

Arguellez v. State, 2013 Tex. Crim. App. LEXIS 1324 (Tex. Crim. App. Sept. 18, 2013)

Arguellez was observed taking photographs of patrons at a public swimming pool at a public park. The subjects of these photographs included women and children who were wearing swimming attire. Cuero police were notified, and patrol officers responded. The dispatched call described an unknown man in a suspicious vehicle, specifically, a male subject in a tan Ford Taurus taking photos at the city pool, and they said he was parked beside the fence. The responding officer testified that he saw a vehicle fitting that description pulling away from the side of the pool. The officer followed the car, received information that the police dispatcher still had the informant on the phone, and confirmed that the patrol car was behind the correct vehicle. He testified that, based on the information at hand, he made a traffic stop of that vehicle, identified Arguellez as the driver of that vehicle, and observed a camera beside the vehicle's console. A second officer arrived and remained with Arguellez while the first officer returned to the swimming pool and identified and spoke with the pool manager, who had made the call to police dispatch.

The first officer returned to Arguellez and requested and received verbal consent to look through the photographs stored on Arguellez 's digital camera. Those photographs depicted the pool area, its surroundings, and people, primarily females in bathing suits, many of whom were young girls. The camera also contained photographs of people in a place that the officer could not identify. The two officers advised Arguellez that he was "detained" and that they would "like him to make a statement in reference to the photos." After receiving Miranda warnings at the Cuero Police Department, Arguellez made a statement, which was written out for appellant by one of the officers. The face of the written statement contained the required statutory warnings. In the statement, appellant acknowledged taking photos of women and a girl in bathing suits, but asserted that the photos were taken "just to see if the pictures come [sic] out good."

A grand jury returned two separate indictments against appellant. Appellant filed an identical motion to suppress in each case, asserting that the officer stopped appellant's vehicle without a warrant, reasonable suspicion, or other legal justification. After hearing testimony from the two officers, the trial court denied the suppression motion in each case. Appellant then pled nolo contendere to the charges in both indictments. On direct appeal, the court of appeals held that the officers had reasonable suspicion to stop and detain appellant; under the totality of the circumstances, the information known collectively to the police "provided specific, articulable facts that, combined with reasonable inferences to be derived from those facts, led to the reasonable conclusion that appellant was, had been, or soon would be engaged in criminal activity." The court described that collective information: the pool's manager called the police, identified herself, reported that appellant was taking pictures of people at the pool, and described the location, make, model, and color of appellant's vehicle; the first officer spotted the vehicle and reported that it was leaving the pool area; and the dispatcher, who remained in contact with the manager, confirmed that the first officer was behind the suspect's vehicle.

In a 6-3 opinion, Judge Johnson, writing for the majority, held that there was insufficient evidence to establish reasonable suspicion for the stop of the defendant's vehicle and the investigatory detention of him was not supported by reasonable suspicion. A generally matching description of his vehicle simply connected Arguellez to the "suspicious" photography, but did not in any way suggest that, by taking pictures in a public place, Arguellez was, had been, or soon would be, engaged in criminal activity.

The dissent, written by Judge Keasler, joined by Presiding Judge Keller and Judge Meyers, asserted that the PDR in this case was improvidently granted because the court of appeals properly applied the law in light of *Derichsweiler v. State*, 348 S.W.3d 906 (Tex. Crim. App. 2011). Whether the specific, articulable facts the officer conducting the investigative detention possessed were themselves criminal is irrelevant; the focus is the degree of suspicion that attaches to particular non-criminal acts. The dissent stated that common sense warrants a finding that taking pictures of people sunbathing at a pool from a car parked in the pool's parking lot is both unusual and suspicious.

Commentary: *Derichsweiler* was prominently featured in TMCEC's 2011-2012 Case Law and Attorney General Opinion Update. Derichsweiler's non-criminal behavior (grinning and staring) at a McDonald's drive thru was deemed enough to justify an investigative detention without reasonable suspicion. See, *The Recorder* (December 2011) at 11-12. Judge Meyers' dissent in this case on the surface seems at odds with his dissent in *Derichsweiler*.

Officer had no reasonable suspicion to make a traffic stop where he mistakenly believed he had the right of way and there was no indisputable visual evidence that he saw defendant's center stripe violation depicted in the recording of the stop.

State v. Duran, 396 S.W.3d 563 (Tex. Crim. App. 2013)

The officer was en route to a domestic call at a speed of over 60 mph in a 45 mph zone when he saw defendant, approaching from the opposite direction, make a left turn in front of the officer, causing the officer to brake. The officer then turned right to follow defendant. The DVD recording showed that defendant's tire swung slightly across the center line. The officer's report stated that he stopped defendant for failing to yield the right of way; however, the officer was mistaken in believing that he had the right of way. Because he was speeding, he did not. The trial court decided that the officer did not see the violation because it was not mentioned in the report, was too minor to cause the officer to abandon his domestic call, and was not visible before he abandoned the domestic call. The Court held that the appellate courts were required to defer to that determination of fact.

There was no reasonable suspicion that defendant had violated Section 544.004 of the Transportation Code where the evidence indicated only that, in the officer's opinion, defendant may have passed a "left lane for passing only" sign located at least 15 miles away.

Abney v. State, 394 S.W.3d 542 (Tex. Crim. App. 2013)

The officer did not know at what point the defendant entered the highway, followed the defendant for a one-mile stretch that did not contain a "left lane for passing only" sign, and pulled the defendant over as he was turning left onto a crossover, assuming the defendant had passed a sign located 15-20 miles behind him. There was no evidence to support the officer's assumption and other testimony indicated that the sign was 27 miles from where the traffic stop was conducted. The facts do support that the defendant was driving in the left lane to make a left turn, which would be an appropriate action to take as it is clearly illegal to make a left turn from the right lane.

Commentary: Does an officer have to observe the driver pass the sign, follow the driver for a certain number of miles, or present evidence that there was no entrance onto the highway between the sign and the location of the stop? The Court points to the Texas Manual on Uniform Traffic Control Devices, which requires signs to be installed *at or near* where the regulations apply, but does not specify guidelines for the spacing of "left lane for passing only" signs. The Court finds that this type of sign located at least 15 miles away is not close enough to be applicable, but notes that there is no bright line rule in this type of situation.

Defendant's detention was supported by reasonable suspicion given that (1) the report of people fighting and the vehicle damage the officer observed indicated that unusual activity occurred, which was some indication that a crime might have taken place, like assault or criminal mischief, and (2) the evidence supported a reasonable basis to believe that appellee or her other occupants might have been connected to this activity.

State v. Kerwick, 393 S.W.3d 270 (Tex. Crim. App. 2013)

After a report that several people were fighting outside a bar, the officer arrived at the bar, saw several people standing outside, and spoke to the owner of a damaged vehicle at the location who pointed at a vehicle parked across the street and said, "There they are right there." The officer approached the vehicle, which began to drive away and ordered the driver to stop. According to the Court, the totality of the circumstances supported detention of the driver. The lower court erred in using a "piecemeal or divide-and-conquer" approach to evaluating the owner's statement apart from the context and circumstances.

The peace officer was justified in stopping the appellant's vehicle for the traffic offense of following too closely.

Young v. State, 2012 Tex. App. LEXIS 8739 (Tex. App.—Texarkana Oct. 19, 2012, no pet.)

The officer testified that the road was dry and the weather was cold. He also testified that Young was following so closely that in the event the car Young was following stopped, Young would have been unable to stop his car without colliding into the car in front of him. While he could not state the exact distance between the vehicles because of the passage of time, he testified he had been trained in judging time, speed, and distance of automobile traffic and that this was the basis of his traffic stop.

The court of appeals held that in comparison to *Ford v. State*, 158 S.W.3d 488 (Tex. Crim. App. 2005), the officer's testimony articulated a bit more background facts upon which he based his opinion that Young was violating the law. The recitation of these background facts upon which the arresting officer based his opinion that Young was following too closely removed his testimony from the realm of a pure conclusory statement. Justice Carter, dissenting, opined that the majority was bound to follow precedent of the Court of Criminal Appeals. In *Ford*, a police officer testified that Ford's vehicle was "following too close behind another vehicle." The Court of Criminal Appeals opined that this presented no factual detail to allow a neutral magistrate to evaluate Ford's conduct. The dissent saw no substantive difference in the testimony that the defendant was "following too close" behind another vehicle and could not stop to avoid a collision.

5. Consent to Search

Consent to search from driver was not invalidated by refusal of consent from passenger who was the driver's common-law wife.

State v. Copeland, 399 S.W.3d 159 (Tex. Crim. App.2013)

Is a vehicle a mobile "castle" so that passengers are treated the same as tenants who may disallow police to search a residence after a fellow tenant has consented to the search? The Court of Criminal Appeals, in an 8-1 opinion by Judge Alcala, declined to extend the holding in *Georgia v. Randolph*, 547 U.S. 103 (2006), from residences to vehicles.

Deputy Jesse Garza was observing a house for illegal narcotics activity when he saw an SUV driven by Danish pull up to the house. Copeland, Danish's common-law spouse, got out of the SUV, left the deputy's sight, and quickly returned to the SUV. After the SUV drove away, the deputy pulled the driver over for a traffic offense. The driver consented to a search of the vehicle, but Copeland, a passenger, refused. She claimed to be the owner of the vehicle, though she was not listed as the owner on the vehicle registration. Both Copeland and Danish informed the officer that they were common law married. Although Copeland continued to refuse consent, the driver again agreed to let the deputy search the car. The deputy found two white pills that Copeland claimed she was holding for a friend. Copeland filed a motion to suppress alleging that the extended detention of her exceeded the scope of the temporary detention. She also alleged that *Georgia v. Randolph* applies to searches of vehicles. The trial court granted the motion to suppress, finding that Deputy Garza lacked consent to search the vehicle because Copeland, who had equal authority to grant or refuse consent, denied consent to search the vehicle.

Because the trial court applied *Randolph* to vehicles, the court of appeals erred by upholding the suppression ruling on that basis. The principle that underlies Randolph weighs against the treatment of vehicles as mobile "castles." Unlike homes occupied by general co-tenants, society does generally recognize a hierarchy with respect to the occupants of a vehicle. The driver is the person who has the superior right. For example, a police officer arresting a driver usually asks him, alone, whether he wants his vehicle towed or released to another person. And it is the driver who receives a traffic citation. A bus driver has a responsibility to maintain the safety of his passengers. A sensible would-be passenger wanting a ride would likely accept an offer from a driver even in the presence of an objecting passenger because a driver exclusively controls the destination. As the person with the exclusive control over the operation of the vehicle, a driver necessarily is placed in a superior role with respect to the society within the vehicle.

Judge Meyers, dissenting, agreed that *Randolph* should not apply to vehicular searches but believed that the trial court's decision could have been upheld under the theory that the consent to search was not voluntary given that one occupant agreed to the search while another did not.

6. Exceptions to the Warrant Requirement

A police officer who enters a home without a warrant merely because he had probable cause to believe contraband was in that home, smelled marijuana, and identified himself to the occupant of that home violates the 4th Amendment.

Turrubiate v. State, 399 S.W.3d 147 (Tex. Crim. App. 2013)

Circumstances did not show destruction of evidence was imminent where police knocked on defendant's door and smelled marijuana when defendant cracked open the door.

The Court requires some evidence of exigency beyond mere knowledge of police presence and an odor of illegal narcotics. However, the case was remanded to decide the State's alternative ground that entry was justified by an objectively reasonable belief that the 6-month-old inside the apartment required immediate aid.

The deputy sheriff's continued presence in apartment after consent was revoked was not justified under the emergency doctrine.

Miller v. State, 393 S.W.3d 255 (Tex. Crim. App. 2012)

The sheriff's deputies received a report of yelling, screaming, and the sounds of objects being thrown in an apartment. When they approached the front door they heard crashing noises, loud music, and a person yelling. The person who answered the door, Miller, was extremely distraught and highly intoxicated. The deputies informed this person of the disturbance report, and they were invited in. The person was upset because a dating companion was seeing other people. When asked, the person said that the dating companion was not home and refused to divulge the dating companion's name. The deputies were informed that children were sleeping in another room. After the deputies obtained the current adult occupant's own identification, they were told to leave. The deputies insisted upon staying long enough to conduct a warrant check. While awaiting the warrant check Miller was arrested for possession of a controlled substance. The trial court denied her motion to suppress evidence of a controlled substance, and she pleaded guilty. Miller appealed the denial of her motion to suppress. The San Antonio Court of Appeals affirmed. Miller petitioned for discretionary review.

The Court of Criminal Appeals reversed and remanded to the trial court. In a 5-1-1 decision, the Court held that while Miller had initially given the officers permission to enter her apartment, upon entry they discovered that Miller was the only adult present and she had no visible injuries. No emergency situation existed when Miller told the officers to leave her home and revoked her consent to their entry. Based on the record, the court of appeals erred when it found that the officers' presence was justified under the emergency doctrine. Because the officers' presence in the apartment at the time they found the illegal substance was not permissible, the trial court should have granted defendant's motion to suppress the evidence under Section 38.23 of the Code of Criminal Procedure.

Presiding Judge Keller, joined by Judge Hervey in a dissenting opinion, stated that the Court should have deferred to the assessment of the lower courts. The dissent wondered whether the majority would have viewed the case differently if the suspect had been a male and domestic violence was suspected.

B. 5th and 6th Amendment

1. Double Jeopardy

Retrial following a court-decreed acquittal is barred under the Double Jeopardy Clause, even in cases where a court misconstrued the statute under which a defendant was charged.

Evans v. Michigan, 133 S. Ct. 1069 (2013)

When the State of Michigan rested its case at petitioner's arson trial, the court entered a directed verdict of acquittal, based upon its view that the State had not provided sufficient evidence of a particular element of the offense, which turned out to not actually be a required element at all. Relying on *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984), which held that a judicial acquittal premised upon a "misconstruction" of a criminal statute is an acquittal on the merits that bars retrial, the majority finds that there is no meaningful constitutional distinction between a trial court's "misconstruction" of a statute and its erroneous addition of a statutory element, and a midtrial acquittal in those circumstances is an acquittal for double jeopardy purposes as well.

The dissent believes the decision makes no sense, is not consistent with the original meaning of the Double Jeopardy Clause, and does not serve the purposes of the prohibition against double jeopardy.

2. The Right to Remain Silent

Absent an invocation, a defendant's pre-custody silence during a voluntary police interview is admissible.

Salinas v. Texas, 133 S. Ct. 2174 (2013)

In 1992, two brothers were shot and killed in their Houston apartment. There were no witnesses to the murder, but a neighbor who heard gunshots saw someone run out of the house and speed away in a dark-colored sports car. Police recovered six shotgun shell casings at the scene. The investigation led the police to Genovevo Salinas who had been a guest at the party the victims had hosted the night before they were killed. Police visited Salinas at his home and saw his dark blue sports car in the driveway. Salinas voluntarily agreed to hand over his shotgun and to accompany police to the station for questioning. The interview lasted one hour and through most of the interview Salinas answered the officer's

questions. But when asked if his shotgun would match the shells recovered from the scene of the murder, Salinas did not answer, looking down at the floor, shuffling his feet, biting his bottom lip, and clenching his hands in his lap. After a few moments of silence, the officer asked additional questions which Salinas answered.

Following the interview, police arrested Salinas on outstanding traffic warrants. Prosecutors soon concluded that there was insufficient evidence to charge him with the murders, and he was released. A few days later, police obtained a statement from a man who said he had heard Salinas confess to the killings. On the strength of that additional evidence, prosecutors decided to charge petitioner, but by this time he had absconded. Fifteen years later, police discovered Salinas living in the Houston area under an assumed name. He was arrested at Harris County Pretrial Services where he had gone to submit to a urine analysis.

Salinas did not testify at trial. Over his objection, prosecutors used his reaction to the officer's question during the 1993 interview as evidence of his guilt. The jury found petitioner guilty, and he received a 20-year sentence. On direct appeal, the court of appeals rejected that argument, reasoning that petitioner's pre-arrest, pre-Miranda silence was not "compelled" within the meaning of the 5th Amendment. The Court of Criminal Appeals affirmed.

The U.S. Supreme Court granted certiorari to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief. But because Salinas did not invoke the privilege during his interview, the Court found it unnecessary to reach that question.

In a 3-2-4 decision, Justice Alito, writing for the plurality, held that such evidence was admissible because Salinas did not invoke his privilege against self-incrimination during the interview. The plurality noted that someone who desires to rely upon the privilege against self-incrimination must claim it. This puts the government on notice when a witness intends to rely upon the privilege and it gives the courts a record establishing the reasons for refusing to answer. Two exceptions were noted to the invocation requirement: (1) a defendant doesn't have to take the witness stand at trial to assert the privilege against self-incrimination in his own trial; and (2) a failure to invoke the privilege is excused where governmental coercion makes the forfeiture of the privilege involuntary.

Justice Thomas and Justice Scalia, in a concurring opinion, stated that Salinas' claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his silence did not compel him to give self-incriminating testimony. The concurring members of the Court do not believe that the 5th Amendment applies to pre-custody interviews.

Justice Breyer, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, issued a dissenting opinion stating that the 5th Amendment prohibits the prosecution from commenting on a defendant's silence during police questioning. Moreover, requiring a suspect to invoke the privilege against self-incrimination when he may not know he is required to invoke it to claim it is unfair.

Commentary: In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the Court held that unless and until a suspect actually states that he or she is relying on that right to remain silent, subsequent voluntary statements can be used in court and police can continue to interact and question. The mere act of remaining silent is, on its own, insufficient to imply a suspect has invoked his or her rights. Furthermore, a voluntary reply even after lengthy silence could be construed as implying a waiver. In this case it should be stressed that Salinas was not in custody and had voluntarily come to the police station to answer questions. What the State sought was to introduce evidence as to his nonverbal response to the question of whether a shotgun would match the shells recovered from the scene of the murder. Had the Court agreed with Salinas, there would likely have been greater challenges to pre-custodial statements due to a lack of a *Miranda* warning. As it stands, a defendant's pre-custody silence can be used against him, but an invocation cannot.

Probation cannot be revoked on the basis that the defendant invoked his 5th Amendment right not to discuss past extraneous offenses.

Dansby v. State, 398 S.W.3d 233 (Tex. Crim. App. 2013)

Commentary: Albeit, in a different context, this case nevertheless is a reminder to all Texas trial courts that in administering compliance with terms of probation, a court cannot revoke probation because a defendant invokes his privilege against self-incrimination.

Loss-prevention officers are not required to read Article 38.22 warnings to shoplifters in order for subsequent statements to be admissible at trial absent an agency relationship with law enforcement.

Elizondo v. State, 382 S.W.3d 389 (Tex. Crim. App. 2012)

Becky Elizondo and her friend were shopping at an Old Navy. The store's loss-prevention officer, David Mora,

noticed that Elizondo's friend was carrying a flat purse. Mora watched the two women part ways inside the store and meet together behind a clothing rack a few minutes later. Mora then watched between the racks as Elizondo's friend, standing shoulder-to-shoulder with Elizondo, put items of merchandise into her purse. The two women, followed by Mora, left the store without paying for the items. Mora intercepted the women when they were outside the store and asked them to return to the store. Mora escorted the women to a room, accompanied by a female Old Navy manager, and retrieved the items from the purse. After retrieving the items, Mora asked Elizondo to read and sign a document entitled "GAP INC. CIVIL DEMAND NOTICE," a document that contained the statement, "I, Becky Abajo Elizondo, have admitted to the theft of merchandise/cash valued at $65.00 from GAP INC., Store No. 6220, located at 6249 Slide Rd. I also hereby acknowledge that my detention on this date was reasonable." Elizondo signed the form, dated it, and completed the address information section. Mora also had Elizondo sign a store receipt reflecting the value of the merchandise and took photographs of Elizondo and the stolen items. After completing what Mora testified was typical protocol for theft at Old Navy, he called the Lubbock Police Department, and officers came to the store to arrest Elizondo and her friend. Before the trial began, Elizondo filed a motion to suppress the civil demand notice. The trial court denied the motion. Elizondo appealed, claiming that there was an agency relationship between the loss-prevention officer and law enforcement, and thus her statement was inadmissible under Article 38.22 of the Code of Criminal Procedure. Elizondo argued that the statement was obtained in violation of the 5th and 14th Amendments to the U.S. Constitution, Article I, Section 10 of the Texas Constitution, and Article 38.22 of the Code of Criminal Procedure.

The court of appeals affirmed the trial court's judgment. The Court of Criminal Appeals granted review to determine whether the court of appeals erred in affirming the trial court's denial of Appellant's motion to suppress the written confession obtained by the loss-prevention officer.

In a unanimous opinion, Judge Meyers noted that the law does not presume an agency relationship. Instead, under *Wilkerson v. State*, 173 S.W.3d 521 (Tex. Crim. App. 2005), courts are to consider three factors: (1) the relationship between the police and the potential police agent; (2) the interviewer's actions and perceptions; and (3) the defendant's perceptions of the encounter. In this case, the police may have been aware that the store had a policy of obtaining a civil demand notice, but that did not indicate a calculated practice between police and loss-prevention staff. The officer was not wearing a uniform and did not contact police until after receiving the statement. His reason for obtaining the statement was to adhere to the store's policies. Moreover, a reasonable person in the defendant's shoes would not have believed that the loss-prevention officer was an agent of law enforcement. The Court agreed with the court of appeals that no agency relationship existed between law enforcement and the loss-prevention officer, and affirmed.

Defendant's statements were inadmissible because a reasonable person who was handcuffed and aware that officers suspected him of involvement in his wife's possession of contraband would have believed he was in custody and was not read his *Miranda* rights.

State v. Ortiz, 382 S.W.3d 367 (Tex. Crim. App. 2012)

During a highway traffic stop, defendant and his wife made conflicting statements to the officer about their trip. The officer called for backup and began asking defendant about drugs. Defendant consented to a search of his person and his car. The backup officers arrived and began to pat down defendant's wife. One of the backup officers handcuffed defendant's wife, and the other stated in defendant's presence that there was something under her skirt. Defendant was then handcuffed. After he was asked what kind of drugs his wife had, defendant replied that she had cocaine. The trial court found that defendant was in custody for 5th Amendment purposes by the time he was placed in handcuffs. Thus, because he had not been advised of his Miranda rights, his statements about cocaine were inadmissible.

3. Ineffective Assistance of Counsel

An alien could not benefit from the new rule in *Padilla v. Kentucky*, 559 U.S. 356 (2010) that defense attorneys must inform non-citizen clients of the deportation risks of guilty pleas five years after her guilty plea became final.

Chaidez v. United States, 133 S. Ct. 1103 (2013)

When the U. S. Supreme Court announces a "new rule," a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding. Only when the Court applies a settled rule may a person avail herself of the decision on collateral review. A case announces a new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989). Before *Padilla*, the Court had declined to decide whether the 6th Amendment had any relevance to a lawyer's advice about matters not part of a criminal proceeding. Some advice of that kind might or might not have to meet

Strickland's reasonableness standard: no Supreme Court precedent "dictated" the answer, according to the majority.

Justice Ginsburg joined Justice Sotomayor in dissenting on the basis that *Padilla* did nothing more than apply the existing *Strickland* rule in a new setting.

The Court of Criminal Appeals adheres to the retroactivity analysis of *Padilla v. Kentucky*, 559 U.S. 356 (2010), in *Chaidez v. United States*, 133 S. Ct. 1103 (2013), regarding the rule that defense attorneys inform non-citizen clients of the deportation risks of guilty pleas.

Ex parte De Los Reyes, 392 S.W.3d 675 (Tex. Crim. App. 2013)

The Court recognizes that it could afford retroactive effect to *Padilla* as a matter of state habeas law, citing *Danforth v. Minnesota*, 552 U.S. 264 (2008), but declines to do so. Here, the applicant's second theft conviction became final in 2004 and the U.S. Supreme Court announced its decision in *Padilla* in 2010. Under *Chaidez*, defendants whose convictions became final prior to *Padilla* cannot benefit from its holding. Therefore, the applicant may not rely on *Padilla* in arguing that he was denied effective assistance of counsel.

C. Supremacy Clause

A trial court cannot order a defendant to self-deport as a condition of probation.

Gutierrez v. State, 380 S.W.3d 167 (Tex. Crim. App. 2012)

As part of her plea agreement for possession of a controlled substance, Maricella Gutierrez was granted community supervision subject to the condition that she file for her appropriate legal status within 90 days or leave the country. Gutierrez did not object to the condition and, based on her noncompliance, had her community supervision revoked. On discretionary review, the Court of Criminal Appeals, in an opinion by Judge Price, affirmed the court of appeals' reversal of the trial court on the basis that the condition violated the Supremacy Clause, Article 6, Clause 2, of the U.S. Constitution. Only the U.S. Government has the authority to regulate the removal of illegal aliens. The condition also violated an express prohibition of banishment of criminal offenders in Article 1, Section 20 of the Texas Constitution. While the State argued that Gutierrez was estopped from arguing the validity of the condition based on her failure to object, estoppel by contract could not apply as the condition at issue violated public policy.

In a concurring opinion, Judge Cochran agreed with the majority opinion, but also felt that Gutierrez could not be revoked for the failure to obtain legal status because that was beyond her control. Revoking probation based upon factors beyond a defendants' control would violate due process.

II. Substantive Law

A. Penal Code

The offense of holding oneself out as a lawyer did not require a jury instruction as to a culpable mental state beyond the intent prescribed in the plain language of Section 38.122 of the Penal Code.

Celis v. State, 2013 Tex. Crim. App. LEXIS 759 (Tex. Crim. App. May 15, 2013)

The defendant was properly denied an instruction on a mistake-of-fact defense under Section 8.02, P.C. (i.e., that he mistakenly believed he was licensed and in good standing to practice law in Mexico) because the offense did not require proof of a culpable mental state as to the licensing and good standing elements.

The offenses of Fraudulent Use of Identifying Information and Failure to Identify are not in pari materia.

Jones v. State, 396 S.W.3d 558 (Tex. Crim. App. 2013)

In November 2007, Jones was stopped and issued a citation for speeding in a school zone, failing to display a driver's license, and failing to maintain financial responsibility by a member of the Addison Police Department. At the time she gave her correct date of birth but said that her name was Tiffani Collier and gave a fictitious address. Tiffani Collier is one of Jones' former schoolmates who shares Jones' date of birth. In June 2008, Jones was again stopped for speeding by an Addison police officer. Jones, again, told the officer that her name was Tiffani Collier. She was cited for speeding and arrested on an outstanding warrant stemming from the citation issued in November 2007. Jones posted bond following her arrest and signed her name as Tiffani Collier on the bond. In January 2009, Tiffani Collier complained to Addison police after receiving letters from the Addison Municipal Court regarding a warrant for her arrest, despite not having been stopped or cited in Addison. Collier was shown a booking photo of Jones, at which point Collier told the police that she and Jones had attended school together.

Jones was charged in two separate indictments with Fraudulent Use or Possession of Identifying Information (Section 32.51(b), Penal Code), a state jail felony. Initially, she pleaded not guilty to both indictments and filed a plea to the jurisdiction on the grounds that, under the in pari materia doctrine, she should have been charged with two instances of Failure to Identify (Section 38.02(b), Penal Code), a Class B misdemeanor. The trial court denied her plea to the jurisdiction. She was ultimately placed on deferred adjudication for a term of two years.

The Court of Criminal Appeals affirmed the court of appeals' rejection of Jones' in pari materia argument first noting that the statutes are aimed at different classes of people. While Section 32.51 applies broadly to anyone who, with intent to harm or defraud another, obtains, possesses, transfers, or uses the identifying information of another, Section 38.02(b)(1)-(3), by its elements, applies only to those who have been lawfully arrested or detained by the police or who are believed by police to have witnessed a crime. Section 38.02 applies to a much narrower class of persons than Section 32.51. The court went on to note that the plain language and placement of each statute in the Penal Code indicate that Section 32.51 and Section 38.02 do not have the same subject or purpose. The subject of Section 32.51 is the use of another's identifying information without permission. The subject of Section 38.02 is the act of providing police officers with false identification. The statutes' plain language further demonstrates that the purposes of the two statutes are sufficiently dissimilar. The purpose of Section 32.51 is to prevent identity theft.

Commentary: The facts of this case are particularly likely to resonate with readers familiar with similar instances of deception in local trial courts. The doctrine of *in pari materia* is a rule of statutory construction that seeks to carry out the Legislature's intent. Statutes are *in pari materia* when they deal with the same general subject, have the same general purpose, or relate to the same person or thing or class of persons and things. Notably, in its analysis, the Court repeatedly cites *Azeez v. State*, 248 S.W.3d 182 (Tex.Crim.App. 2008), a seminal case of particular importance to municipal and justice courts regarding the distinction between Violate Promise to Appear and Failure to Appear. See, Ryan Kellus Turner, "Sorting Out the Anomaly: Non-Appearance Crimes in Light of *Azeez*," *The Recorder* (June 2008).

B. Transportation Code

A hospital employee licensed as an EMT and employed to draw blood was not "emergency medical services personnel" for the purposes of Section 724.017 of the Transportation Code, and was a "qualified technician" within the meaning of the statute, authorizing her to take blood specimens in DWI cases.

Krause v. State, 405 S.W.3d 82 (Tex. Crim. App. 2013)

***Erdman* is overruled. The voluntariness of a decision to provide a breath sample is evaluated under the totality of the circumstances.**

Fienen v. State, 390 S.W.3d 328 (Tex. Crim. App. 2012)

Affirming the judgment of the court of appeals, the Court of Criminal Appeals opined that the trial court did not err by denying defendant's motion to suppress evidence because Fienen voluntarily provided a specimen of his breath following his arrest for DWI. Fienen was informed that he could refuse the breathalyzer test, and he did so at least two times before his ultimate consent. Upon defendant's initial refusal, Officer Barker followed standard protocol by preparing to obtain a search warrant for a blood draw under Section 724.015 of the Transportation Code. Barker's demeanor was professional and accommodating, and her comments did not put undue psychological pressure on Fienen. Under the totality of the circumstances, defendant made a conscious and voluntary decision to consent to the breathalyzer test. The Court overruled *Erdman v. State*, 861 S.W.2d 890 (1993), which held that law enforcement officials conveying information to DWI suspects besides the statutory warnings could have the effect of undermining their resolve and coercing their consent.

The court explained that the rules developed post-*Erdman* misapply the relevant burden of proof in addressing warnings regarding the consequences of passing or failing a breathalyzer test. When the issue is raised in a motion to suppress, the State must prove voluntary consent by clear and convincing evidence. Contrary to this notion, the courts of appeals have placed a burden on the defendant to show that he was coerced, specifically that there was a causal connection between the warning and his decision to submit to the test. The Court stated that once the defendant has raised the issue in his motion, the burden of proof is on the State, and it does not shift back to the defendant.

HB 2357 and SB 1386 (82nd Legislature), amending Section 502.010 of the Transportation Code, can be harmonized, as required by the Code Construction Act, by giving effect to the Senate bill's additions and to the parts of the House bill that do not merely reenact the statute. Section 502.010 authorizes certain counties to impose an additional fee of $20 on a person

who fails to pay a fine, fee, or tax to the county or on a defendant who fails to appear in connection with a pending criminal proceeding.

Tex. Atty. Gen. Op. GA-1006 (5/28/13)

The commissioners court may determine whether a county imposes the additional fee and which county official or department assesses and collects that fee. If the commissioners court decides to impose the fee, it may determine whether the officer charged with assessing and collecting the additional fee may waive it in particular circumstances. The additional fee may be imposed after the date on which the fine, fee, or tax is due, and it may be assessed when a defendant fails to appear for a criminal proceeding but has not been convicted.

Commentary: Section 502.010 (formerly 502.185) is the County Scofflaw law. This should not be confused with the Municipal Scofflaw law found in Section 702.003. Though SB 1386 amended Section 702.003 to provide that a municipality shall notify the TxDMV or the county assessor-collector, rather than the county, and to authorize the imposition of a $20 fee, HB 2357 only amended 502.010. Therefore, there is no reconciliation issue. Like 502.010, who may determine whether a municipality contracts with the county and imposes the $20 fee and when that fee may be assessed is readily apparent within 702.003.

Judges and peace officers who choose to omit their residence address from their driver's licenses and desire to obtain a homestead exemption must produce a personal identification certificate issued by DPS.

Tex. Atty. Gen. Op. GA-0974 (11/9/12)

Though Sections 521.121(c) and 521.1211(b) of the Transportation Code exclude judges (and their spouses) and peace officers respectively from the requirement that a license contain a licensee's residence address, no such exception exists in Chapter 11 of the Tax Code, which establishes a homestead exemption from residential property taxes (Section 11.13) and requires the applicant to produce a driver's license or state-issued personal identification certificate with the applicant's address (Section 11.43).

Commentary: Section 521.121(c) requires DPS to establish a procedure for a federal judge, state judge, or the spouse of a federal or state judge to omit the license holder's residence address on their driver's license. This does not include municipal judges as Section 521.001 defines "state judge" as the judge of an appellate court, district court, or county court at law or an associate judge appointed under Chapter 201 of the Family Code.

III. Procedural Law

A. Code of Criminal Procedure

1. Magistration

A person who is arrested may waive his or her right to have a magistrate orally recite the admonishments of Article 15.17 of the Code of Criminal Procedure only if the waiver is made plainly, freely, and intelligently.

Tex. Atty. Gen. Op. GA-0993 (3/15/13)

Commentary: "Waiver of magistration" is a loaded term that requires explanation. The term has no general meaning. It happens in different ways, in different locales. Depending on what it entails, the practice may be benign or malignant. Although this opinion focuses on practices in Travis County, it warrants careful reading by magistrates and city attorneys. To grasp the genesis, the homegrown backstory that resulted in this opinion (which incidentally involved TMCEC and a topic featured in the 2012 Regional Judges Program), read the opinion request (*RQ-1085-GA*) available on-line on the Attorney General's website. The request posed two questions: (1) Whether a magistrate has a mandatory duty to admonish an arrested person as required by Article 15.17 of the Code of Criminal Procedure irrespective of the arrested person's wishes? (2) Whether an arrested person may lawfully waive his right to be taken before a neutral magistrate and be admonished in accordance with Article 15.17?

As to the first question, the opinion limits its analysis to waiver of oral recitation of rights. Notably, the Attorney General expressly declined to offer an opinion on whether any other aspects of Article 15.17 procedure may be waived. By limiting its analysis to waiver of oral recitations of rights, the opinion side-steps a number of Article 15.17 related issues posed in the first question. Incidentally, it limits the utility of the opinion.

The Attorney General answers the second question by explaining how a defendant can generally "waive any rights secured to him by law" per Article 1.14(a) of the Code of Criminal Procedure. The opinion does not, however, answer whether a defendant may waive the magistrate's duty? Debatably, it confuses the difference between the *duty* of magistrates (which is mandatory) and the *rights* underlying Article 15.17 (which defendants can waive). Furthermore, it opines that it is ok for a defendant to waive magistration without bothering to

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➤*Defendant had standing to challenge the search of his aunt's backyard and seizure of his dogs therein because he had permission to enter and keep his dogs in the backyard, which he did on a daily basis. The plain view doctrine did not justify the warrantless search because officers did not have a lawful right to go into the backyard within the residence's curtilage. 7*

➤*An officer had reasonable suspicion to prolong defendant's detention during a traffic stop for the purpose of getting a drug dog where there was no factual dispute that the officer conducted a criminal history check revealing a recent drug arrest and the defendant was subsequently nervous with hands shaking and responded "no" when asked if she had ever been in trouble before. 7*

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➤*The taking of photographs of patrons in their swim suits at a public swimming pool did not give rise to reasonable suspicion justifying an investigative detention. 7*

➤*Officer had no reasonable suspicion to make a traffic stop where he mistakenly believed he had the right of way and there was no indisputable visual evidence that he saw defendant's center stripe violation depicted in the recording of the stop. 8*

➤*There was no reasonable suspicion that defendant had violated Section 544.004 of the Transportation Code where the evidence indicated only that, in the officer's opinion, defendant may have passed a "left lane for passing only" sign located at least 15 miles away. 8*

➤*Defendant's detention was supported by reasonable suspicion given that (1) the report of people fighting and the vehicle damage the officer observed indicated that unusual activity occurred, which was some indication that a crime might have taken place, like assault or criminal mischief, and (2) the evidence supported a reasonable basis to believe that appellee or her other occupants might have been connected to this activity. 8*

➤*The peace officer was justified in stopping the appellant's vehicle for the traffic offense of following too closely. 8*

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➤*Absent an invocation, a defendant's pre-custody silence during a voluntary police interview is admissible. .. 10*

➤*Probation cannot be revoked on the basis that the defendant invoked his 5th Amendment right not to discuss past extraneous offenses. 11*

➤*Loss-prevention officers are not required to read Article 38.22 warnings to shoplifters in order for subsequent statements to be admissible at trial absent an agency relationship with law enforcement. 11*

➤*Defendant's statements were inadmissible because a reasonable person who was handcuffed and aware that officers suspected him of involvement in his wife's possession of contraband would have believed he was in custody and was not read his **Miranda** rights. 12*

3. Ineffective Assistance of Counsel 12

➤*An alien could not benefit from the new rule in **Padilla v. Kentucky**, 559 U.S. 356 (2010) that defense attorneys must inform non-citizen clients of the deportation risks of guilty pleas five years after her guilty plea became final. 12*

➤*The Court of Criminal Appeals adheres to the retroactivity analysis of **Padilla v. Kentucky**, 559 U.S. 356 (2010), in **Chaidez v. United States**, 133 S. Ct. 1103 (2013), regarding the rule that defense attorneys inform non-citizen clients of the deportation risks of guilty pleas. 13*

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B. Transportation Code.....14

➤*A hospital employee licensed as an EMT and employed to draw blood was not "emergency medical services personnel" for the purposes of Section 724.017 of the Transportation Code, and was a "qualified technician" within the meaning of the statute, authorizing her to take blood specimens in DWI cases. 14*

➤***Erdman** is overruled. The voluntariness of a decision to provide a breath sample is evaluated under the totality of the circumstances. 14*

➤*HB 2357 and SB 1386 (82nd Legislature), amending Section 502.010 of the Transportation Code, can be harmonized, as required by the Code Construction Act, by giving effect to the Senate bill's additions and to the parts of the House bill that do not merely reenact the statute. Section 502.010 authorizes certain counties to impose an additional fee of $20 on a person who fails to pay a fine, fee, or tax to the county or on a defendant who fails to appear in connection with a pending criminal proceeding. 14*

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2. Pre-Trial Motions/Issues 20

➤*Article 44.01(a)(1) allows the State to appeal a decision dismissing any portion of an indictment, including enhancement allegations the State was not required to plead. 20*

3. Trial 20

➤*Asking a prospective juror whether being abused as a child reduces a person's moral culpability constituted an improper commitment question. 20*

➤*Defendant did not suffer egregious harm from the trial court's failure to read the jury charge out loud before sending the jury back to deliberate in violation of Articles 37.14 and 37.16 of the Code of Criminal Procedure. 20*

➤*Internet research conducted by a juror at her home on an overnight break constituted an "outside influence," into which a trial court should be able to inquire as to whether other jurors received such outside information and its impact on the verdict without delving into actual jury deliberations. 20*

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➤*Defendant did not forfeit the right to complain about the restitution order because he did not have an opportunity to object and preserve error where his motion for new trial was filed before the written judgment, which differed from the oral pronouncement of his sentence. 21*

➤*Trial court properly adjudicated the defendant to regular probation rather than incarcerating him for his inability to pay restitution. 21*

5. Probation 22

➤*Under Article 42.12, Section 9(a) of the Code of Criminal Procedure, a district judge does not have authority to (1) order the director of a community supervisions and corrections department who does not supervise defendants placed on community supervision to personally conduct a presentence investigation report; (2) order such a director to personally appear in court to present the ordered presentence investigation report; or (3) order a specifically named supervision officer to conduct a presentence investigation report. 22*

B. Evidence 22

➤*A district or inferior court likely does not have authority to order the destruction of blood collected during the investigation of an intoxication-related misdemeanor offense after the underlying case has been finally resolved. 22*

C. Appellate Procedure 22

➤*The death of a surety in a criminal case does not divest an appellate court of jurisdiction. 22*

➤*Appellee attempted to use statutory habeas corpus procedure to circumvent appellate procedures and other legal remedies available to defendants charged in municipal court. 22*

➤*Failure to comply with briefing requirement of Section 31.00021(b) of the Government Code is neither mandatory nor jurisdictional. 23*

➤*A waiver of appeal was not a binding element of plea agreements with handwritten and preprinted terms. 23*

➤*The Court of Criminal Appeals alters the parameters of the equitable doctrine of laches as it applies to bar a long-delayed application for a writ of habeas corpus, reducing the burden on the State. 23*

➤*Does a defendant who pleads true to the failure to pay "fees" in a probation revocation hearing forfeit the claim that he was unable to make those payments? 24*

➤*An intermediate court of appeals lacks the authority to mandamus a judge appointed to serve as a presiding judge of the administrative judicial region. 24*

➤*The legal and factual sufficiency standards that govern Texas civil proceedings still apply to the rejection of an affirmative defense after* ***Brooks v. State****, 323 S.W.3d 893 (Tex. Crim. App. 2010).* 24
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answer whether an attorney may make the waiver on behalf of his client. The opinion implicitly assumes that the waiver made by an attorney is the same as a waiver by the attorney's client.

The opinion states that whether a valid waiver has occurred is an altogether separate question. It cites *Sanchez v. State*, 120 S.W.3d. 359, 366 (Tex. Crim. App. 2003), for the proposition that a person is not deemed to have waived a right unless he says so, plainly, freely, and intelligently. Reliance on *Sanchez* begs a host of unanswered questions. (Such as, can defendants who are illiterate, in jail, and have had no opportunity to avail themselves of the assistance of counsel make such a waiver?) The opinion concludes that whether a particular waiver is effective is a matter for the magistrate to decide on an individual case basis. It is hard to reconcile such a conclusion with knowledge that such decisions are potentially ripe for second guessing by defense attorneys, trial courts, and appellate courts.

2. Pre-Trial Motions/Issues

Article 44.01(a)(1) allows the State to appeal a decision dismissing any portion of an indictment, including enhancement allegations the State was not required to plead.

State v. Richardson, 383 S.W.3d 544 (Tex. Crim. App. 2012)

The Court references *State v. Moreno*, 804 S.W.2d 327 (Tex. Crim. App. 1991), where it traced the history of the statute to determine the meaning of "dismiss," finding that when the Legislature enacted Article 44.01, it "borrowed liberally" from the federal statute permitting the State to appeal, which resulted in some ill-fitting language being incorporated into the Texas statute. Texas criminal procedure does not use "dismiss" as the term for a challenge to the validity of a charging instrument. Keeping Texas' statute in line with the federal counterpart, the Court held that 44.01(a)(1) permits the State to appeal an order concerning an indictment or information "whenever the order effectively terminates the prosecution in favor of the defendant," *Id*. at 332, or "foreclose[s] the State from proceeding with the information [or indictment] under which it wished to proceed." *Id*. at 333, n.7. Here, by quashing the enhancement paragraphs, the trial court's ruling foreclosed the State from proceeding on the indictment under which it wished to proceed.

Commentary: Article 44.01(a), C.C.P., also references complaints. This case would likely support the State's ability to appeal an order concerning a complaint that "effectively terminates the prosecution in favor of the defendant" or "forecloses the State from proceeding with the [complaint] under which it wished to proceed."

3. Trial

Asking a prospective juror whether being abused as a child reduces a person's moral culpability constituted an improper commitment question.

Hernandez v. State, 390 S.W.3d 310 (Tex. Crim. App. 2012)

Defendant did not suffer egregious harm from the trial court's failure to read the jury charge out loud before sending the jury back to deliberate in violation of Articles 37.14 and 37.16 of the Code of Criminal Procedure.

Casanova v. State, 383 S.W.3d 530 (Tex. Crim. App. 2012)

The applicable portion of Article 36.19 mandates that in the absence of a trial objection, the judgment shall not be reversed unless it appears from the record that the defendant has not had a fair and impartial trial. Here, the defendant identified no specific objection to the charge he would have made had the instructions been read aloud and the record fails to show the jury ignored the judge's explicit instruction to read the charge aloud in the jury room.

Internet research conducted by a juror at her home on an overnight break constituted an "outside influence," into which a trial court should be able to inquire as to whether other jurors received such outside information and its impact on the verdict without delving into actual jury deliberations.

McQuarrie v. State, 380 S.W.3d 145 (Tex. Crim. App. 2012)

Texas Rule of Evidence 606(b) permits juror testimony relating to outside influence as an exception to its general rule that a juror not testify as to any statement made during jury deliberations or the effect of anything on the verdict. Before this case, the Court of Criminal Appeals had never specifically defined what qualifies as an outside influence. In this case it adopts a plain-meaning interpretation: something originating from a source outside the jury room and other than the jurors themselves.

The dissent believes the phrase "outside influence" carries a narrower meaning and would hold that the internet research was not an outside influence because

the information did not involve a communication from a person outside the jury.

Commentary: Two interests are at odds here. A defendant has a 6th Amendment interest in an unimpaired jury, but the government has an interest in insulating the jury's deliberative process, making it difficult to prove jury misconduct. The U.S. Supreme Court has suggested that the jury system could not survive if courts permit extensive post-verdict investigations into juries' internal deliberative processes. *Tanner v. United States*, 483 U.S. 107, 120 (1987). What effect should technology have on the balance of these interests? How does your court protect these interests?

4. Restitution

Defendant did not forfeit the right to complain about the restitution order because he did not have an opportunity to object and preserve error where his motion for new trial was filed before the written judgment, which differed from the oral pronouncement of his sentence.

Burt v. State, 396 S.W.3d 574 (Tex. Crim. App. 2013)

Defendant could not have objected during the oral pronouncement because at that point, he could not have known that the sentence in the written judgment would be different from the orally pronounced sentence, or that there might be error in the amount of restitution. Similarly, when appellant filed his motion for new trial, the written judgment had not yet issued, so he could not have known to include the restitution issues in the motion. The trial court ruled on the motion for new trial that same day, thus preventing him from amending the motion to include the restitution issues.

Commentary: The rationale in *Burt* was heavily relied upon in the Court's reasoning in *Landers v. State*, 402 S.W.3d 252 (Tex. Crim. App. 2013), *infra*.

Trial court properly adjudicated the defendant to regular probation rather than incarcerating him for his inability to pay restitution.

Bryant v. State, 391 S.W.3d 86 (Tex. Crim. App. 2012)

The State filed a motion to revoke Robert Bryant's deferred adjudication community supervision for misapplication of trust funds. The trial court adjudicated defendant's guilt, sentenced him to regular probation, reduced his restitution payments, and waived court costs and fees. Bryant appealed. The Texarkana Court of Appeals reversed. The State petitioned for discretionary review.

In an opinion by Judge Alcala, the Court of Criminal Appeals held that the trial court did not abuse its discretion in revoking Bryant's community supervision under former Article 42.037(h) of the Code of Criminal Procedure because the State proved Bryant violated a term of his community supervision. The trial court properly considered the statutory factors: (1) the defendant's employment status; (2) the defendant's earning ability; (3) the defendant's financial resources; (4) the willfulness of the defendant's failure to pay; and (5) any other special circumstances that may affect the defendant's ability to pay.

Writing for an eight-judge majority, Judge Alcala explained that Article 42.037(h) authorizes the revocation of probation based upon the failure to pay restitution so long as the trial court considers the relevant statutory factors including, but not limited to, a defendant's inability to pay restitution. Here, the record indicated that the trial court considered the statutorily enumerated factors. The trial court carefully considered Bryant's financial circumstances in rendering its ruling. The court of appeals had properly determined that the trial court's sentence did not violate the federal due process rights under *Tate v. Short*, 401 U.S. 395 (1971), because the trial court did not imprison the defendant for his inability to pay. The court of appeals' judgment was reversed, and the trial court's judgment was affirmed. Judge Johnson dissented without a written opinion.

Commentary: Restitution is an equitable remedy under which a person, a victim of a crime, is restored to his or her original position prior to loss or injury. In Texas, restitution in criminal cases is generally governed by Article 42.037 of the Code of Criminal Procedure. In county and district court proceedings it may also be ordered as part of community supervision. To the degree more specific provisions exist that govern municipal court proceedings, Chapter 45 of the Code of Criminal Procedure authorizes two ways for a municipal judge to order restitution: (1) pursuant to a deferred disposition order, or (2) as specified in the judgment upon conviction. However, the existence of these more specific rules does not mean that the general law, Article 42.037, is inapplicable. Notably, in 2005, a sixth factor, a partial codification of *Tate* and *Bearden v. Georgia*, 461 U.S. 660 (1983), was added to Article 42.037(h). It requires the court to consider the defendant's current and future ability to pay restitution. In this case, the trial court's decision conformed to the holding in *Tate* and *Bearden* despite the absence of language in Article 42.037. This case is a good

reminder to judges and prosecutors that the protections afforded indigent defendants ordered to pay *fines* similarly extends to *restitution*.

5. Probation

Under Article 42.12, Section 9(a) of the Code of Criminal Procedure, a district judge does not have authority to (1) order the director of a community supervisions and corrections department who does not supervise defendants placed on community supervision to personally conduct a presentence investigation report; (2) order such a director to personally appear in court to present the ordered presentence investigation report; or (3) order a specifically named supervision officer to conduct a presentence investigation report.

Tex. Atty. Gen. Op. GA-0991 (2/19/13)

Commentary: As all forms of probation in Texas are statutory, the authority of all trial judges is similarly restrained by the parameters of a legislative enactment.

B. Evidence

A district or inferior court likely does not have authority to order the destruction of blood collected during the investigation of an intoxication-related misdemeanor offense after the underlying case has been finally resolved.

Tex. Atty. Gen. Op. GA-0992 (3/12/13)

A trial court does not retain jurisdiction over a case that has been finally resolved, and thus, does not have authority to issue an order providing for the destruction of evidence in that case. The brief submitted with the request letter indicated that Harris County District Attorney's Office understood that Article 38.43(a)(2) of the Code of Criminal Procedure governed the destruction of blood evidence in *felony* cases. The brief states that the vast majority of blood samples currently in the possession of Harris County law enforcement officials were seized in relation to intoxication-related *misdemeanor* offenses, in which the procedures governing felony cases are inapplicable. While there may be legal means to destroy misdemeanor samples, the opinion does not discuss other possible procedures for destroying such evidence because that question was not asked in the request for opinion.

C. Appellate Procedure

The death of a surety in a criminal case does not divest an appellate court of jurisdiction.

Comunidad Corp. v. State, 2013 Tex. App. LEXIS 12145 (Tex. App. Houston 1st Dist. Sept. 27, 2013)

The fire marshal issued 68 citations to appellant Comunidad Corporation, the purported owner of the Windfield Landing Apartments in Nassau Bay. The cases were tried in the Nassau Bay Municipal Court. A jury returned a guilty verdict in each of the 68 cases and assessed cumulative fines in excess of $200,000. Comunidad appealed to the county court. Subsequently, Comunidad's surety died. The State successfully argued in county court that as a result of the surety's death, the county court no longer had appellate jurisidiction.

Although Article 44.15 of the Code of Criminal Procedure states that the court to which an appeal is taken "may" permit a defendant to file a new appeal bond, the fact that the statute exists is evidence that the county court's jurisdiction does not evaporate immediately upon finding a bond inadequate. In this instance, Comunidad was never given notice that its case would be dismissed if it did not file an amended bond. Because the county court was not deprived of jurisdiction when it granted the State's motion to find the bonds insufficient, it should have provided defendant with notice and an opportunity to cure any defect by filing another bond in each case, instead of dismissing the appeals.

Appellee attempted to use statutory habeas corpus procedure to circumvent appellate procedures and other legal remedies available to defendants charged in municipal court.

State v. Burnett, 2013 Tex. App. LEXIS 7422 (Tex. App.—Dallas June 18, 2013, no pet.)

The court of appeals held that the appellee failed to pursue the remedies at law available to him, and used the writ of habeas corpus as a way to circumvent an orderly appeal and the applicable appellate rules. In his petition for the writ, he complained that his motion for continuance was denied. Additionally, in the alternative, he requested that an out of time appeal be granted. Habeas corpus per Article 11.072 of the Code of Criminal Procedure is allowed in only certain extraordinary circumstances which were not applicable to the appellee's petition. By ordering the Carrollton Municipal Court to vacate its judgment, the county court granted the appellee more relief than necessary to preserve his rights, such that the trial court abused its discretion.

Commentary: This case, and a companion case stemming from the same facts, *State v. Pierce*, 2013 Tex. App. LEXIS 7421 (Tex. App.—Dallas June 18, 2013, no pet.) are indicative of what appears to be an emerging trend in

municipal courts: defendants attempting to utilize habeas corpus. While habeas corpus has its place in municipal court proceedings, instances like *Burnett* and *Pierce* are examples of how the writ may be sought improperly.

Failure to comply with briefing requirement of Section 31.00021(b) of the Government Code is neither mandatory nor jurisdictional.

In re Mizer, 400 S.W.3d 689 (Tex. App.—Fort Worth 2013, no pet.)

Mizer was accused of 14 violations of a city ordinance prohibiting parking cars on an unapproved surface in a lot next to his auto repair shop. The cases were tried in the Roanoke Municipal Court, a court of record. On September 27, 2011, the municipal court found Mizer guilty of all charges and imposed a fine of $25,396. Mizer filed a motion for new trial, in which he contested the constitutionality of the city ordinance under which he was convicted, the validity of the complaint, the jurisdiction of the municipal court, and the sufficiency of the evidence. The motion for new trial was denied.

Ultimately, because of Mizer's failure to comply with Section 30.00021(b) of the Government Code, which states that "[t]he appellant must file the brief with the appellate court clerk not later than the 15th day after the date on which the clerk's record and reporter's record are filed with that clerk," the Denton County Criminal Court #4 dismissed his appeal and ordered the case be remanded to municipal court for execution of sentence.

Mizer sought mandamus relief in the Fort Worth Court of Appeals arguing that the county judge abused his discretion by dismissing his appeal for failure to file a brief, in violation of Article 44.33(b) of the Code of Criminal Procedure and Texas Rules of Appellate Procedure (TRAP) Rule 38.8(b). The State argued the plain language of Section 30.00021(b).

The court of appeals held that Section 30.00021(b) is neither mandatory nor jurisdictional. Furthermore, the court held that it had no jurisdiction to hear Mizer's appeal until the county court either affirmed the conviction or addressed the merits of Mizer's constitutional question. Thus, Mizer had no adequate remedy by appeal. Accordingly, the petition for writ of mandamus was conditionally granted in part and the county court was ordered to set aside the order dismissing the resident's appeal and to enter a scheduling order granting the resident 15 days to file a brief.

Commentary: It will be interesting to see if other intermediate courts of appeals will follow the Fort Worth Court of Appeals' lead in terms of how Section 30.00021(b) should be read in light of TRAP 38.8(b) and Article 44.33(b). This case only confirms what many "users" of Chapter 30 already know–specifically, that applying its provisions is not always a "cut and dried" matter. In fact, questions of procedure as a result of Section 30.00021 are not limited to the appellate court; the trial court is left with direction that is less than clear. Section 30.00021(d) requires parties, upon filing briefs with the appellate court, to also deliver a copy to the municipal judge. Section 30.00022 instructs the municipal judge to decide from the briefs whether to allow the defendant to withdraw the notice of appeal and be granted a new trial by the court. This can be done at any time before the record is filed with the appellate court. It would appear to be a very rare occurrence when the municipal judge could grant a new trial based on the briefs *before* the record is filed, as the briefs are not due until 15 (appellant) or 30 (appellee) days *after* the record is filed with the appellate court.

A waiver of appeal was not a binding element of plea agreements with handwritten and preprinted terms.

Ex parte De Leon, 400 S.W.3d 83 (Tex. Crim. App. 2013)

The pre-printed language of paragraph 13 provided that Applicant must have the trial court's permission to appeal. However, the pre-printed language of paragraph 14 provided that Applicant expressly waives his right to appeal. There was no mention of waiver of appeal in the handwritten language. The agreements expressly provided that the State would dismiss all charges against the applicant's brother, and it did so. After Applicant appealed, however, the State reindicted the brother. The Court held that given all the evidence in the record, the waiver of appeal was not a binding element of the plea agreements. Because specific performance of the plea agreements was not possible (the brother had already been convicted), the proper remedy was to return both parties to their original pre-plea positions.

The Court of Criminal Appeals alters the parameters of the equitable doctrine of laches as it applies to bar a long-delayed application for a writ of habeas corpus, reducing the burden on the State.

Ex parte Perez, 398 S.W.3d 206 (Tex. Crim. App. 2013)

Going forward, Texas courts will apply the Texas common law doctrine of laches instead of the federal standard in determining whether to grant habeas relief. The Court of Criminal Appeals will (1) no longer require the State to make a "particularized showing of prejudice" so that courts may more broadly consider material prejudice

resulting from delay, and (2) expands the definition of prejudice under the existing laches doctrine to permit consideration of anything that places the State in a less favorable position, including prejudice to the State's ability to retry a defendant, so that a court may consider the totality of the circumstances in deciding whether to grant equitable relief.

Does a defendant who pleads true to the failure to pay "fees" in a probation revocation hearing forfeit the claim that he was unable to make those payments?

Gipson v. State, 383 S.W.3d 152 (Tex. Crim. App. 2012)

In a unanimous decision, written by Judge Alcala, the Court opined that *Bearden v. Georgia*, 461 U.S. 660 (1983), does not place an evidentiary burden on the State. Rather, it sets forth a mandatory judicial directive that requires a trial court to (1) inquire as to a defendant's ability to pay and (2) consider alternatives to imprisonment if it finds that a defendant is unable to pay. In probation revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the defendant willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the defendant could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. According to the Court, *Bearden* is a mandatory judicial directive, not a prosecutorial evidentiary burden. Thus, *Bearden* does not categorically prohibit incarceration of indigent defendants; rather it permits incarceration where alternative measures are not adequate to meet the State's interest in punishment and deterrence. Moreover, Article 42.12, Section 21(c) of the Code of Criminal Procedure, requiring the State prove a defendant's ability to pay only applies to some fees, and in this case Gipson pleaded true to the failure to pay fees and fines not specified in that statute. With these considerations in mind, the Court remanded the case to the court of appeals to consider whether Gipson had forfeited his right to complain on appeal about the sufficiency of the evidence supporting his failure to pay the probation fees.

Commentary: On remand, the court of appeals rejected the State's argument that Gipson had procedurally defaulted on his sufficiency claim. *Gipson v. State*, 395 S.W.3d 910 (Tex. App.—Beaumont 2013, pet. granted). The court of appeals concluded that a plea of "true" does not constitute an intentional relinquishment of a sufficiency claim because the admission of failure to pay is not an admission to willfully failing to pay. At common law, the State had the burden of showing that a defendant had the ability to pay costs. Article 42.12, Section 11(b) similarly contemplates a defendant's ability to pay fines. Because the record in this case did not show that Gipson intentionally failed to pay his fine, the case was reversed and remanded to the trial court. The State Prosecuting Attorney filed a petition for discretionary review that was granted on June 26, 2013. This case has the potential to have major implications on the adjudication of fine-only offenses and the delineation between "fines" and "fees." Despite the fact that municipal and justice courts do not utilize Article 42.12, this is a case to keep tabs on. There continues to be an emerging trend in Texas criminal appellate law illustrating a complicated triangulated relationship between fines, court costs (including fees), and restitution.

An intermediate court of appeals lacks the authority to mandamus a judge appointed to serve as a presiding judge of the administrative judicial region.

In re Cook, 394 S.W.3d 668 (Tex. App.—Tyler 2012, no pet.)

By statute, a court of appeals' mandamus authority is limited to writs necessary to enforce the jurisdiction of the appellate court and writs against a judge of a district or county court in the appellate court's district, or against a judge of a district court acting as a magistrate at a court of inquiry in the appellate court's district. Section 22.221(a)-(b), Government Code. Such courts lack mandamus jurisdiction against a presiding judge of the administrative judicial region.

The legal and factual sufficiency standards that govern Texas civil proceedings still apply to the rejection of an affirmative defense after *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010).

Matlock v. State, 392 S.W.3d 662 (Tex. Crim. App. 2013)

In this case, the court of appeals applied the standard of review for factual sufficiency and sustained appellant's inability to pay claim. However, it rendered a judgment of acquittal as if it had granted his legal sufficiency claim. If an appellate court conducting a factual-sufficiency review finds that the evidence supporting the affirmative defense so greatly outweighs the State's contrary evidence that the verdict is manifestly unjust, then the remedy is a new trial, not an acquittal, where the defendant may once again raise his or her affirmative defense.

IV. Court Administration

A. Court Costs

Appellant was legally entitled to an itemization of court costs.

Johnson v. State, 389 S.W.3d 513 (Tex. App.—Houston [14th Dist.] 2012, pet. granted)

Johnson pled guilty to aggravated robbery with a deadly weapon. He was sentenced by the trial court to seven years in prison. In its judgment of conviction, the trial court also ordered appellant to pay $234 in court costs. Johnson contended on appeal that there was insufficient evidence in the record to support the court's ordering him to pay a particular amount in court costs. The original clerk's record filed with the court of appeals did not contain a bill of costs (an itemization of court costs). In fact, the record filed with the court of appeals did not contain any evidence supporting the assessment of $234 in court costs. When the court of appeals ordered that the record be supplemented, the clerk's office explained that no bill of costs existed.

The court of appeals held that the trial court did not err in ordering the payment of costs; it was mandated by Article 42.16 of the Code of Criminal Procedure. It was error, however, for purposes of Article 103.001 of the Code of Criminal Procedure, for the trial court to enter a specific dollar amount in the judgment without support for that amount. The court of appeals reformed the judgment to delete the specific amount of costs and affirmed the judgment as modified.

Commentary: Although *Johnson* is an important reminder that all criminal defendants are legally entitled to an itemization of court costs, clamor that the opinion has broad implications on municipal and justice courts seems mostly unjustified and certainly premature. See, Ryan Kellus Turner, "Costs Payable? *Johnson v. State* and its Implications on Local Trial Courts of Limited Jurisdiction in Texas," *The Recorder* (March 2013). The Court of Criminal Appeals granted that State's PDR in *Johnson* and recently heard oral arguments. TMCEC will keep you informed on *Johnson*-related developments.

A defendant can challenge on appeal the imposition of court costs where the defendant previously had no opportunity to object.

Landers v. State, 402 S.W.3d 252 (Tex. Crim. App. 2013)

Tristan Landers was convicted of tampering with a witness. At sentencing, the trial court made no mention of imposing court costs. The written judgment included $4,562.50 in court costs, but those costs were handwritten into a typed judgment. There was no indication that the handwriting was added before or after Landers signed the judgment, and there was no itemization or explanation of court costs. The clerk's record included a bill of costs issued six days after the judgment was imposed. It itemized the court costs and included a fee for an attorney pro tem and a fee for investigative costs of the prosecutor. The document was not provided to Landers or her attorney.

The Court of Criminal Appeals held that Landers could raise the challenge to the imposition of the attorney pro tem charges for the first time on appeal because Landers never had the opportunity to object in the trial court. Writing for the majority, Judge Womack rejected the State's argument accepted by the court of appeals that a motion for new trial was necessary to preserve error. A motion for new trial is only necessary to adduce facts not in the record. Propriety in the assessment of court costs is a question of law, not of fact. Moreover, the Court rejected the argument that an objection was required because this type of error was neither "waivable only" or "systemic." But such categories presuppose an opportunity to object. The Court relied on its recent decision in *Burt v. State*, 396 S.W.3d 574 (Tex. Crim. App. 2013).

Presiding Judge Keller concurred to suggest a formal bill may possibly be an appropriate avenue for raising a bill-of-costs claim imposed after a judgment, but the State did not make that argument. Even if a formal bill of exception is the appropriate vehicle for a bill-of-costs claim that involves allowable fees, it was not necessary in this case.

Commentary: Three unrelated points: First, to read the tea leaves, which in the interest of disclosure is not a skill taught in Texas public schools, *Landers* does not seem to bode well for the State in the forthcoming Court of Criminal Appeals' review of *Johnson v. State*, 389 S.W.3d 513 (Tex. App.—Houston [14th Dist.] 2012, pet. granted). Second, it is surprising that the Court did not see it proper to cite precedent holding that a trial court lacks the authority to order a defendant to reimburse for the costs of an attorney pro tem because that is not a "court cost." *Busby v. State*, 984 S.W.2d 627 (Tex. Crim. App. 1998). Third, *Landers*, *Burt* (two cases decided by the Court of Criminal Appeals this year), and *Johnson* (submitted to the Court in October) all warrant close examination by municipal courts of record. All three cases beg a fundamental question: What is the proper remedy for a defendant in justice courts and non-record municipal courts to challenge the improper assessment of court costs? This is an important question. Yet, it is a question that most likely will have no foreseeable answer in sight.

See, Ryan Kellus Turner, "Costs Payable? *Johnson v. State* and its Implications on Local Trial Courts of Limited Jurisdiction in Texas," *The Recorder* (March 2013) at 7. Without some avenue of review in non-record courts, the two-tier system of courts (a system that the Court has held comports with the equal protection requirement) will be ripe for challenge. (*Id.* See, Note 11.)

B. Municipal Judges and Judicial Appointments

Former municipal judges failed to allege a justiciable controversy as to the rights and status of the parties which will be resolved by the declaration they seek.

Rawlings v. Gonzalez, 2013 Tex. App. LEXIS 8957 (Tex. App.—Dallas July 17, 2013, no pet.)

Appellees were appointed judges of the Dallas Municipal Court. Per Section 30.00006 of the Government Code and the Dallas City Charter, municipal judges are evaluated by the City Council and considered for reappointment every two years. None of the appellees were reappointed when their terms expired although all were candidates for reappointment. The former judges alleged that the 2012 selection process violated applicable law and brought suit seeking an injunction and a declaratory judgment.

The former judges contended that appellants, the Mayor and members of the City Council, conducted the 2012 selection process for municipal judges in violation of the Dallas City Code and the Dallas Transportation Code. The former judges' petition alleges that Dallas City Code required the Council to select municipal judges only from a list of nominees recommended by the Judicial Nominating Commission (JNC). The former judges did not dispute that their names were included on the list of 18 nominees submitted by the JNC to the Ad Hoc Legislative Committee of the City Council in accordance with the Code. They contended, however, that the committee contacted individuals who were not on the list of 18 candidates, interviewed an additional four candidates with no explanation or justification, and made the unprecedented and illegal decision to recommend additional candidates of their own choosing. The former judges also alleged that in violation of the Transportation Code, appellants asked nominees to comment in writing on a list of recommendations proposed by the Ad Hoc Legislative Committee.

According to the former judges' petition, these recommendations required the former judges to commit to results and predispose of cases, and specifically to require that the judges commit to assessing maximum fines or maximum deferred fees in all traffic cases, regardless of the merits or facts of the case, as a condition to their appointment. The former judges pleaded that this requirement violated Section 720.002(b)(2) of the Transportation Code, which "prohibits requiring or suggesting to a municipal court judge that the judge is required or expected to collect a predetermined amount of money from persons convicted of traffic offenses within a specified period." The former judges alleged that the Council then voted to appoint the applicants who agreed to predispose of cases. The former judges also alleged that their due process rights were violated when appellants violated their own procedural rules by voting on a "slate" of proposed municipal judges when the appointment of municipal judges was not on the consent agenda but instead one of the items for individual consideration.

In their petition, the former judges sought a judgment declaring that the Council had violated the Transportation Code and the Dallas City Code, and an injunction prohibiting the Council from publishing the ordinance appointing municipal judges for the term beginning in 2012. The Council filed a plea to the jurisdiction, which the trial court denied. However, the ordinance appointing municipal judges for the term beginning in 2012 was subsequently published. The only relief sought by the former judges was a declaration that the selection process violated applicable law. They sought neither to set aside the 2012 appointments nor to obtain reappointments for themselves.

The Dallas Court of Appeals opined that regardless if the court disposed of the issue as mootness, lack of standing, or seeking an advisory opinion, the district court lacked jurisdiction to determine the former municipal judges' claims. The Dallas City Council's plea to the jurisdiction should have been granted. Accordingly, the court of appeals reversed the trial court's order denying the council's plea to the jurisdiction and rendered judgment granting the plea to the jurisdiction and dismissing the former judges' claims.

Agreement between municipality and retired municipal judge for continued health insurance did not violate state or federal law.

City of McAllen v. Casso, 2013 Tex. App. LEXIS 3860 (Tex. App.—Corpus Christi Mar. 28, 2013, no pet.)

Dahlia Guerra Casso was Presiding Judge for the City of McAllen Municipal Court in 1990. In 1991, she was diagnosed with systemic lupus, an autoimmune disorder with no known cure. Casso was reappointed as municipal judge several times, but decided to resign in 1999. At that time, she informed the City that she believed her health condition had been aggravated by unsanitary conditions at the building in which she worked. She indicated to City

officials that she would be amenable to releasing whatever claims she had against the City in exchange for, among other things, continued health insurance coverage. In 2003, the City disavowed the agreement as unenforceable. Casso sued and prevailed in district court. The City appealed.

The court of appeals held that the agreement between the City and the former Presiding Judge was not prohibited by either state or federal law. The City was not prohibited from entering into agreements in which continued access to health insurance coverage was granted in exchange for the release of disputed claims. The court further held that nothing in the terms of the written plan at issue precluded enforcement of the parties' release agreement. The court also rejected the City's contention that any agreement to grant the employee health insurance eligibility following her retirement was unenforceable due to the statute of frauds. The fact that the agreement was ambiguous as to the employee's post-2002 health insurance eligibility did not negate the agreement's written character. The judgment was modified to delete the attorney's fees award and to delete the award of pre-judgment interest on the $150,000 awarded as damages. As modified, the judgment was affirmed ordering the City to pay over $440,000 in damages and $150,000 in attorney's fees, and to specifically perform its duties under the contract.

Section 27.055 of the Government Code does not permit a county judge to appoint an "at large" temporary justice of the peace or more than one temporary justice of the peace. A sitting justice of the peace may serve as a temporary justice of the peace under Section 27.055, in place of a regular justice of the peace in the same county, if he or she is a "qualified person," and such a person does not violate Article XVI, Section 40 of the Texas Constitution (concerning dual offices).

Tex. Atty. Gen. Op. GA-1005 (5/6/13)

Commentary: Chapter 29 governs the appointment of temporary municipal judges.

C. Judicial Conduct

A court could conclude that the Legislature has not authorized the staff of the Sunset Advisory Commission to review the confidential records, documents, and files of the State Commission on Judicial Conduct (SCJC) or to attend confidential meetings and deliberations of the SCJC.

Tex. Atty. Gen. Op. GA-0979 (12/4/12)

Under Article V, Section 1-a of the Texas Constitution, papers filed with the SCJC, along with the Commission's proceedings, are made confidential unless the Legislature enacts a law establishing an exception to the constitutional confidentiality requirement.

Commentary: The Legislature did just that in the 83rd Session and superseded this opinion with S.B. 209, specifically clarifying in added Section 33.0322 of the Government Code that the SCJC's confidentiality and privilege provisions do not authorize the SCJC to withhold from the Sunset Advisory Commission staff access to any confidential document, record, meeting, or proceeding to which Sunset staff determines access is necessary for a review. The bill clarifies that Sunset staff must maintain the same level of confidentiality as the SCJC staff and, as a result, is entitled to access whatever components of the SCJC's process Sunset staff deems necessary. S.B. 209, meant to clarify the role of the SCJC, stems from the latest Sunset Review process, in which SCJC staff denied Sunset Advisory Commission staff access to closed session informal proceedings and to memoranda that SCJC staff attorneys prepared to aid the SCJC in its decisions. This controversy received much media attention, and TMCEC shared several news accounts on its Facebook feed.

V. Local Government

A. Open Meetings Act

A private consultation between a member of a governmental body and an employee of that governmental body that takes place outside the hearing of a quorum of the other members of the governmental body does not, under the facts presented, constitute a "meeting" under Chapter 551 of the Government Code.

Tex. Atty. Gen. Op. GA-0989 (2/19/13)

The Open Meetings Act (Chapter 551, G.C.) requires that every meeting of a governmental body be open to the public with some exceptions. The two definitions of "meeting" found in Section 551.001(4) both require an exchange between a quorum and the employee. Here, an individual council member consulting with a city employee outside the hearing of the other council members does not meet either definition.

B. Code Enforcement

State law did not preempt home-rule municipality ordinance regulating air pollution within the city's borders.

City of Houston v. BCCA Appeal Group, Inc., 2013 Tex. App. LEXIS 11089 (Tex. App.—Houston [1st Dist.] Aug. 29, 2013, no pet.)

The BCCA Appeal Group, Inc. (the Group), a non-profit organization whose members own and operate industrial facilities in the Houston area, brought suit to enjoin enforcement of two air pollution control ordinances enacted by the City of Houston: Ordinance Nos. 2007-208 and 2008-414. The Group asserted that the ordinances were preempted by the Texas Clean Air Act (Health and Safety Code Chapter 382) and Section 7.251 of the Texas Water Code. The parties filed cross-motions for summary judgment; the trial court denied the City's motion and granted the Group's motion.

The court of appeals opined that the ordinance's enforcement provision only pertained to violations of the ordinance and, as such, is not preempted by state law; further, the ordinance required city officers to defer to the state agency's decisions with respect to the lawfulness of a given air-contaminant emitter's actions. Furthermore, Sections 54.001-54.012 of the Local Government Code gave cities the right to enforce their ordinances related to public safety and health. The court of appeals concluded that the Group failed to show that the Legislature intended to preempt the ordinance with "unmistakable clarity," and thus, failed to meet its extraordinary burden to establish that the ordinance is invalid.

A water control and improvement district (WCID) has implied authority under Chapters 49 and 51 of the Water Code to adopt an ordinance to control weeds or regulate illegal dumping within its jurisdiction only if the ordinance is reasonable and is a practical means to accomplish a district purpose, such as the protection of water purity. The Water Code expressly authorizes a WCID to enforce state offenses prohibiting illegal dumping.

Tex. Atty. Gen. Op. GA-1011 (7/1/13)

A WCID has only those powers expressly granted by statute, including those "necessarily implied as an incident to the express powers given." *Harris Cnty. Water Control & Improvement Dist. No. 58 v. City of Houston*, 357 S.W.2d 789, 795 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.). Neither Chapter 49 nor 51 of the Water Code expressly grants powers to address weed control; however, a WCID must determine for itself whether any particular weed-control ordinance is reasonable and a practical means to preserve the sanitary condition of all water controlled by the district under Section 51.122(2) of the Water Code, which authorizes a WCID to adopt and enforce rules and regulations (i.e., ordinances).

Commentary: What does this have to do with municipal courts? Section 51.241 of the Texas Water Code makes violations of a regulation (ordinance) adopted by a WCID under Chapter 51 a Class C misdemeanor. Your city may be a municipal district (See, Section 51.038, Water Code) or included within a WCID (See, Section 51.035, Water Code) and authorized to adopt certain ordinances, the violations of which may be filed in your court.

VI. Juvenile Justice

In obtaining a juvenile confession, there is no statutory requirement that the magistrate be alone with the juvenile at the time the warnings are given.

Herring v. State, 395 S.W.3d 161 (Tex. Crim. App. 2013)

Affirming the judgment of the court of appeals, and disavowing contrary dicta in *Diaz v. State*, 61 S.W.3d 525, 527 (Tex. App.—San Antonio 2001, no pet.), the Court of Criminal Appeals held that Section 51.095 of the Family Code does not mandate that a magistrate be alone with the juvenile at the time the warnings are given.

Commentary: From a magistrate's perspective, this is an important decision. It is noteworthy that the Court expressly left open the question of whether a magistrate may choose to exclude law-enforcement officers from the reading of the statutory warnings.

Compliance with truancy prevention measures is nonessential for purposes of determining contempt in juvenile court.

In re I.R.M., 2013 Tex. App. LEXIS 9379 (Tex. App.—Texarkana July 30, 2013, no pet.)

I.R.M., a juvenile, was ordered to attend school in a justice court and subsequently violated the court's order. The State filed a petition in juvenile court alleging child engaged in delinquent conduct. The petition specified the ground for the petition was I.R.M.'s inability to comply with "a lawful court order" because he "failed to attend each entire class of every regularly scheduled day of school as required, for a period of six months from the date of the court's order." The petition listed 25 separate dates within a two-month period in which I.R.M. skipped school. I.R.M. filed a motion to quash the petition, alleging, inter alia, that the petition failed to comply with requirements of Section 25.0915 of the Education Code (i.e., truancy prevention measures). The motion to quash was denied, and the court entered an order of adjudication declaring that I.R.M. had engaged in delinquent conduct. I.R.M. appealed the juvenile court's denial of his motion to quash the petition. The court of appeals found that

I.R.M. had adequate notice of the offense alleged in the petition, and affirmed the juvenile court's judgment.

Commentary: Ostensibly, this is the first time that the truancy prevention measures statute, which became law in 2011, has been the focus of an appellate decision. Caution: This opinion does not alleviate either the school or the court of the responsibility to comply with Section 25.0915. In the context of a juvenile adjudication hearing, the State is not required to plead additional facts unless they are essential to proper notice. The charge need only be reasonable and definite. In this case, I.R.M. had notice to attend school. This case does not stand for the proposition that failure to comply with truancy prevention measures is harmless. To the contrary, as clarified in S.B. 393, compliance is jurisdictional. If a school does not comply with Section 25.0915, a court has no jurisdiction and is required to dismiss the matter. See, *The Recorder* (August 2013) at 27-28.

VII. Prosecution

There is no definitive answer to the question whether a prosecutor may require a defendant to plead guilty as a condition of pretrial intervention (pretrial diversion) under Section 76.011 of the Government Code, due to the absence of controlling legal authority.

Tex. Atty. Gen. Op. GA-0986 (2/5/13)

One appellate court found the purpose of pretrial intervention to be an opportunity for the defendant to have the charges dismissed prior to a finding of guilt or innocence, suggesting that requiring a guilty plea is inconsistent with such a purpose. *Fisher v. State*, 832 S.W.2d 641, 643-44 (Tex. App.—Corpus Christi 1992, no writ). However, another appellate court found pretrial diversion agreements to be akin to negotiated plea agreements, *In re D.R.R.*, 322 S.W.3d 771, 773 (Tex. App.—El Paso 2010, no pet.), the terms of which courts will not interfere with unless they are manifestly unjust. *State v. Moore*, 240 S.W.3d 248, 250 (Tex. Crim. App. 2007). No law specifically prohibits a prosecutor from this practice.

VIII. Dogs

Damages available for loss of a family pet after a shelter worker mistakenly placed a dog on the euthanasia list are limited to loss of value, not loss of relationship, barring legislative reclassification.

Strickland v. Medlen, 397 S.W.3d 184 (Tex. 2013)

TMCA Recognition continued from pg 2

commending Deborah's excellent customer service, her colleagues will say. They believe she takes ownership of the court room activities and serves as a vital component to moving the nearly 7,000 cases filed each month effectively.

In addition to her many years in public service, Ms. Dixon has a long history of community service and devotion to her church. Judge Sharon Newman-Stanfield sums up the winner and Ms. Dixon's character as "[She] is the epitome of professionalism. She demonstrates excellence every day through her strength of character and dedication to customer service. Her service to the court community is unparalleled and ensures the opportunity for justice to each and every person who appears in our courts."

TMCA is an association composed of over 1,000 municipal judges, clerks, prosecutors, and court support personnel. It monitors legislation, attorney general opinions, and changes in case law to ensure that the over 900 municipal courts in Texas remain current.

The next Annual Meeting will be at the Inn of the Hills in Kerrville on July 17-19, 2014.

Note: Membership information on TMCA may be accessed at www.txmca.com

2014 Municipal Traffic Safety Initiatives Conference

Coming April of 2014, TMCEC is proud to offer the next Municipal Traffic Safety Initiatives Conference with funding from the Texas Department of Transportation (TxDOT). The conference is open to municipal judges, clerks, juvenile case managers, and prosecutors. Registration is $50. Register by March 1, 2014.

April 2-4, 2014
Hilton NASA Clear Lake
Houston

Don't miss it this year! For more information, visit http://www.tmcec.com/mtsi/2014-traffic-safety-conference/

Resources for Your Court

Volunteers Needed to Test Online Language Access Training

Have you ever struggled to meet the needs of court customers who do not speak English? The Language Access Basic Training (LABT) is an online, interactive training, which serves as an introduction to language access for court employees.

The training is being developed by the New Mexico Administrative Office of the Courts with a grant from the State Justice Institute, in collaboration with other states, including the Texas Office of Court Administration. The training will ultimately be made available to all states.

The English-only module (2 hours to complete) can help you understand:

* your ethical and legal obligations in serving limited English proficient individuals
* professional standards and best practices (ensuring accuracy, remaining impartial, understanding limits of service, maintaining confidentiality, etc.)
* the roles of interpreters vs. bilingual staff
* the importance of cultural differences in providing good customer service

The bilingual modules (4 additional hours) add training on:

* terminology
* interpreting techniques outside the courtroom
* dealing with challenging bilingual customer service scenarios

CALL FOR VOLUNTEERS : The Texas Office of Court Administration is looking for court employees who are willing to test the training before its official launch. Individuals who speak English only are welcome, as well as bilingual individuals who speak English and any other language(s).

Participants can complete the training at work or home at any time that is convenient to them, between December 2 and December 16, 2013. The deadline to volunteer is November 15, 2013.

Please contact Marco Hanson, Language Access Coordinator, Texas Office of Court Administration, at marco.hanson@txcourts.gov or 512.936.7559, if you would like to volunteer.

Notice

The TMCEC Board of Directors has voted to restore the regional clerks program from eight to 12 hours with the grant providing two nights hotel stay in FY 15 (September 1, 2014 – August 31, 2015). The program, including the prep sessions and pre-conference (typically on Day 1), will then be 16 hours in length. In FY 13, the program was reduced to two days (four hours on Day 1/Arrival Day and eight hours on Day 2) due to a reduction in grant funds.

Also, judges are reminded to report their "flex time" if they do not complete the mandatory 16 hours at the TMCEC regional programs. The deadline for reporting is August 31, 2014. It is the responsibility of the judges to report the time to TMCEC using the affirmation found at www.tmcec.com/programs/judges/. This should be the affirmation/not the affidavit). Although TMCEC may send out reminders or the reporting requirement, do not wait on our reminder or depend on it. Report ASAP.

2014 Municipal Traffic Safety Initiatives Awards

Purpose:
To recognize those who work in local municipalities and have made outstanding contributions to their community in an effort to increase traffic safety. This competition is a friendly way for municipalities to increase their attention to quality of life through traffic safety activities.

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

Awards:
Award recipients will be honored at the Texas Municipal Courts Education Center (TMCEC) Traffic Safety Conference that will be held on April 2-4, 2014 in Houston, Texas at the Hilton NASA Clear Lake Hotel.

Nine (9) awards will be given:

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

Award recipients receive for two municipal court representatives, complimentary conference registration, travel to and from the 2014 Municipal Traffic Safety Initiatives Conference to include airfare or mileage that is within state guidelines, two nights' accommodations at the Hilton NASA Clear Lake Hotel, and most meals and refreshments.

Honorable Mention: If there are a number of applications that are reviewed and deemed outstanding and innovative, at the discretion of TMCEC, honorable mentions may be selected. Honorable mentions will be provided complimentary conference registration to attend the Traffic Safety Conference and will be recognized at the Traffic Safety Conference.

Deadline:
Entries must be postmarked no later than Tuesday, December 31, 2013.

Presentation:
Award recipients and honorable mention winners will be notified by February 14, 2014 and honored during the Traffic Safety Conference to be held April 2-4, 2014 in Houston, Texas at the Hilton NASA Clear Lake Hotel.

Details:
For complete award details, submission guidelines, and application form, go to www.tmcec.com, Municipal Traffic Safety Initiative, Traffic Safety Awards 2014.

Traffic safety benefits can go far beyond the traffic stop!

What Can You Do?

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

2014 One-Day Clinic Series

Save the Date

January 17 — Adventures in Bond Forfeitures

February 21 — Implementing Juvenile Justice Changes to the Education Code

May 16 — Judicial Trial Skills

June 6 — Judicial Writing Practicum

TMCEC ONE-DAY CLINIC REGISTRATION FORM (2014)

- ☐ **Adventures in Bond Forfeitures (January 17)**
- ☐ **Implementing Juvenile Justice Changes to the Education Code (February 21)**
- ☐ **Judicial Trial Skills (May 16)**
- ☐ **Judicial Writing Practicum (June 6)**

Name (Last, First): _____ **State Bar No.** _____
Title: ___**Judge** ___**Prosecutor** ___**Clerk** ___**Bailiff/Warrant Officer** ___**Other (Describe)**_____
Court:_____ **Telephone:** _____
Address: _____
Email (for your confirmation letter): _____
I hereby attest that I am a judge, prosecutor, or court personnel for the municipal court above. I agree that if I fail to cancel more than 72 hours in advance of the clinic, I will forfeit the $20 registration fee to cover meal costs (and if applicable, TMCEC reserves the right to invoice me for meal expenses, course materials, and housing).

_____
Participant's Signature Date

Payment Information (cost is $20 per participant):

☐ Check Enclosed (Make checks payable to TMCEC)
☐ Credit Card ☐ MasterCard ☐ Visa

_____
Credit Card Number Expiration Date

_____
Name as it appears on card (print clearly)

_____
Authorized Signature

Please mail registration form and payment to the Texas Municipal Courts Education Center at 2210 Hancock Drive • Austin, Texas 78756 or fax to 512.435.6118
Participants may also register online (with credit card payment) at http://register.tmcec.com.

TEXAS MUNICIPAL COURTS EDUCATION CENTER
FY14 REGISTRATION FORM:
Regional Judges Seminar

Conference Date: _____ Conference Site: _____

Check one:

☐ Non-Attorney Judge ($50)
☐ Attorney Judge not-seeking CLE credit ($50)
☐ Attorney Judge seeking CLE credit ($150)

By choosing TMCEC as your MCLE provider, attorney-judges help TMCA pay for expenses not covered by the Court of Criminal Appeals grant. Your voluntary support is appreciated. The CLE fee will be deposited into the grantee's private fund account to cover expenses unallowable under grant guidelines, such as staff compensation, membership services, and building fund.

Name *(please print legibly)*: Last Name: _____ First Name: _____ MI:_____
Names you prefer to be called (if different): _____Female/Male: _____
Position held: _____
Date appointed/hired/elected: _____Years experience:_____
Emergency contact:_____DOB:_____

HOUSING INFORMATION - Note: $50 a night single room fee

TMCEC will make all hotel reservations from the information you provide on this form. **TMCEC will pay for a double occupancy room at all regional judges.** To share with a specific seminar participant, you must indicate that person's name on this form.

☐ I request a private room ($50 per night : ____ # of nights x $50 = $_____). TMCEC can only guarantee a private room, type of room (queen, king, or 2 double beds*) is dependent on hotels availability. Special Request: _____

☐ I request a room shared with a seminar participant. Room will have 2 double beds. TMCEC will assign roommate **or** you may request roommate by entering seminar participant's name here:_____

☐ I do not need a room at the seminar.

Hotel Arrival Date (this **must** be filled out in order to reserve a room): _____

*If you bring a companion with you to stay in the hotel, the hotel reserves the right to charge an additional fee.

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

I certify that I am currently serving as a municipal judge or court support personnel in the State of Texas. I agree that I will be responsible for any costs incurred if

I plan to attend the following sessions in their entirety:

☐ **Day 1: Pre-Conference, 1 p.m. – 5 p.m. (4 hours)**

(In Tyler and South Padre Attorney judges seminars, the pre-conference will be a post-conference and will be on Day 3, 1 p.m.-5 p.m.)

☐ **Day 2: Seminar, 8 a.m. – 5 p.m. (8 hours)**

☐ **Day 3: Seminar, 8 a.m. – Noon (4 hours)**

***I understand that if I do not attend Day 3 in its entirety, then I am not allowed a hotel room at grant expense on the evening of Day 2.**

All judges are allowed a hotel at Grant expense on the evening of Day 1.

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

_____ _____
Participant Signature (may only be signed by participant) *Date*

PAYMENT INFORMATION: Payment **will not** be processed until all pertinent information on this form is complete.

Amount Enclosed: $_____ = Registration/CLE Fee $_____ Housing Fee $_____

☐ Check Enclosed *(Make checks payable to TMCEC.)*
☐ Credit Card

Credit Card Payment:
Amount to Charge: Credit Card Number Expiration Date
Credit card type: $_____ _____ _____
☐ *MasterCard*
☐ *Visa* *Name as it appears on card (print clearly):* _____
*Authorized signature:*_____

Please return completed form with payment to TMCEC at 2210 Hancock Drive, Austin, TX 78756, or fax to 512.435.6118.

TEXAS MUNICIPAL COURTS EDUCATION CENTER
FY14 REGISTRATION FORM:
Regional Clerks Seminars

Note: Please use other registration forms for Level III Assessment Clinic and Court Administrators Conference

Conference Date: _____ Conference Site: _____

Clerk/Court Administrator ($50) for Regional Seminar

Name *(please print legibly)*: Last Name: _____ First Name: _____ MI:_____
Names you prefer to be called (if different): _____Female/Male: _____
Position held: _____
Date Hired: _____ Years experience:_____
Emergency contact and phone number: _____

HOUSING INFORMATION - Note: $50 a night single room fee

TMCEC will make all hotel reservations from the information you provide on this form. **TMCEC will pay for a double occupancy room at all regional clerks seminars.** To share with a specific seminar participant, you must indicate that person's name on this form.

☐ I request a private room ($50 for one night only). TMCEC can only guarantee a private room, type of room (queen, king or 2 double beds*) is dependent on hotels availability. Special Request: _____

☐ I request a room shared with a seminar participant. Room will have 2 double beds. TMCEC will assign roommate **OR** you may request a roommate by entering seminar participant's name here:_____

☐ I do not need a room at the seminar.

Hotel Arrival Date (this **must** be filled out in order to reserve a room): _____

*If you bring a companion with you to stay in the hotel, the hotel reserves the right to charge an additional fee.

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

STATUS (*Check **all** that apply):*
☐ Full Time ☐ Part Time ☐ Court Clerk/Deputy Clerk ☐ Juvenile Case Manager
☐ Court Administrator ☐ Other _____

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

_____ _____
Participant Signature (may only be signed by participant) *Date*

PAYMENT INFORMATION: Payment **will not** be processed until all pertinent information on this form is complete.

Amount Enclosed: $ ____ = Registration Fee $_____ Housing Fee $_____
☐ Check Enclosed *(Make checks payable to TMCEC.)*
☐ Credit Card

Credit Card Payment:
Amount to Charge: Credit Card Number Expiration Date
Credit card type: $_____ _____ _____
☐ *MasterCard*
☐ *Visa* *Name as it appears on card (print clearly):* _____
Authorized signature: _____

Please return completed form with payment to TMCEC at 2210 Hancock Drive, Austin, TX 78756, or fax to 512.435.6118.

2013 - 2014 TMCEC Academic Schedule At-A-Glance

Seminar	Date(s)	City	Hotel Information
Regional Clerks Seminar	November 18-19, 2013 (M-T)	Austin	Omni Southpark Austin 4140 Governors Row, Austin, TX
Regional Judges Seminar	November 18-20, 2013 (M-T-W)	Austin	Omni Southpark Austin 4140 Governors Row, Austin, TX
New Judges & Clerks Seminar	December 9-13, 2013 (M-T-W-Th-F)	Austin	Omni Southpark Austin 4140 Governors Row, Austin, TX
Regional Clerks Seminar	January 6-7, 2014 (M-T)	Galveston	San Luis Resort Spa & Conference Center 5222 Seawall Boulevard, Galveston, TX
Regional Clerks Seminar	January 13-14, 2014 (M-T)	San Antonio	Omni San Antonio at the Colonnade 9821 Colonnade Boulevard, San Antonio, TX
Regional Judges Seminar	January 13-15, 2014 (M-T-W)	San Antonio	Omni San Antonio at the Colonnade 9821 Colonnade Boulevard, San Antonio, TX
Level III Assessment Clinic	January 27-30, 2014 (M-T-W-Th)	Austin	Crowne Plaza Austin 6121 IH 35 North, Austin, TX
Regional Clerks Seminar	February 10-11, 2014 (M-T)	Addison	Crowne Plaza Addison 14315 Midway Road, Addison, TX
Regional Judges Seminar	February 10-12, 2014 (M-T-W)	Addison	Crowne Plaza Addison 14315 Midway Road, Addison, TX
Regional Clerks Seminar II	February 13, 2014 (Th)	Addison	Crowne Plaza Addison 14315 Midway Road, Addison, TX
Regional Judges Seminar	February 23-25, 2014 (Su-M-T)	Galveston	San Luis Resort Spa & Conference Center 5222 Seawall Boulevard, Galveston, TX
Regional Clerks Seminar	March 3-4, 2014 (M-T)	Houston	Hilton NASA Clear Lake 3000 NASA Road 1, Houston, TX
Regional Judges Seminar	March 3-5, 2014 (M-T-W)	Houston	Hilton NASA Clear Lake 3000 NASA Road 1, Houston, TX
New Judges & Clerks Orientation	March 19, 2014 (W)	Austin	TMCEC 2210 Hancock Drive, Austin, TX
Prosecutors Seminar	March 24-26, 2014 (M-T-W)	San Marcos	Embassy Suites 1001 E McCarty Ln, San Marcos, TX
Traffic Safety Conference	April 2-4, 2014 (W-Th-F)	Houston	Hilton NASA Clear Lake 3000 NASA Road 1, Houston, TX
Regional Clerks Seminar	April 14-15, 2014 (M-T)	Lubbock	Overton Hotel & Conference Center 2322 Mac Davis Lane, Lubbock, TX
Regional Judges Seminar	April 14-16, 2014 (M-T-W)	Lubbock	Overton Hotel & Conference Center 2322 Mac Davis Lane, Lubbock, TX
Regional Clerks Seminar*	April 28-30, 2014 (Su-M-T)	S. Padre Island	Pearl South Padre 310 Padre Boulevard, S. Padre Island, TX
Regional Attorney Judges Seminar	May 4-6, 2014 (Su-M-T)	S. Padre Island	Isla Grand Beach Resort 500 Padre Boulevard, S. Padre Island, TX
Regional Non-Attorney Judges Seminar	May 6-8, 2014 (T-W-Th)	S. Padre Island	Isla Grand Beach Resort 500 Padre Boulevard, S. Padre Island, TX
New Judges & Clerks Orientation	May 14, 2014 (W)	Austin	TMCEC 2210 Hancock Drive, Austin, TX
Bailiffs and Warrant Officers Seminar	May 18-20, 2014 (Su-M-T)	San Antonio	Omni San Antonio at the Colonnade 9821 Colonnade Boulevard, San Antonio, TX
Regional Clerks Seminar	June 9-10, 2014 (M-T)	El Paso	Wyndham El Paso Airport 2027 Airway Boulevard, El Paso, TX
Regional Judges Seminar	June 9-11, 2014 (M-T-W)	El Paso	Wyndham El Paso Airport 2027 Airway Boulevard, El Paso, TX
Prosecutors & Court Administrators Seminar	June 23-25, 2014 (M-T-W)	Houston	Hilton NASA Clear Lake 3000 NASA Road 1, Houston, TX
Juvenile Case Managers Seminar	July 7-9, 2014 (M-T-W)	Austin	Omni Southpark Austin 4140 Governors Row, Austin, TX
New Judges & Clerks Seminar	July 14-18, 2014 (M-T-W-Th-F)	Austin	Omni Southpark Austin 4140 Governors Row, Austin, TX

*There is an optional Traffic Safety four-hour program on April 30, 2014

Register Online: http://register.tmcec.com

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TMCEC MISSION STATEMENT

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

Have You Visited tmcec.com Lately?

The TMCEC website has a new and improved look and design. It has a responsive design that will allow you to view it on a smart phone, tablet, laptop, or desktop. The website shrinks or expands automatically for easy viewing on the type of device being used. The color scheme has been updated and the home page layout has been streamlined. There is a wealth of information contained in the 271+ pages.

From the home page a user may access online registration, as well as the online learning center. Pages are updated and new material is added weekly. We hope you logon frequently and use it as your home page.