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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, 2015 and October 1, 2016 except where noted (*). Acknowledgment: Thank you Judge David Newell, Courtney Corbello, Benjamin Gibbs, Carmen Roe, Stacey Soule, and Randy Zamora. Your insight and assistance helped us bring this paper to fruition.

I. Constitutional Issues

A. 1st Amendment

A municipal ordinance that placed stricter limitations on the size and placement of religious signs than other types of signs was an unconstitutional content-based restriction on free speech.

**Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)

The Town of Gilbert, Arizona adopted a municipal sign ordinance regulating the manner in which signs are displayed in public areas. The ordinance banned the display of most outdoor signs without a permit. Twenty-three categories of signs were exempt from the permit requirement. Categories of signs exempt from the permit requirement included: (1) "ideological signs," containing "a message or ideas for noncommercial purposes," which could be up to 20 square-feet in size and could be placed in any zoning district for any length of time; (2) "political signs," including content "designed to influence the outcome of an election called by a public body," which could be no larger than 32 square-feet on nonresidential property and 16 square-feet on residential property and could only be displayed "up to 60 days before a primary election and up to 15 days following a general election;" and (3) "temporary directional signs relating to a qualifying event," which directed "pedestrians, motorists, and other passersby" to events hosted by non-profit organizations, which could be no larger than six square-feet and displayed no earlier than 12 hours before the start of a qualifying event and no later than one hour after the end of the event. Such signs could only be displayed on private

Case Law Update *continued on pg. 8*

Inside This Issue

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AROUND THE STATE

Mental Health Initiative in Fort Worth

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Sometimes change begins with a conversation. For Ann Collins, Associate Judge, City of Fort Worth, that conversation was with a homeless veteran during magistration. Arrested for criminal trespass and public intoxication, the defendant apologized to the court for taking up their time and stated he needed help in getting his life back together. Because of that encounter and many others like it, discussion began among the Fort Worth judges, who all expressed a need to look at additional ways to address individuals facing homelessness, substance abuse, and mental health challenges.

And sometimes the timing is just right for change. Fort Worth judges, Danny Rodgers (Deputy Chief Judge), Raquel Brown, Kim Catalano, Ann Collins, and Nicole Webster attended TMCEC's inaugural Mental Health Summit in May of 2016. The Fort Worth judges subsequently discovered they were not alone in their pursuit of information and tools. A Tarrant County Delegation attended a Stepping Up Initiative conference, hosted by the American Psychiatric Association, the National Association of Counties, and the Council of State Governments Justice Center that same month. After the summit, the Fort Worth judges began reaching out to elected officials, district and county courts, law enforcement, mental health agencies, and other governmental entities in Fort Worth and Tarrant County.

Among their efforts, they sought and obtained appointment to the Tarrant County Criminal Justice Coordinating Committee (CJCC). The CJCC is appointed by the Commissioners Court in Tarrant County and includes county government, criminal justice department heads, elected officials, and local social services agencies. The mission of the CJCC is to collectively discuss public policy and criminal justice issues in the most evidence-based, cost effective, and equitable way possible and to make recommendations to positively impact the county's provision of services.

The City of Fort Worth made a commitment to addressing the specific issue of the overpopulation of individuals with mental health issues in local and county jails, and on June 14, 2016, the Judicial Division of the Fort Worth Municipal Court submitted a letter of commitment to addressing the matter. Judge Collins was subsequently selected as a participant in the Behavioral Health & Justice Leadership Academy sponsored by the federal government.

TMCEC selected the Fort Worth Municipal Court for a county-wide Sequential Intercept Model mapping workshop, held in Fort Worth on August 30, 2016 with funding from the Texas Court of Criminal Appeals. Facilitated by Policy Research Associates, Inc., through SAMHSA's

GAINS Center, a national project designed to expand access to community-based services for adults diagnosed with co-occurring mental illness and substance use disorders at all points of contact with the justice system, roughly 60 individuals from across Tarrant County participated in the mapping workshop. "The Sequential Intercept Mapping workshop was an outstanding opportunity for many of the stakeholders in Tarrant County to come together to address mental health issues and concerns. Our community will only become stronger because of the work and cooperation exhibited that day," said Danny Rodgers, Deputy Chief Judge, City of Fort Worth. The end product from the mapping workshop was a systems map identifying gaps in services and recommendations.

In addition to reaching out into the surrounding community, the Fort Worth Municipal Court pursued efforts within its staff. Chief Judge Ninfa Mares and Deputy Chief Judge Danny Rodgers communicated mental health related issues with all judges, including presentations in quarterly judges' meetings, training on dealing with mentally ill defendants, as well as pursuing revision of current specialty dockets to address the issues. At their most recent quarterly meeting on October 31, Judge Simon Gonzalez, Lead Judge/Magistrate, Fort Worth Municipal Court #7, and Walter Taylor, Assistant Director of Training and Development at Tarrant County Mental Health Mental Retardation presented on Mental Health First Aid, an eight-hour training course designed to give members of the public key skills to help with individuals experiencing mental health crisis. At the same meeting, Sergeant G. Banda of the Fort Worth Police Department (FWPD) presented on Crisis Intervention and FWPD procedures under Section 573 of the Health & Safety Code. Ramey Heddins, Senior Director of Criminal Justice, MHMR of Tarrant County, presented on current procedures and services for defendants at the Tarrant County Jail.

Specialty dockets aimed at addressing mental health at the Fort Worth Municipal Court include Indigence Dockets and Community Court Dockets. The court is also formalizing procedures on competency and mental health screening during commitment proceedings.

The clerks are also playing a role in the court's efforts. The Clerks Division is working with Tarrant County MHMR and is pursuing training for all court personnel. Juvenile case managers recently attended training on Youth Mental Health First Aid to assist them in responding appropriately when young people experience a mental health crisis or concern. The Clerks Division is also fostering new relationships with other courts, governmental and social service agencies, and law enforcement as a result of the contacts fostered during the mapping workshop.

This is only a small picture of the efforts being made in Fort Worth and an even smaller picture of the statewide efforts being made by Texas municipal courts. It is the hope of TMCEC that more courts will bring awareness of mental health and substance abuse issues to the forefront both at the city and county levels. For more information and resources, visit the TMCEC Mental Health webpage at http://tmcec.com/mental-health/.

Top Row from left: Standing - Judge Simon Gonzalez, Deputy Chief Judge Danny Rodgers, Judge Raquel Brown, Judge Tyler Atkinson, Judge Benita Harper, Judge Andrew Bradshaw, Judge Ann Y. Collins, and Judge Neel McDonald. Seated: Judge JoAnn Reyes, Chief Judge Ninfa Mares, Judge Sharon Newman-Stanfield, Judge Claudia Martinez, and Judge Patricia Summers.

Table of Contents

Case Law Update continued from pg. 1

property or public rights-of-way, but no more than four signs could be placed on a piece of property at the same time.

Justice Thomas delivered the opinion of the Court, reversing and remanding the case to the court of appeals. Justice Thomas explained that government regulation of speech is content-based if the regulation applies to particular speech because of the topic discussed or the message or idea expressed. Under this two-pronged test, a law can be content-based either because it distinguishes speech by topic discussed or because the government's justification or purpose for the law depends on the underlying message or idea. While the Town argued that the sign ordinance was constitutional because it did not endorse or suppress specific viewpoints or ideas, this argument and the conclusion of the court of appeals (that the ordinance was content neutral because it focused on specific classes of speakers and not speech content) were rejected by the Court. Because the ordinance imposed content-based restrictions on free speech, it is subject to strict scrutiny.

Justice Alito, joined by Justice Kennedy and Justice Sotomayor, wrote a concurring opinion explaining that content-based regulations present the same dangers as viewpoint-based regulations. While the ordinance before the Court contained content-based distinctions that were subject to strict scrutiny, he does not believe

the Court's decision prevents local governments from regulating signs in a way that protects public safety and serves legitimate esthetic objectives. He provides nine examples of rules that are not content-based, including: (1) regulations that target the size of signs, (2) regulations that target the locations at which signs may be placed, (3) regulations distinguishing between lighted and unlighted signs, (4) regulations distinguishing between fixed-message and electronic signs, (5) regulations that distinguish between the placement of signs on public and private property, (6) regulations that distinguish between the placement of signs on commercial and residential property, (7) regulations that distinguish between on-premises and off-premises signs, (8) regulations that distinguish between rules that restrict the total number of signs "per mile of roadway," and (9) rules that distinguish between freestanding signs and signs that are attached to buildings.

In a concurring opinion, Justice Breyer pointed out that strict scrutiny will almost always compel legal condemnation of such ordinances and that this will potentially require judicial involvement in the most basic of government regulatory activities. While the Town's ordinance was unconstitutional because it did not provide a rational justification for treating some signs differently than others, he did not believe that strict scrutiny is the proper standard and offered a more moderate standard for evaluating such content-based regulations.

Justice Kagan, joined by Justice Ginsburg and Justice Breyer, in a concurring opinion addressed the potentially wide-ranging effects of the majority opinion. As a consequence of applying the strict scrutiny standard, reasonable laws will begin to be struck down. Justice Kagan emphasized that the Town of Gilbert's ordinance could have been struck down without the Court applying strict scrutiny and precariously broadening the scope of what constitutes a content-based regulation.

Commentary: This case was inadvertently not included in last year's Case Law and Attorney General Opinion Update, but is essential to understanding *Auspro Enters., LP v. Tex. DOT*, 2016 Tex. App. LEXIS 9469 (Tex. App.—Austin 2016, no pet.), infra. The approach in *Reed* marks a departure from what was previously understood to be content discrimination. Prior to *Reed*, courts focused on the second prong (impermissible government justification or purpose) as the primary basis for finding content discrimination. However, under *Reed*, impermissible motive is no longer required to find content discrimination. A law can be content-based on its face regardless of motive, content-neutral justification, or lack of hostility of the ideas contained in the regulated speech. *Reed* marks the first time that the Court articulated this broader two-pronged definition of content discrimination.

City councils and city attorneys need to be aware, if they are not already, that now is a good time to reevaluate local sign ordinances for content-based restrictions in light of *Reed* and *Auspro*. Judges need to be aware of this case. Take the time to read it. While municipal sign ordinances tend to vary greatly, *Reed* is a game changer.

In light of *Reed*, the Texas Highway Beautification Act's outdoor-advertising regulations and the Texas Department of Transportation's permitting rules are, on their face, content-based regulations of speech. Both the regulations and rules failed strict scrutiny because the government cannot prove that the Act's differentiation between types of signs furthered a compelling governmental interest and is narrowly tailored. Accordingly, all of the content-based provisions in Chapter 391 of the Transportation Code are severed.

Auspro Enters., LP v. Tex. DOT, 2016 Tex. App. LEXIS 9469 (Tex. App.—Austin August 26, 2016, no pet.)

Commentary: The sections contained in Subchapter B (Regulation of Outdoor Advertising Generally) and Subchapter C (License and Permit for Outdoor Advertising) were deemed unconstitutional by the 3rd Court of Appeals. Both subchapters contain Class C misdemeanors under which each day is a separate offense. This opinion severs all of the content-based provisions, including Section 391.031(b) (Unlawful Outdoor Advertising; Offense) (punishable by fine of $500 - $1,000) Section 391.037 (Outdoor Advertising by Certain County Agriculture Fairs), Section 391.061(c) (Outdoor Advertising Without License; Offense) (punishable by fine of $500 - $1,000), and Section 391.070 (Exceptions for Certain Nonprofit Organizations). See, the commentary for *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), supra.

Because the Texas flag-destruction statute, by its text and in actual fact, prohibits a substantial amount of

protected activity, it is facially invalid because it is unconstitutionally overbroad in violation of the 1st Amendment.

State v. Johnson, 475 S.W.3d 860 (Tex. Crim. App. 2015)

The appellee was charged with the current flag destruction statute (Section 42.11 of the Penal Code, amended subsequent to *Texas v. Johnson*) after throwing a flag onto a highway. The trial court granted his motion to dismiss, concluding the statute was unconstitutional in violation of the 1st Amendment. The State appealed, and the court of appeals concluded that the statute, though not unconstitutional as applied, was unconstitutional on its face because it was overbroad.

After resolving the issue of standing in an overbreadth analysis and whether to narrowly construe the statute at issue, the Court analyzes the question whether the applications of a statute that proscribes conduct that in some circumstances will not implicate the 1st Amendment and in some circumstances will implicate the 1st Amendment does the latter so substantially that the statute must be held invalid on its face. Here, the Texas flag-destruction statute violates the 1st Amendment when applied to some circumstances. Similar to the statute considered in *U.S. v. Eichman*, 496 U.S. 310, 314 (1990), where the U.S. Supreme Court was not persuaded that the statute's lack of requirement of intent or knowledge with respect to the prohibited action made a difference, Section 42.11 distinguishes between disrespectful and respectful conduct that damages a flag. While Section 42.11 does not require that the disrespectful conduct be expressive, such conduct is very likely to be expressive because of the symbolism associated with flags. "The only ascertainable purpose of a law as broadly worded as the present one—which applies even when the actor damages his own flag—is to protect the integrity of the United States flag or Texas flag as a symbol."

The majority of the Court finds that most conduct that falls within the provisions of the statute and that would come to the attention of the authorities would constitute protected expression, making the statute unconstitutionally overbroad.

Judge Alcala, in her concurring opinion, makes three observations that influence her decision in the case: (1) though most people in Texas would prefer that the Court uphold the flag-preservation statute because they love their flags as much as she does hers, she must honor her duty to preserve, protect, and defend the Constitution of the United States; (2) this statute is so broad that the majority of homeowners in Texas have violated it on numerous occasions and that they could be subject to prosecution by a government official acting under his lawful authority; and (3) the U.S. Supreme Court's decisions in *Texas v. Johnson* and *U.S. v. Eichman* have already resolved the vast majority of the issues before the Court with respect to the constitutional implications of laws regulating the destruction or damage of flags.

Judge Meyers dissented, finding the statute "quite specific" in serving to keep people from destroying a symbol of our nation and state, "which is exactly what Appellee did here" and "[b]y all accounts he was not attempting to make any type of statement, so his conduct is not protected" under the 1st Amendment.

Judge Yeary dissented, finding that the majority avoids the question of whether the statute was applied unconstitutionally, which he would answer in the positive under the circumstances presented in this case. In reaching the conclusion that the statute facially conflicts with the 1st Amendment, Judge Yeary finds the majority to have gone "where no United States Supreme Court opinion has gone before it." According to his dissent, the Supreme Court has never…found such a statute to be facially unconstitutional. Judge Yeary points out two mistakes made by the majority: (1) in concluding that the Court has both the power and the constitutional obligation, mandated by no less than the 1st Amendment itself, to decide that the destruction of a flag statute is facially unconstitutional in this case, even though the defendant cannot show the statute was unconstitutionally applied to him and to his own conduct; and (2) by mistakenly concluding that the statute at issue here is substantially overbroad in relation to its otherwise plainly legitimate sweep, when it is not.

The plain wording of Section 42.01(a)(8) of the Penal Code (Disorderly Conduct) provides that the punishable conduct is "the intentional and knowing display of a firearm in a public place, and the actor must display the firearm in a manner calculated to alarm." It punishes conduct, not speech, and is rationally related to the State's interest in protecting citizens from harm. While certain terms

are undefined, all terms in the statute have a plain meaning so that ordinary people can understand what is prohibited. The trial court properly denied the inmate's habeas application because Section 42.01(a)(8) is not facially unconstitutional under either the 1st Amendment or 2nd Amendment.

Ex parte Poe, 491 S.W.3d 348 (Tex. App.—Beaumont 2016, pet. ref'd)

A justice of the peace's practice of opening daily court proceedings with a prayer by a volunteer chaplain does not violate the Establishment Cause where the chaplain program consists of invited leaders within the county of any faith and the bailiff provides an opportunity for individuals to leave the courtroom during the prayer and explains that participation in the prayer will have no effect on the decisions of the court.

Tex. Atty. Gen. Op. KP-0109 (8/15/16)

The Attorney General finds this practice similar to facts in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) where a town had a practice of opening its board meetings with prayer. Like the court at issue in this opinion, the Town of Greece invited religious leaders of any faith to deliver the prayer. No guidance was given about the tone or content of the prayers. The public was not required to participate and nothing suggested nonparticipants were disadvantaged or disfavored by not participating. Justice Kennedy in that case explained that merely exposing constituents to prayer they would "rather not hear and in which they need not participate" does not equate to engaging in impermissible coercion under the Establishment Clause. Though *Galloway* involves legislative prayer and not judicial prayer, the Attorney General opines that case law is not clear concerning whether judicial prayer has the historical foundation associated with legislative prayer and nothing in the facts described suggests that the justice of the peace compels or coerces individuals in his courtroom to engage in a religious observance.

However, the Attorney General opines that case law is clear that opening a court session with the statement, "God save the State of Texas and this Honorable Court" does not violate the Establishment Cause. The opinion also addresses this court's chaplain program, which allows religious leaders to provide counseling to individuals in distress upon request (established in relation to the justice of the peace's function as coroner). According to the opinion, the program as described in the request for opinion does not violate the Establishment Clause.

Commentary: The 1st Amendment provides in the Establishment Clause that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This opinion is nuanced, fact-specific, and worth a read if questioning a similar court practice

B. 4th Amendment

1. Search Warrants

a. Blood Draws

The search incident to arrest doctrine does not apply to warrantless blood draws, but it does apply to warrantless breath tests.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)

In a 5-3 decision, the Court examined three consolidated cases involving state laws criminalizing refusal to take warrantless tests measuring BAC. All three defendants were arrested for drunk driving. Defendants Birchfield (North Dakota) and Beylund (North Dakota) received warnings that they were obligated to submit to blood tests. Defendant Bernard (Minnesota) received instruction that a breath test was required. Birchfield and Bernard refused and were convicted of a criminal offense for the refusal. Beylund complied with the demand for the blood sample and his license was subsequently administratively suspended based on the test results revealing a high BAC.

Justice Alito delivered the opinion of the Court. If the warrantless searches in these cases comport with the 4th Amendment, it follows that a state may criminalize the refusal to comply with a demand to submit to required testing, just as a state may make it a crime to obstruct the execution of a valid search warrant. It also follows that the test results are not inadmissible under federal law in a criminal prosecution or civil or administrative proceeding. Because all three defendants were searched or told they were required to submit to a search after being placed under arrest, the Court considered how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests. In situations that could not have been envisioned when the 4th

Amendment was adopted, like searches of data in a cell phone (*Riley v. California*, 134 S. Ct. 2473 (2014)), the Court does not have "guidance from the founding era," and therefore, determines whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."

Using the same analysis as in *Riley*, the Court found that breath tests do not implicate significant privacy concerns, but that blood tests are a different matter. For breath tests, the physical intrusion is almost negligible, the tests only result in a BAC reading and no sample is left, and participation in the test does not enhance embarrassment inherent in any arrest. ("Humans have never been known to assert a possessory interest in or any emotional attachment to any of the air in their lungs.") Blood tests, however, require piercing the skin and extracting a part of the subject's body, are significantly more intrusive than blowing into a tube, and place in the hands of law enforcement a sample that can be preserved holding information beyond a BAC reading.

Weighing this against legitimate state and federal interests, the Court finds that the laws at issue in these cases making it a crime to refuse to submit to a BAC test are designed to provide an incentive to cooperate in drunk driving cases, which serves an important function. Balancing privacy with the interests of the State, the Court concludes that the 4th Amendment permits warrantless breath tests incident to arrests for drunk driving, but not warrantless blood tests.

As for the implied consent laws at issue, the Court concludes that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense (the Court notes its prior opinions that refer approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply). The Court notes more than once that while the exigent circumstances exception involves an evaluation of the particular facts of each case, the search-incident-to-arrest exception is categorical. It does not depend on an evaluation of the threat to officer safety or the threat of evidence loss in a particular case.

Justice Sotomayor joined the majority's disposition of *Birchfield* and *Beylund*, in which the Court holds that the search-incident-to-arrest exception to the 4th Amendment's warrant requirement does not permit warrantless blood tests, but dissented from the Court's disposition of *Bernard*, in which the Court holds that the same exception permits warrantless breath tests. Justice Sotomayor would instead require a warrant unless exigent circumstances existed, finding the search-incident-to-arrest exception "ill-suited to breath tests." ("[N]o governmental interest categorically makes it impractical for an office to obtain a warrant before measuring a driver's alcohol level.") She describes the precedential framework differently, requiring an analysis of all exceptions to determine whether to apply them categorically or on a case-by-case basis. Relying in part on *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U.S. 523, (1967) (having to do with routine home searches for possible housing code violations) she gives different examples of where having to procure a warrant does not frustrate governmental interests.

Justice Thomas concurred in part in the judgment and dissented in part, finding that the majority contorted the search-incident-to-arrest exception to the 4th Amendment's warrant requirement. According to Thomas, the tests revealing the BAC of a driver suspected of driving drunk are constitutional under the exigent circumstances exception to the warrant requirement. The majority's "hairsplitting" between breath and blood tests makes little sense to Thomas, who finds that either the search-incident-to-arrest exception permits bodily searches to prevent the destruction of BAC evidence, or it does not. This decision is a further erosion of exceptions to the search warrant requirement. Justice Thomas, reiterating his dissent from *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), Justice Thomas would find both breath and blood tests for BAC constitutional based on exigent circumstances from the natural dissipation of alcohol in the bloodstream.

Commentary: Will this be the case that breathes new life into breath testing? What are the odds that we will see at least one bill introduced during the 85th Legislature criminalizing refusal to provide a breath specimen? What are the odds such a bill will become law? In North Dakota, a first-time offense is punishable by a mandatory fine of $500.

The State's motion for rehearing in the *Villarreal* case was improvidently granted and denied.

State v. Villarreal, 475 S.W.3d 784 (Tex. Crim. App. 2015)

In *State v. Villarreal*, 2014 Tex. Crim. App. LEXIS 1898 (Tex. Crim. App. November 26, 2014), the Texas Court of Criminal Appeals, in a 5-4 decision, held that a nonconsensual search of blood of a DWI suspect, conducted pursuant to the mandatory blood draw and implied consent provisions in Chapter 724 of the Transportation Code, violates the 4th Amendment when undertaken in the absence of a warrant. Three judges filed concurrences. Two judges wrote dissenting opinions. Each dissenting opinion was joined by one other judge.

Although Judge Meyers believes it improper to imply consent based on past convictions, in a concurring opinion no longer believes Section 724.012(b)(3)(B) of the Transportation Code (which applies when the DWI suspect has two prior DWI convictions) creates a valid exception to the warrant requirement for a blood draw in intoxication cases.

Judge Richardson explained that while it makes sense that a repeat DWI offender should have a lessened expectation of privacy, a defendant's status as a repeat offender does not fall within an exception recognized by the Supreme Court. Section 724.012(b)(3)(B) of the Transportation Code does not create an exception to the 4th Amendment's warrant requirement and the Legislature does not have the authority to create a statutory exception.

Judge Newell wrote in support of the *Villarreal* opinion. Per se rules are strongly disfavored under the 4th Amendment. Accordingly, a *per se* warrantless blood draw based on the criminal record of the subject and the dissipation of alcohol is impermissible. Prior convictions do not diminish the individual's 4th Amendment protections. While the State has a compelling interest in keeping the public safe from drunk drivers, to be constitutionally permissible, a warrantless search has to serve more than a general interest in crime control. He rejected arguments that the search at issue in this case is an administrative search and driving is a "closely regulated industry." Like *McNeely,* the *Villarreal* opinion is narrow and does not hold that drawing a driver's blood could be justified upon a showing of exigent circumstances or that another exception to the warrant requirement might apply. In light of Supreme Court precedent, he cannot support a holding that a felony DWI defendant has a greater expectation of privacy in the contents of his cell phone than his own blood.

Judge Keasler, joined by Judge Hervey, explained that although the Transportation Code does not create a per se exigency exception to the 4th Amendment and the State has failed to establish exigency in this case, given the circumstances of this case and the underlying interests at play, the blood draw was constitutionally reasonable. Villarreal's status as a recidivist DWI offender resulted in a diminished expectation of privacy. The search of Villarreal should be considered a regulatory search and the means and procedures of the search performed on Villarreal were reasonable.

Judge Yeary, joined by Presiding Judge Keller, asserted that when dealing with incorrigible drunk drivers and the warrantless taking of blood, the touchstone is reasonableness. This requires a balancing of interests. To require a search warrant in cases involving DWI suspects with two prior convictions does not protect the privacy interests of the citizenry. It does, however, frustrate the governmental purpose behind the search (i.e., preventing the destruction of evidence) and is inconsistent with the 4th Amendment's warrant requirement. This should be the standard when evaluating the "implied consent" statutes. The criterion in the statute in question involves an *objective* determination of the known facts by peace officers. To require a magistrate to rubber stamp the determination of a peace officer's determination that there is probable cause to draw blood elevates meddlesome formality over 4th Amendment substance. Under a general balancing approach, the scope of an already existing exception—the exigent circumstances exception—to the warrant requirement properly extends to authorize automatic blood draws for incorrigible DWI offenders when the terms of the statute are satisfied.

Commentary: This is not simply a 40-word *per curiam* opinion. The concurring opinions total 7,539 words. The dissenting opinions total 12,349 words. Contrary to what others have written, this opinion is hardly anticlimactic or a non-decision. In fact, despite what many predicted, the Court reaffirmed the holding in *Villarreal*. The pivotal plot-twist in *Villarreal* is the concurring opinion issued by Judge Meyers who dissented in *Villarreal,* but switched sides in this opinion. The three new members

of the Court made their positions known. Judge Richardson and Judge Newell issued separate opinions concurring in the denial of the State's motion for rehearing. Judge Yeary issued a dissenting opinion.

The holding in *Villarreal* was hardly a surprise. A number of state intermediate appellate courts reached similar conclusions, in light of the U.S. Supreme Court decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) (holding that natural metabolization of alcohol does not present a per se exception to the 4th Amendment's warrant requirement for nonconsensual blood testing.) While prosecutors continued to hold out hope for a reversal, few were surprised that the that U.S. Supreme Court denied the State's petition for certiorari in *Villarreal* after the decision in *Birchfield v. N. Dakota*, 136 S. Ct. 2160 2016) (See above.)

b. Probable Cause

A search warrant was not supported by probable cause because the Penal Code section upon which it was based was later declared to be unconstitutional.

Siller v. State, 2016 Tex. App. LEXIS 8733 (Tex. App.—Eastland August 11, 2016, no pet.)

The good faith exception in Article 38.23(b) to the general exclusionary rule does not apply because the plain wording of that subsection "requires a finding of probable cause." Here, as in *McClintock v. State*, 444 S.W.3d 15 (Tex. Crim. App. 2014), the search warrant was not supported by probable cause because of the subsequent declaration that the underlying search was unconstitutional. The court cites commentators, which have noted that it is not enough for an officer to believe he or she was acting pursuant to a valid warrant based on probable cause, but rather, the warrant must in fact be supported by probable cause. Here, the search warrant was for evidence of an alleged offense, which was later declared unconstitutional. The contraband found when police searched the appellant's home should have been suppressed.

An affidavit provided a substantial basis for the magistrate to issue a search warrant where the detective gave (1) detailed information regarding the alleged offense as provided by the complainant, and (2) a detailed opinion, based on her experience and training and conversations with more experienced officers, that the appellant would likely possess the items to be seized. This was true even though the detective did not expressly state how she obtained all of her information or refer to the place to be searched as the appellant's residence.

Aguirre v. State, 490 S.W.3d 102 (Tex. App.—Houston [14th Dist.] 2016, no pet.)

The court also found that (1) there was no showing in the trial court to obtain a *Franks* hearing (to allege deliberate or reckless falsehood by the affiant); (2) the facts in the affidavit had not become stale because of the nature of the ongoing offense and the detailed opinion of the detective based on experience related to the offense; and (3) the warrant was not too general or overbroad because under the totality of the circumstances, the magistrate could have reasonably inferred that the appellant might have stored evidence, or transmitted such evidence to the complainant or others, using any cellular phones he owned.

The trial court did not err in denying the defendant's motion to suppress evidence discovered during a search incident to arrest because the underlying arrest warrant was supported by an affidavit that met the requirements of Article 15.05 of the Code of Criminal Procedure. The affidavit stated the defendant's name, that he committed the offense of Failure to Appear/Bail Jumping in the City of Oak Ridge North Municipal Court, and was signed by the affiant, a police officer. The affidavit established probable cause to justify a decision to issue the arrest warrant.

Horhn v. State, 481 S.W.3d 363 (Tex. App.—Houston [1st Dist.] 2015, no pet.)

Commentary: Most people do appreciate the possible challenges to an arrest warrant for Failure to Appear. This is a good review of case law and contrasts *Gordon v. State*, 801 S.W.2d 899 (Tex. Crim. App. 1990) to *Brooks v. State*, 76 S.W.3d 426 (Tex. App.—Houston [14th Dist.] 2002, no pet.). See also, "Sorting Out the Anomaly: Non-Appearance Crimes in Light of *Azeez v. State,*" *The Recorder* (June 2008).

2. Reasonable Suspicion

An officer does not have reasonable suspicion for a stop and investigative detention of a suspect based on the time of day, the location of the suspect, and

the officer's unsubstantiated belief that the suspect was a "known criminal."

Brodnex v. State, 485 S.W.3d 432 (Tex. Crim. App. 2016)

Around 2:00 a.m., Midland Police Officer Chesworth observed Brodnex and a female leave the Deluxe Inn on foot. The officer testified that the Deluxe Inn is located in an area known for narcotic activity. The officer approached the individuals on a nearby street, asked them their names and what they were doing, and placed Appellant in handcuffs without placing him under arrest. When Brodnex identified himself, the officer asked him, "Didn't you just get picked up?" Brodnex replied, "Hell no." The officer then had Brodnex and his female companion come to the front of the car. While lifting Brodnex's shirt tail and patting down the exterior of his front pant pockets, the officer asked him, "You got anything on you?" Brodnex replied, "No." The officer then asked, "Mind if I check?" and Brodnex appeared to consent. The officer continued his search, seeming to check all of Brodnex's pockets and the area around his waistband. The officer found an orange plastic cigar tube protruding from Brodnex's waistband; it contained crack cocaine.

The trial court denied Brodnex's motion to suppress, who proceeded to a bench trial where he pled guilty to possession of a controlled substance and not guilty to tampering with evidence. The court found him not guilty of tampering but guilty of possession. Brodnex was sentenced to 20 years in prison. The court of appeals affirmed the judgment of the trial court.

The Court of Criminal Appeals reversed. Judge Meyer's, writing for the majority, stated that the reasonable suspicion standard, while low, is not that low. The circumstances in this case: (1) the time of day, (2) the area's known narcotic activity, and (3) the officer's belief, based on what other officers had told him (i.e., that Brodnex was a "known criminal") did not amount to a showing of reasonable suspicion. Citing prior case law, the Court explicated that reasonable suspicion is to be determined by a multitude of factors, rather than just the location of the defendant or an officer's knowledge of the defendant's criminal record. There were not enough factors in this case for the officer to have reasonable suspicion to detain and search the suspect. Presiding Judge Keller concurred without written opinion.

3. Exceptions to the Warrant Requirement

a. Independent Source Rule

A trial court did not abuse its discretion in denying a motion to suppress under the independent source rule where the search of an iPod containing incriminating evidence was not the basis for a subsequent search warrant, which was instead based on statements of employees who had discovered the iPod in a restroom, viewed the pictures therein to determine ownership of the iPod, and called the police.

Lopez v. State, 2016 Tex. App. LEXIS 2974 (Tex. App.—Corpus Christi-Edinburg March 24, 2016, no pet.)

The court also found an additional basis for the trial court's denial of the motion to suppress in that due to the appellant's voluntary discarding of his iPod (not asking for it to be returned the next day at work after being advised he would have to speak with the manager to get it back), he no longer possessed a reasonable expectation of privacy in the iPod.

b. Community Caretaking Exception

The stop of the defendant's vehicle was justified under the community-caretaking function because the totality of the circumstances would lead a reasonable person to believe that the defendant, who was driving his car with two flat tires in a residential area at night, was in need of help. The officer had reasonable suspicion that the defendant was operating a vehicle with defective required safety equipment in an unsafe manner in violation of Section 547.004 of the Transportation Code.

Dearmond v. State, 487 S.W.3d 708 710 (Tex. App.—Fort Worth 2016, no pet.)

Commentary: Justice Dauphinot dissented because under the community caretaking function, a stop is supposed to be totally divorced from crime detection, which by the majority's admission was not true in this case.

The community caretaking exception to the warrant requirement did not apply where the only facts relied upon by the officer for stopping the

appellant's vehicle were that the passenger appeared "hunched over" in the appellant's vehicle and the officer smelled alcohol emitting from the vehicle.

Byram v. State, 478 S.W.3d 905 (Tex. App.—Fort Worth 2015, pet. granted)

The court applied the four factors delineated in *Wright v. State*, 7 S.W.3d 148, 151 (Tex. Crim. App. 1999) (citing *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)), to determine whether a search or seizure is justified by this "narrow exception:" (1) the nature and level of the distress exhibited by the individual; (2) the location of the individual; (3) whether or not the individual was alone and/or had access to assistance independent of that offered by the officer; and (4) to what extent the individual—if not assisted—presented a danger to himself or others. Here, the court found that the only facts relied upon by the officer were that the passenger appeared "hunched over" in the appellant's vehicle and the officer smelled alcohol emitting from the vehicle. Along "the 'community caretaking distress spectrum' this case strongly tends to involve no apparent distress," according to the court. The passenger was located in a busy area of town where there were nearby hospitals, she was not alone, and she did not appear to be a danger to herself or others.

The court also found no reasonable suspicion to stop the appellant's vehicle because of the absence of articulable facts which could reasonably raise a suspicion that the appellant was engaged in an alcohol-based offense, the officer's stop violated his 4th Amendment rights. The court was not persuaded by the facts: the officer smelled the "odor of an alcoholic beverage" from the vantage of his vehicle in an area where admittedly there were numerous people in the officer's direct vicinity—a vicinity that the officer described as being a "4th of July weekend celebration" where there was 'a lot of partying" occurring; the appellant ignored the officer; and the passenger was hunched over.

One judge dissented, finding the community caretaking exception applied in this case based on all four *Wright* factors. According to the dissent, the nature and level of the female's distress was significant—she was not moving and appeared unconscious. Her location, in a vehicle driven by a man who appeared unconcerned about her well-being, was precarious. Her access to assistance was doubtful for this same reason—the man driving the SUV exhibited no concern about his passenger in response to the officer's query about her condition. The passenger was also a danger to herself; she appeared comatose and incapable of asking for help. According to the dissent, the majority failed to view the evidence and all its reasonable inferences in the light most favorable to the trial court's denial of the motion to suppress.

c. Immunity

A state prosecutor did not have absolute immunity from a Section 1983 suit where she ordered the warrantless arrest of a witness in the courtroom without probable cause for filing a false police report in retaliation for the witness' refusal to testify that her boyfriend had struck her in the face during a domestic violence altercation.

Loupe v. O'Bannon, 824 F.3d 534 (5th Cir. 2016)

Applying the "functional approach" prescribed by the Supreme court in *Rehberg v. Paulk*, 123 S. Ct. 1497, 1503 (2012), the 5th Circuit concludes that the prosecutor in this case is not absolutely immune from the federal and state actions brought by Loupe based on the order of the warrantless arrest because that conduct was not part of her prosecutorial function. The court cites *Burns v. Reed*, 500 U.S. 478, 482 (1991), in which the Supreme Court held that giving legal advice to police, including advice as to whether there is probable cause to arrest a suspect, is not a function protected by absolute immunity. The 5th Circuit finds the same to be true when a prosecutor orders a warrantless arrest, noting that O'Bannon's order of arrest came immediately after the court refused her request to issue such an order. Ordering a warrantless arrest is not intimately associated with the judicial phase of the criminal process; it is conduct outside the judicial process and therefore is not protected by absolute immunity.

The 5th Circuit did, however, agree with the lower court that O'Bannon is absolutely immune from suit for money damages based on her alleged malicious prosecution of Loupe (after Loupe was released from jail, O'Bannon charged her with criminal mischief, the trial of which resulted in Loupe's acquittal and the filing of the Section 1983 suit). "Our decisions applying those of the Supreme Court make clear that

'[p]rosecutors enjoy absolute immunity for acts taken to initiate prosecution,' and that this '[a]bsolute immunity shelters prosecutors even when they act maliciously, wantonly, or negligently.'"

4. Exclusionary Rule

A valid pre-existing warrant for an individual's arrest can attenuate the taint from an illegal detention provided the officer did not engage in flagrant police misconduct.

Utah v. Strieff, 136 S. Ct. 2056 (2016)

In response to an anonymous call to the South Salt Lake City police's drug-tip line reporting "narcotics activity" at a particular residence, Detective Fackrell began to conduct intermittent surveillance of the home for about a week. He observed visitors who left a few minutes after arriving at the house. The detective was suspicious. One of the individuals was Strieff. After Strieff exited the house and walked to a nearby convenience store, he was detained by the detective, who after identifying himself, asked Strieff what he was doing at the house. After he was stopped, upon the detective's request, Strieff produced a state-issued identification card. The detective relayed Strieff's information to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic violation. Strieff was arrested. Incident to the arrest, the detective searched Strieff and discovered a baggie of methamphetamine and drug paraphernalia.

The trial court ruled that, although the investigatory stop was unlawful, the search incident to arrest was lawful and therefore justified the admission of the drugs and drug paraphernalia at trial. The court of appeals affirmed the trial court ruling, but the Utah Supreme Court reversed, holding that the evidence should have been suppressed because the warrant that was the basis for the arrest was discovered during an unlawful investigatory stop.

In a 5-3 decision, the Supreme Court reversed. Justice Thomas, writing for the majority, explained that evidence obtained in violation of the 4th Amendment's protections should not be excluded from evidence when the costs of its exclusion outweigh its societal benefits. Furthermore, exclusion is not justified when the link between the unconstitutional conduct and the discovered evidence is too attenuated. The Court rejected the assertion of the Utah Supreme Court that an outstanding warrant does not implicate the attenuation doctrine because attenuation is limited to circumstances involving independent acts of the defendant's free will (e.g., a defendant's confession or consent to search). Rather, the presence of a valid arrest warrant is an "extraordinary intervening circumstance" that breaks the causal chain between the unconstitutional stop and the subsequent discovery of evidence. The Court reached this conclusion by considering the facts in light of the three factors articulated in *Brown v. Illinois*, 422 U. S. 590 (1975): (1) temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

In this instance, a majority of the Court found that there was no flagrant police misconduct and there was no indication that this stop was part of any systemic or recurrent police misconduct. According to Justice Thomas, the detective was at most negligent in stopping Strieff, having only made two good-faith mistakes: (1) he did not observe Strieff enter the suspected drug house so he did not know how long Strieff had been there and could not conclude that Strieff was a short-term visitor; and (2) he could have simply approached Strieff to ask what was going on in the house without detaining him.

The Court rejected the argument made by Strieff and the dissenting members of the Court, specifically, that the detective's conduct was flagrant because he detained Strieff without reasonable suspicion. For the violation to be flagrant, more severe police misconduct is required than simply the absence of proper cause for the seizure. The Court believed it unlikely that because of the high number of outstanding arrest warrants across the county, police will engage in dragnet searches if the exclusionary rule is not applied. Such wanton conduct would expose police to civil liability and the *Brown* factors take into account the purpose and flagrancy of police misconduct. Were evidence of a dragnet search presented in *Strieff*, the application of the *Brown* factors could be different. There is no evidence in this case that the concerns that Strieff raises about the criminal justice system are present in South Salt Lake City, Utah.

Justice Sotomayor wrote a dissenting opinion joined in part by Justice Ginsburg. "The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive an officer's violation of your [4]th Amendment rights. Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong." Despite the temptation to forgive the officer in this case, the 4th Amendment should require suppression. Two wrongs do not make right. The purpose of the exclusionary rule is to prevent police officers from taking advantage of their own unconstitutional conduct. In this case, the initial unconstitutional stop was calculated to procure further evidence, and, therefore, it was not an intervening circumstance that attenuated the connection between the misconduct and the discovery of evidence.

According to the dissent, the discovery of an outstanding traffic warrant "was not some intervening surprise:" there are over 180,000 such warrants listed in Utah's database. And "respectfully, nothing about this case is 'isolated.'" Citing the Brennan Center for Justice's research on criminal justice debt and Department of Justice Report on Ferguson, "outstanding warrants are surprisingly common." The detective, "by his own account, did not fear Strieff. While a warrant check may be relevant during a legal traffic stop, because it ensures that vehicles on the road are operated safely and responsibly and advances traffic safety interests, a warrant check of a pedestrian on the sidewalk, by contrast, is aimed at detecting evidence of ordinary criminal wrongdoing." Surely the Court "would not allow officers to warrant check random joggers, dog walkers, and lemonade vendors just to ensure that they pose no threat to anyone else." Even officers "prone to negligence can learn from suppression. There is nothing isolated about this case or this kind of police conduct. The Court's decision will open the door to allowing officers to use the 7.8 million outstanding federal and state arrest warrants to justify police stops without reasonable suspicion."

Justice Sotomayor, "writing only for myself, and drawing on my professional experiences," wrote "[t]he white defendant in this case shows that anyone's dignity can be violated in this manner." She went on to say, "[b]ut it is no secret that people of color are disproportionate victims of this scrutiny." She referenced writers Michelle Alexander, W.E.B. Du Bois, and Ta-Nehisi Coates, and wrote of the conversations that minority parents "for generations" have had with their children, "out of fear of how an officer with a gun will react to them." "By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time," Sotomayor wrote. "It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."

Justice Kagan filed a dissenting opinion joined by Justice Ginsburg. Justice Kagan wrote that the discovery of the evidence and the unconstitutional investigatory stop were too closely connected for the warrant to attenuate the connection. If an officer found drugs during a pat down after an unlawful stop, but before discovering a valid arrest warrant, the Court would suppress. "The added wrinkle of discovering a warrant makes no difference under the Constitution." There is no attenuation. The detective's conduct "was a calculated one," not a "Barney Fife-type mishap." Accordingly, the exclusionary rule should apply in cases like this one because the two events were closely connected in time, the warrant itself was not an intervening circumstance, and the police conduct was purposeful and flagrant. Only unforeseeable events "break the chain" in a proximate cause analysis. In this case, the existence of a warrant was eminently foreseeable. Because millions of people in this country have outstanding traffic warrants, the Court's opinion creates unfortunate incentives for the police who will see potential advantage in stopping individuals without reasonable suspicion. This endangers constitutional rights, according to this dissent.

Commentary: The exclusionary rule is a court-created remedy and deterrent, not an independent constitutional right. Similarly, the numerous limitations of the exclusionary rule's application are also court-created. *Strieff* is one more limitation. The Court's decision should not be understood as an endorsement of conducting unbridled warrant checks by law enforcement. The majority and dissenting opinion make it clear that the individual facts of each case matter and suppression can occur. This aspect of the law is unchanged.

Notably, because the State conceded that the detective lacked reasonable suspicion to initially stop Strieff, and because it was determined the warrant broke the causal chain, the majority opinion expressly passed on deciding whether the warrant's existence alone would make the initial stop constitutional even if the detective was unaware of its existence. Yet, that decision seems potentially primed for consideration in the future.

While *Strieff* garnished quite a bit of attention from the digital media when it was handed down, mostly because of Justice Sotomayor's passionate and strongly-worded dissent, its holding parallels Texas law. In 2012, the Court of Criminal Appeals held that the presence of a pre-existing warrant attenuated the taint of a police officer's illegal detention in a mall parking lot because the officer's conduct was not purposeful or flagrant. *State v. Mazuca*, 375 S.W.3d 294 (Tex. Crim. App. 2012). Three years later in *State v. Jackson*, 464 S.W.3d 724 (Tex. Crim. App. 2015), the Court of Criminal Appeals held that a peace officer's observation of the defendant committing a traffic offense was sufficient to attenuate the taint from the illegal detention and installation of a GPS tracking of the defendant's car. The misconduct was not so flagrant that the observation of an independent basis for a traffic stop could not attenuate the taint from the original illegality. See, *The Recorder*, November 2015 at 13.

Neither the 4th Amendment nor Chapter 59 of the Code of Criminal Procedure provides for what is tantamount to an exclusionary rule for civil-forfeiture proceedings. Chapter 59 requires that the State show lawful seizure as a procedural prerequisite to commencing a Chapter 59 proceeding.

State v. One (1) 2004 Lincoln Navigator, 494 S.W.3d 690 (Tex. 2016)

Commentary: While municipal courts are not involved in civil-forfeiture proceedings, city attorneys are authorized as attorneys representing the State under Article 59.01. Asset forfeiture is one of the primary focuses of criminal justice reform and is likely to be the subject of legislation in the upcoming 85th Texas Legislature.

5. Reasonable Expectation of Privacy

A defendant's 4th Amendment rights were not violated because IP addresses and peer-to-peer-shared files are not subject to a reasonable expectation of privacy, being widely and voluntarily disseminated in the course of normal use of networked devices and peer-to-peer software.

U.S. v. Weast, 811 F.3d 743 (5th Cir. 2016)

The defendant claimed that a Fort Worth officer violated his rights by using peer-to-peer software, without a warrant, to identify his IP address as possibly linked to child pornography and to download data that he had made available for sharing. Citing the Supreme Court's recent decision in *Riley v. California*, he moved before trial to suppress all evidence obtained through these activities and the subsequent search of his household. In *Riley*, the Supreme Court held that the 4th Amendment prohibits warrantless searches of arrestees' cell phones. That case relied on the presumption that the arrestees had a reasonable expectation of privacy in the information on their cell phones. Unlike those arrestees, however, the 5th Circuit found that he had already voluntarily shared all of the information at issue in this case. He "broadcast his IP address far and wide in the course of normal internet use, and he made the child pornography files and related data publicly available by downloading them into a shared folder accessible through a peer-to-peer network." According to the court, such behavior eliminates any reasonable expectation of privacy in the information, rendering *Riley* inapposite.

The 5th Circuit also found that the district court did not deny the defendant his 6th Amendment rights by refusing to let him represent himself at trial because his behavior was bizarre and disruptive.

C. 5th Amendment

An investigatory detention was not converted to an arrest upon placing the appellant in handcuffs in the back of a patrol car for his safety, among other reasons, and thus, the officer conducting the DWI investigation was not required to read the appellant his Miranda warnings before continuing the investigation.

Koch v. State, 484 S.W.3d 482 (Tex. App.—Houston [1st Dist.] 2016, no pet.)

The appellant was not in custody for purposes of Article 38.22 (When Statements May Be Used) where he was detained in the back of the patrol car, in handcuffs for approximately 14 minutes, an officer told him that he was being detained rather than being arrested, the officers on the scene were conducting an ongoing investigation including talking to witnesses and trying to clear the street, and officers reasonably moved him to a nearby parking lot to continue the DWI investigation instead of conducting the investigation in the middle of the street. The record also contained evidence that the appellant had tried to leave the scene on multiple occasions.

D. 6th Amendment

1. Public Trial

In a case in which the defendant's large family was excluded from voir dire, according to the trial court, not as a closure of the trial but because the jury panel would fill all of the available chairs and space in the courtroom, the court of appeals was required to consider (1) whether the defendant bore her burden of proof to show that the trial was closed to the public, and (2) whether the closure was justified.

Cameron v. State, 482 S.W.3d 576 (Tex. Crim. App. 2016)

In a 6-2 decision (Judge Yeary, not participating), Judge Hervey, writing for the majority, explained that the burden to show that a trial is closed to the public is on the defendant. Although this was not expressly stated in *Lilly v. State*, 365 S.W.3d 321 (Tex. Crim. App. 2012), it was implied. The correct standard of review in these circumstances is to defer to the trial court's determination of the facts and to review the issue *de novo* because whether a defendant's trial was closed to the public is a mixed question of law and fact that does not turn on credibility and demeanor. Accordingly, the case was remanded back to the court of appeals to apply the principles as stated to the facts of this case.

Judge Alcala filed a dissenting opinion, joined by Judge Johnson, stating that in light of the trial court's failure to make findings to support a legitimate overriding interest for the closure, the case was correctly decided on original submission and that the closure was unjustified under *Waller v. Georgia*, 467 U.S. 39 (1984).

2. Right to Counsel

The government improperly froze assets of a defendant where the assets had no connection to the charged crimes, and depriving the defendant of the untainted assets intended to pay for counsel undermined the defendant's fundamental right to the assistance of counsel of the defendant's choice at the defendant's expense.

Luis v. U.S., 136 S. Ct. 1083 (2016)

A federal statute authorizes a court to freeze before trial certain assets belonging to a criminal defendant accused of violations of federal health care or banking laws, including (1) property "obtained as a result of" the crime, (2) property "traceable" to the crime, and (3) other "property of equivalent value." In this case the government obtained a court order freezing assets belonging to the third category, which the plurality found violated the 6th Amendment right to have assistance of counsel, insofar as it prevented her from paying her lawyer. Here, the government undermined the right to representation by counsel by taking from her the ability to use the funds she needs to pay for her chosen attorney. Though the government has an interest in guaranteeing that those funds will be available later to pay for statutory penalties (including forfeiture of untainted assets) and restitution, should it secure convictions, the nature of the assets here at issue are key. The property here is not "loot, contraband, or otherwise 'tainted,'" but instead belongs to the defendant, "pure and simple."

Although the law of property sometimes allows a person without a present interest in a piece of property to impose restrictions upon a current owner, for example, to prevent waste, here, she needs some portion of those same funds to pay for the lawyer of her choice. The right to representation is fundamental. The interests in obtaining payment of a criminal forfeiture or restitution order do not enjoy constitutional protection. The plurality also found support for its position in the common law as understood in 19th-century America and as a practical matter—to accept the government's position could well erode the right to counsel to a considerably greater extent than the Court has so far indicated, with no obvious stopping place.

Justice Thomas concurred in the judgment, writing separately to disagree with the plurality's balancing approach, stating he would rest strictly on the 6th Amendment text and common-law backdrop. The 6th Amendment "does not permit the government's bare expectancy of forfeiture to void that right. When the potential of a conviction is the only basis for interfering with a defendant's assets before trial, the Constitution requires the government to respect the longstanding common-law protection for a defendant's untainted property." Justice Thomas, along with the dissent by Justices Kennedy and Alito, finds the plurality's reference to defendants rendered indigent by a pretrial asset freeze irrelevant, as the original understanding of the 6th Amendment was to protect a defendant's right to retain an attorney he could afford.

Justice Kennedy, joined by Justice Alito, dissented, finding that precedent makes clear that a defendant has no 6th Amendment right to spend forfeitable assets (or assets that will be forfeitable) on an attorney. According to this dissent, the rule adopted by the plurality and Justice Thomas is found nowhere in the Constitution or this Court's precedent—that the 6th Amendment protects a person's right to spend otherwise forfeitable assets on an attorney so long as those assets are not related to or the direct proceeds of the charged crime. The dissent cites *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 628, for potential far-reaching implications, finding no clear explanation why this principle does not extend to the exercise of other constitutional rights: "If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel?"

Justices Kennedy and Alito also find the result creates arbitrary distinctions between defendants. "Money, after all, is fungible. There is no difference between a defendant who has preserved his or her own assets by spending stolen money and a defendant who has spent his or her own assets and preserved stolen cash instead." In addition, the 6th Amendment does not provide an unfettered right to counsel of choice. Because the defendant cannot afford the legal team she desires, and because there is no indication that she will receive inadequate representation as a result, the dissent finds she does not have a cognizable 6th Amendment complaint. Finally, the dissent has concerns with the workability of the plurality's decision and its proposed reliance on courts' experience "separating tainted assets from untainted assets, just as they have experience determining how much money is needed to cover the costs of a lawyer."

Justice Kagan filed her own dissenting opinion, agreeing with much of the other dissent, but writing separately to express her disagreement with the controlling case, *U.S. v. Monsanto*, 491 U.S. 600 (1989), finding it troubling, but none the less precedent: because the government has established probable cause to believe that it will eventually recover Luis' assets, she has no right to use them to pay an attorney. The plurality reaches a contrary result to that case only by differentiating between the direct fruits of criminal activity and substitute assets that become subject to forfeiture when the defendant has run through those proceeds. In agreement with the other dissent, the government's and the defendant's respective legal interests in those two kinds of property, prior to a judgment of guilt, are exactly the same: The defendant maintains ownership of either type, with the government holding only a contingent interest. According to Justice Kagan, the plurality's use of the word "tainted" to describe assets at the pre-conviction stage makes an unwarranted assumption about the defendant's guilt.

The trial court did not abuse its discretion by denying the defendant's request on the day of trial for a continuance to retain a new lawyer. The case had been set for trial for three months. The lawyer he had was prepared for trial and no other attorney was prepared to try the case.

James v. State, 2016 Tex. App. LEXIS 9603 (Tex. App.—Houston [1st Dist.] August 30, 2016, no pet.)

Commentary: This case is a good reference to controlling law when a defendant urges a last minute substitution of counsel. It also sets out the nonexclusive factors outlined by the Court of Criminal Appeals to inform a decision whether to grant a continuance due to the absence of counsel of the defendant's choice.

3. *Batson* Challenges

Prosecutors struck two black jurors in violation of *Batson v. Kentucky* where the proffered justification for doing so was contradicted by the record and the contents of the prosecution's file, which instead evidenced they were motivated in substantial part by race.

Foster v. Chatman, 136 S. Ct. 1737 (2016)

Addressing only *Batson*'s third step, the majority of the Court found many instances where the prosecutor's proffered reason for striking a black panelist applied "just as well to an otherwise-similar nonblack [panelist]" who was permitted to serve, which the Court explained in *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005), is evidence tending to prove purposeful discrimination. With respect to the prosecutors in this case, the Court found the evidence compelling, referring to the sheer number of references to race in the prosecution's file as arresting.

Justice Alto concurred in the judgment, but wrote separately to address the role of state law in the proceedings on remand, concluding that whether the Court's finding of a *Batson* violation justifies relief under state law is a matter for that court to decide.

Justice Thomas dissented, finding that the majority's ruling in favor of the appellant nearly three decades after voir dire was done without adequately grappling with the possibility that the Court lacked jurisdiction. He also finds that the ruling, "based in part on new evidence procured decades after his conviction, distorts the deferential *Batson* inquiry."

E. 8th Amendment

A trial court abused its discretion by granting a motion for new trial regarding punishment where the evidence did not substantiate an allegation of disproportionate punishment under the 8th Amendment.

State v. Simpson, 488 S.W.3d 318 (Tex. Crim. App. 2016)

After a conviction and sentence, the trial court held a hearing on a motion for new trial based on an allegation that the defendant's sentence violated "the proportionality tenant of the 8th Amendment." After hearing evidence that included new evidence not admitted at trial, the trial court granted the motion for new trial as to punishment. The court of appeals vacated the trial court's order and reinstated the original judgment, finding that the trial court abused its discretion because though the defendant articulated a valid legal claim in his motion, the defendant did not substantiate the claim.

Acknowledging first that a sentence is grossly disproportionate to the crime only in exceedingly rare or extreme cases and that the Court has traditionally held that punishment assessed within the statutory limits is not excessive, cruel, or unusual, the Court agreed with the court of appeals that this was not one of those "rare" cases. This was true in light of his role in the robbery and his significant prior adjudicated and unadjudicated offenses. Additionally, his sentence fell well within the statutory range.

Here, the defendant sought to use an 8th Amendment claim to develop additional evidence relevant to sentencing that was not introduced at the trial court's punishment hearing, even though it was available to him. According to the Court, even when the trial court assesses the sentence, it abuses its discretion by granting a motion for new trial without requiring a showing that the original punishment hearing was seriously flawed. The defendant did not produce evidence or point to evidence existing in the record that substantiated his claim that his sentence was unconstitutional.

Commentary: This case is a great reminder that a motion for new trial is not a vehicle to introduce new evidence that was available during trial. The finality of judgments is paramount in the criminal justice system. Note that the Court has traditionally held that punishment assessed within the statutory range does not violate the 8th Amendment. Make meaningful use of the fine range when setting the fine. Once it is set, that judgment cannot be altered with few exceptions. Merely failing to make meaningful use of the fine range at sentencing is not enough to overcome the finality of a judgment.

F. 14th Amendment

Judicial recusal is required when the judge had significant, personal involvement in a critical decision regarding the defendant's case as a prosecutor. An unconstitutional failure to recuse constitutes structural error and is not subject to harmless error analysis.

Williams v. Pennsylvania, 136 S. Ct. 1899 (2016)

In a 5-3 opinion, delivered by Justice Kennedy, the Court held that under the Due Process Clause, there is an impermissible risk of actual bias when a judge

earlier had significant, personal involvement as a prosecutor in a critical decision regarding a defendant's case. During his time as district attorney, the now-state Pennsylvania Supreme Court justice gave his official approval to seek the death penalty in Williams' case. Twenty-six years later, as a judge, he denied the defendant's motion for recusal from an appeal and participated in a decision to deny relief. The decision to pursue the death penalty occurred during a critical stage in the adversarial process. Consequently, the justice's failure to recuse himself presented an unconstitutional bias. By failing to recuse himself, the judge committed a structural error that cannot be fixed by a harmless-error review, regardless of whether the judge's vote was a deciding one.

Chief Justice Roberts, joined by Justice Alito, issued a dissenting opinion. Justice Thomas issued a separate dissenting opinion.

Commentary: *Williams* adds to the line of U.S. Supreme Court cases some believe is gradually creating a constitutional rule of recusal, a rule that supposedly supersedes state laws and rules. Notably, the line of cases began in municipal courts 90 years ago (specifically the municipal courts in the City of North College Hill and the Village of Monroeville, both of which are located in Ohio). From matters originating in these municipal courts, the Supreme Court held that a judge with "a direct, personal, substantial, pecuniary interest" in a case may not preside over that case (*Tumey v. Ohio*, 273 U. S. 510, 523 (1927)) and that a mayor, acting as a judge, cannot adjudicate traffic violations if revenue from convictions constituted a substantial portion of the municipality's revenue (*Ward v. Monroeville*, 409 U. S. 57, 59, 61 (1972)). While both *Tumey* and *Ward* had to do with fines, financial motives of judicial decision makers, and the Due Process Clause, the two decisions were the foundation 27 years later for the Court's reasoning when it was time to consider campaign dollars, judicial decision making, and political patronage. In *Caperton v. A. T. Massey Coal Co*., 556 U. S. 868 (2009), the Court held that the Due Process Clause of the 14th Amendment requires recusal, not only when actual bias has been demonstrated or when the judge has an economic interest in the outcome of the case, but when extreme facts create a probability of bias. In *Caperton*, the Court applied an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable." *Id.* at 872. To this end, *Williams* simply further articulates circumstances that create a probability of bias and that run afoul of the Due Process Clause.

A plea is not necessarily involuntary because the defendant pled guilty under the mistaken belief that specific evidence would be available for use against him at trial, and thus does not violate due process.

Ex parte Palmberg, 491 S.W.3d 804 (Tex. Crim. App. 2016)

In a 6-3 decision, Judge Yeary delivered the opinion of the Court. Based on U.S. Supreme Court case law, the majority points out that the voluntariness of a defendant's plea is not contingent upon his awareness of the full dimension of the prosecution's case; the reality being that every defendant who enters a guilty plea "does so with a proverbial roll of the dice." The correct question for due process purposes is not whether the applicant knew every fact relevant to the prosecution of his case. Rather, the correct question is whether he was aware of sufficient facts—including an awareness that there are or may be facts that he does not yet know—to make an informed and voluntary plea.

The majority also points out the practical reason that warrants such an interpretation of "voluntariness" for guilty plea purposes. "Simply put, a requirement that a defendant be completely informed about every fact relevant to his prosecution at the time of his plea (even facts that no one directly involved in the plea process—including the prosecutor—could possibly yet know) would impose an untenable and undesirable burden on the institution of plea bargaining."

The majority notes that its analysis does not mean that they would never grant relief to an uninformed applicant, for example if the applicant was misled by the prosecutor or because of ineffective assistance of counsel.

Judge Alcala dissented, joined by Judges Meyers and Johnson, finding that in assessing the merits of the applicant's claim, the habeas court properly considered and determined that, had the applicant known that the substance could not be tested by a laboratory and that the State would not have prosecuted him for the offense if it had been aware of that fact, he would not have pleaded guilty to this offense and, therefore, his guilty plea was involuntary. The dissenting judges find that the

majority's opinion cannot be reconciled with *Ex parte Mable*, 443 S.W.3d 129 (Tex. Crim. App. 2014), which should remain the controlling precedent.

II. Substantive Law

A. Penal Code

Prosecuting the governor of Texas for exercising his absolute right to veto legislation violates the separation of powers under the Texas Constitution; prosecuting the governor for merely threatening to veto legislation violates the 1st Amendment.

Ex parte Perry, 483 S.W.3d 884 (Tex. Crim. App. 2016)

A Travis County grand jury returned a two-count indictment against former governor, Rick Perry; Count I alleged the offense of "abuse of official capacity" (Section 39.02, Penal Code), and Count II alleged the offense of "coercion of a public servant" (*Id.*; Section 36.03, Penal Code). The Court summarized the background this way: Count I alleged that Perry abused his official capacity by misusing funds appropriated to the Public Integrity Unit of the Travis County District Attorney's Office, and Count II alleged that he coerced a public servant—District Attorney Rosemary Lehmberg—by threatening to veto the funds for that unit if she did not resign. The trial court denied habeas relief for both counts. The court of appeals affirmed the trial court's denial of habeas relief as to Count I but reversed the denial of habeas relief as to Count II and ordered the trial court to dismiss Count II.

Addressing Count I, after first determining that Perry was entitled to raise his claims by pretrial habeas corpus because a separation of powers claim (here, an as applied challenge) that alleges infringement of the governor's power involves a constitutional right that includes a right to avoid trial by litigating the issue before trial, the Court concludes that the Texas Legislature cannot directly or indirectly limit the governor's veto power. This conclusion is based on the inability of Congress to directly or indirectly limit the President's power to veto. *Pocket Veto Case*, 279 U.S. 655, 677-78 (1929) and the holdings of other state courts of last resort (Minnesota and Massachusetts) that the governor's veto power is absolute if it is exercised in compliance with the state constitution and that courts may not examine the motives behind a veto or second-guess the validity of a veto. Because the only act being prosecuted here was a veto, the prosecution itself violates separation of powers.

As to Count II, Perry challenged the definition of "coercion" in Subsection 1.07(f) as it is incorporated into Section 36.03 of the Penal Code (Coercion of Public Servant or Voter) as overbroad in violation of the First Amendment. Finding that an overbreadth challenge may focus on this particular statutory meaning of coercion and that the State's proffered definition of "threat" and construction of the exception were too narrow, the Court analyzes whether the 1st Amendment is implicated. It is. The Court concludes that the portion of Subsection 36.03(a)(1) Penal Code at issue here, as it incorporates Subsection 1.07(a)(9)(F), is unconstitutionally overbroad in violation of the 1st Amendment. The Court explains that public servants have a 1st Amendment right to engage in expression, even threats, regarding their official duties. Because of the Court's construction of the "governing body" exception, officials subject to criminal liability under the provisions at issue in this case include any public servant who, as a single individual, controls a governmental entity. This includes the Governor, Attorney General, Comptroller, Secretary of State, Land Commissioner, tax-assessor collectors, and trial judges.

Judge Alcala, joined by Judge Newell, concurs in the lead opinion by Presiding Judge Keller that renders judgment in favor of Rick Perry, but writes separately to explain to lower courts to take the approach in the lead opinion in determining which claims are cognizable through pretrial habeas corpus. It is the nature of the constitutional right at stake that drives the pretrial-cognizability inquiry; this principle-based approach adheres to the underlying purpose of the writ of habeas corpus.

Judge Newell, joined by Judges Keasler and Hervey, filed a separate concurring opinion "because it appears…that everyone is making this case more complicated than it is because of who it involves." As to Count I (the pretrial habeas corpus issue), it became apparent from the face of the pleadings that the prosecution of the appellant violated a constitutional provision (separation of powers). No factual development was necessary; under *Ex parte Boetscher*, 812 S.W.2d 600 (Tex. Crim. App. 1991), the trial court was authorized to consider the appellant's legal claim in a pretrial application for writ of habeas corpus (Judge Newell points out that Presiding Judge

Keller correctly observes that this claim would also be "cognizable" on a pretrial writ of habeas corpus to vindicate a constitutional right that would be effectively undermined if a defendant could only receive relief from that constitutional violation after trial). "While it is certainly more likely that an as-applied challenge would require development of facts outside the pleadings, we should not bar consideration of a pretrial claim when the pleadings themselves establish an infringement of a constitutional right simply because the claim is labeled an 'as-applied challenge.'"

As for Count II, Judge Newell agrees with the majority that the court of appeals properly held that the statutory definition of "coercion" at issue in this case is facially unconstitutional because it criminalizes a substantial amount of protected 1st Amendment speech, but finds it unclear why the Court does not simply adopt the reasoning of the court of appeals in affirming the court of appeals' decision.

Judge Meyers dissented, disagreeing with the majority's resolutions to both the appellant's and the State's claims. As to Count I, Judge Meyers finds that because the resolution would be aided by the development of evidence at trial, these claims do not have pretrial cognizability. Thus, the separation of powers claim does not need to be addressed at this time. As to Count II, Judge Meyers disagrees that the coercion-of-a-public-servant statute is facially unconstitutional because it is overbroad, finding that the majority only gets to this conclusion by employing an overly broad definition of "threat." Thus, because the statute is not overbroad, it should be that, where an individual is concerned that his prosecution under this statute is not supported by the evidence, it becomes an issue to be considered once the case has been tried and a conviction occurs.

Judge Johnson also dissented finding this case does not involve separation of powers. Judge Johnson finds "nothing in the plain meaning of the Texas Constitution that permits the executive branch of the state to interfere in the affairs of a different sovereign and then claim the protection of the state doctrine of separation of powers, which is intended to keep one branch of state government from interfering with the powers assigned to either of the other two state branches." Like Judge Meyers, Judge Johnson disagrees with the majority's "loose usage" of the word "threaten." She also takes issue with the references to "Governor Perry" instead of "appellant."

Judge Richardson did not participate.

Commentary: This is another case where you need to count the votes. Presiding Judge Keller delivered the opinion of the Court as to Parts I, II.B.3, III and IV in which Judges Keasler, Hervey, Alcala, Yeary, and Newell joined and announced the judgment of the Court and filed an opinion as to the remainder of Part II in which Judges Alcala and Yeary joined. Judge Newell's concurring opinion provides a simple and abbreviated synopsis of the case that is useful.

A defendant used the requisite force against the officers under Section 38.03 of the Penal Code where he "clench[ed] up, pull[ed], and tr[ied] to pull his arm away" from officers and kept pulling his arm forward towards his body—the opposite direction from the officers' efforts.

Finley v. State, 484 S.W.3d 926 (Tex. Crim. App. 2016)

Judge Keasler delivered the opinion of the Court, basing the holding on the construction of the phrase, "by using force against a peace officer or another," within the resisting arrest statute's context in *Dobbs v. State*, 434 S.W.3d 166, 171 (Tex. Crim. App. 2014). Applying a plain meaning approach to the word "force," the Court found in *Dobbs* that force requires some "violence, compulsion, or constraint exerted upon or against a person or thing." The Court further defined "against" in Section 38.30 as "in opposition or hostility to;" "contrary to;" "directly opposite;" "in the direction of and into contact with;" or "in a direction opposite to the motion or course of."

Judge Meyers dissented in light of the more extreme facts in *Dobbs* where the Court did not find requisite force, "having a hard time understanding how brandishing a weapon in the presence of multiple police officers and threatening to shoot yourself if the officers attempt to arrest you—a situation that could result in the death or serious injury of multiple people—is not using force against an officer but holding your arms in front of you is."

A judge committed Theft of a Public Servant by Deception (Sections 31.01 and 31.03 of the Penal Code) where he purchased an airline ticket for county-approved travel with a county credit card, but later used the voucher resulting from the

cancellation of the ticket for personal travel without correcting the impression that the ticket would be used for county-approved business.

Fernandez v. State, 479 S.W.3d 835 (Tex. Crim. App. 2016)

Here, a justice of the peace directed his clerk to make travel arrangements for him to attend a conference in Florida. The county auditor received documentation supporting the county-business nature of the trip. Upon falling ill, he instructed his clerk to cancel the trip, which resulted in a voucher from the airline. Later that year, he asked his clerk for the reservation number and told her to call his son and give him the number. The clerk later tried to get a refund for the ticket only to discover it had been used for a flight to Phoenix. An investigation by the Attorney General resulted in a charge and conviction of theft by a public servant by way of deception. The court of appeals affirmed.

In an opinion written by Presiding Judge Keller, the Court found that the voucher was the property of the county and that the judge induced consent by deception. As is relevant to this case, deception means "failing to correct a false impression of law or fact that is likely to affect the judgment of another in the transaction, that the actor previously created or confirmed by words or conduct, and that the actor does not now believe to be true."

Here, the justice of the peace did not tell his clerk that he was using the ticket for personal travel, and he did not inform the county auditor that he was using the ticket at all, as he had done for the Orlando ticket. He made no representation about how the airline ticket would be used. Instead, by remaining silent, he left intact the impression he originally created that the airline voucher would be used for county-approved travel. His silence was deceptive, according to the Court.

Judge Johnson concurred only in the judgment, finding that the appellant's failure to inform the county official who possesses the authority to approve travel expenses for county employees, which does not include his clerk, was the deception that is required to support a conviction.

Conviction was upheld where a defendant claimed double jeopardy for multiple convictions of Failure to Appear where the hearing for three separate charges was held on the same day at the same time.

Ex parte Marascio, 471 S.W.3d 832 (Tex. Crim. App. 2015)

Marascio was convicted of three charges of felony Bail Jumping and Failure to Appear (Section 38.10, Penal Code), and was sentenced to eight years' imprisonment for each charge, to run concurrently. In these applications for writ of habeas corpus under Article 11.07 of the Code of Criminal Procedure, Marascio contended that these multiple convictions violate the constitutional prohibition against double jeopardy. The Court set these applications to determine several issues associated with Marascio's double-jeopardy claims and concluded that Marascio is not entitled to relief.

Commentary: This is an odd case where the concurring and dissenting opinions cast a shadow over the per curiam. The number of differing opinions makes it appear that the Court is divided as to the core questions: Is a defendant required to raise a double jeopardy argument on direct appeal or lose the ability to challenge one of his convictions on collateral attack? Are all double jeopardy claims the same or does it vary depending on the nature of the offense? While much of this decision has to do with issues of procedural default and the proper application of precedent, it left us wondering whether the peculiar nature of the offense of Section 38.10 is an important factor. See, Ryan Kellus Turner, "Sorting Out the Anomaly: Non-Appearance Crimes in Light of *Azeez v. State,*" *The Recorder* (June 2008).

In absence of charging and proving a culpable mental state, as part of an amended nuisance complaint, a sentence of a $2000 fine exceeded the amount of $500, permitted by Section 6.02(f), Penal Code, and was an illegal sentence.

O'Reilly v. State, 2016 Tex. App. LEXIS 9519 (Tex. App.—Dallas August 26, 2016, no pet.)

Following a jury trial in the Richardson Municipal Court for two Class C misdemeanors, O'Reilly was convicted of (1) a nuisance violation (allowing trash and debris to accumulate in a manner offensive or injurious to the public health), and (2) an "open-storage" violation (i.e., knowingly permitting outdoor storage of items not normally stored or used outside

where they were visible from the public right-of-way for more than 24 hours).

The jury assessed a $2000 fine for the nuisance-ordinance violation and a $400 fine for the outdoor-storage-ordinance violation. On appeal, the county criminal court of appeals affirmed the judgments of the municipal court of record. O'Reilly appealed to the court of appeals.

The court of appeals held that: (1) there was sufficient evidence from which a rational jury could have decided that the defendant's accumulation of items in his yard violated the ordinances as charged because it was estimated that the accumulated items still occupied 50 percent of the lot and numerous items and debris remained on his property at the time the citations were issued; (2) the offenses as charged had different elements and did not constitute double jeopardy; and (3) the defendant's sentence of a $2000 fine exceeded the amount permitted by Texas law because the City failed to charge and prove a mental state as part of the amended nuisance complaint. The maximum fine was limited to $500.

After considering arguments, which included a sufficiency challenge and an alleged double jeopardy violation, the court of appeals affirmed the conviction of the "outdoor storage" violation and affirmed the nuisance violation, but reversed that part of the judgment of the county court of appeals affirming O'Reilly's $2000 fine and remanded it to the municipal court for a new punishment hearing.

An illegal sentence is one that is not authorized by law. A sentence that is outside the range of punishment authorized by law is considered illegal. A fine outside the range authorized by law is an illegal sentence. Citing *Ex parte Pena*, 71 S.W.3d 336, 336 n.2 (Tex. Crim. App. 2002), the court of appeals explained that a defendant may obtain relief from an unauthorized sentence on direct appeal or by a writ of habeas corpus. Furthermore, because no court can assess a punishment that the law does not authorize, an illegal sentence cannot be waived and may be challenged at any time.

A culpable mental state is required for municipal offenses that impose a fine in excess of $500. Section 6.02(f), Penal Code. An offense defined by municipal ordinance or by order of a county commissioners court may not dispense with the requirement of a culpable mental state if the offense is punishable by a fine exceeding $500. Neither the complaint for the nuisance violation nor the jury charge addressed a mental state. The jury's conviction, therefore, did not include a finding that O'Reilly had any culpable mental state. Defendants are under no obligation to raise such an omission before submitting a charge to a jury. The court of appeals had no authority to reform an illegal or void sentence by adding a punishment of any amount; the only remedy was a new punishment hearing.

Commentary: This case is timely in light of the focus on fines. A fine that is either more or less than allowed by law is an illegal sentence. Since its passage in 2007, there has been a good deal of justified speculation about Section 6.02(f). Without questioning either the rationale or reasoning behind the portion of the opinion stating that an illegal sentence of a fine cannot be waived and may be challenged at any time, the practical and legal reality is that a lot of questions remain unanswered about what must occur before a defendant can obtain relief from an unauthorized fine on a writ of habeas corpus. This case only illustrates how to obtain relief on appeal.

Subsection 20A.02(a)(7)(C) of the Penal Code (trafficking a child and by any means causes the child to engage in, or become the victim of, certain prohibited conduct) is not facially overbroad or vague.

Kuhl v. State, 2016 Tex. App. LEXIS 6350 (Tex. App.—Texarkana June 16, 2016, no pet.)

The court found the appellant failed to overcome his burden to show the statute was unconstitutional because (1) he did not assert that any constitutionally protected conduct was implicated by the statute, which is required to prevail on an overbreadth claim, and (2) he made no showing that the statute is impermissibly vague as applied to him and his conduct; further the evidence clearly shows that he knowingly transported a child and caused her to engage in the prohibited conduct.

The evidence was insufficient to support a conviction under the human trafficking statute where the charging instrument, part of the jury charge, and the State's proof at trial focused on a form of "forced labor or services" that included sexual

conduct because the Penal Code's definition of that phrase means labor and services other than those that constitute sexual conduct.

Davis v. State, 488 S.W.3d 860 (Tex. App.—Fort Worth 2016, no pet.)

Section 20A.02 of the Penal Code (Trafficking of Persons) provides multiple statutory alternatives for committing the offense. Here, the State did not plead or mention in the jury charge any of the alternative methods for committing the offense under the statute that could involve sexual conduct (i.e., Subsections 20A.02 (a)(2)-(4), (6)-(8)). Instead, the State used the language from Subsection 20A.02(a)(1), "forced labor and services," which is defined in Section 20A.01 as "labor or services, other than labor or services that constitute sexual conduct… ."

Participation in paid daily fantasy sports leagues is a Class C misdemeanor under Section 47.02 of the Penal Code (Gambling); however, participation in traditional fantasy sport leagues, though also illegal gambling, may satisfy a statutory defense to prosecution under Subsection 47.02(b).

Tex. Atty. Gen. Op. KP-0057 (1/19/16)

Participants in traditional fantasy sport leagues may avail themselves of the defense to prosecution in Subsection 47.02(b) if play is in a private place, no person receives any economic benefit other than personal winnings, and the risks of winning or losing are the same for all participants. The difference between the two leagues hinges on whether "the house takes a rake," i.e., gaming sites that retain a portion of the fees collected instead of paying them out to participants.

B. Transportation Code

The officer had reasonable suspicion to stop a driver for suspicion of DWI where the driver failed to maintain a single lane of traffic and drove well below the speed limit.

Leming v. State, 2016 Tex. Crim. App. LEXIS 73 (Tex. Crim. App. April 13, 2016)

Officer Gilow received a citizen's report from dispatch of a vehicle on the road that was swerving from side to side. The report was made by Arliss who described the vehicle as an older style white Jeep. Gilow located the vehicle driven by Arliss and the vehicle matching Ariliss' description. The officer observed the white Jeep driven by Leming start from a position fairly close to the curb and cut all the way over to the broken white stripes that divide the lanes, where he touched them but did not cross over. Leming weaved back and forth like that for quite some time, but he did not go past the white striped lines. Officer Gilow also observed, and confirmed with radar, that the white Jeep was driving well below the speed limit and slowing down. Officer Gilow initiated a traffic stop. He detected a mixed odor of cigarettes and old liquor. Leming denied drinking alcohol, but admitted to taking clonazepam and hydrocodone. He was arrested for and charged with felony DWI. Leming filed a motion to suppress, which the trial court denied. The court of appeals reversed, holding that the officer lacked reasonable suspicion to detain Leming.

In a plurality opinion, written by Judge Yeary, the Court of Criminal Appeals reversed.

Section 545.060(a) of the Transportation Code, which provides that an operator on a roadway divided into two or more clearly marked lanes for traffic: (1) shall drive as nearly as practical entirely within a single lane; and (2) may not move from the lane unless that movement can be made safely.

Judge Yeary, joined by Presiding Judge Keller, Judge Meyers, and Judge Richardson, opined that the basic tenants of statutory construction supported a reading of the statute as requiring the driver to either (1) fail to maintain a single lane as far as is practical, or (2) change lanes without checking to assure the maneuver can be accomplished safely before it may be said that he has committed an offense. Under this interpretation of the statute, Officer Gilow had reasonable suspicion that Leming failed to drive as nearly as practical entirely within a single lane of traffic. The officer did not have to have proof of the actual commission of the offense. Personal observation that Leming had several times at least come very close to entering the adjacent lane was sufficient.

According to the plurality, Officer Gilow had reasonable suspicion to believe that Leming was driving while intoxicated. The officer had a dispatch

report from a partially-identified informant that he had observed Leming's Jeep weaving from side to side. Gilow observed the Jeep to be traveling unusually slow and swerving fairly radically within the dedicated lane, nearly striking a curb. These observations were recorded on a dash-cam video. Thus, Arliss' tip was corroborated.

In a concurring opinion, Judge Richardson, joined by Judge Meyers, stated that he did not disagree with the majority's analysis of Section 545.060. He added that he believed that the stop was justified under the community caretaking exception.

In a dissenting opinion, Judge Keasler, joined by Judge Johnson and Judge Hervey, disagreed with Judge Yeary's interpretation of Section 545.060(a), arguing that the plain meaning of the statute, and the fact that the two offenses were joined by the conjunction "and," made it clear that the requirements must both be satisfied for the offense to be committed. The word "and" should not be read as an "or." There was independent reasonable suspicion for a stop and the Court's expansive holding elevates weaving within the lane to establish per se reasonable suspicion for DWI.

Although he agreed with Judge Keasler on the interpretation of Section 545.060(a), Judge Newell filed a separate dissenting opinion stating that he would remand the case to the court of appeals for consideration of whether there was reasonable suspicion to stop the vehicle for suspicion of DWI. He agreed with Judge Keasler that it was a "close call," but the court of appeals had no opportunity to address the arguments presented by the State on discretionary review.

Commentary: In Texas criminal law circles, this case lit up the internet and TMCEC's phone lines. It has been described as one of the most significant traffic stop decisions that the Court of Criminal Appeals has issued. However, count the votes carefully in this case. Judge Yeary announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV. He was joined by Presiding Judge Keller, Judge Meyers, Judge Alcala, and Judge Richardson. However, most of the clamor surrounding this case has to do with the analysis in Part II – Failure to Maintain a Single Lane. It is important to emphasize that while there were four judges who subscribed to Judge Yeary's statutory interpretation of Failure to Maintain a Single Lane, there were also four judges that disagreed with it. Accordingly, how to interpret Section 540.060(a) is an open question and ripe for debate. On a separate note, however, five judges subscribed to the proposition that weaving within a lane can be considered, with other facts, to give rise to reasonable suspicion to stop a vehicle for suspicion of DWI.

Section 29-189 of the Pearland Code of Ordinance's turn signal requirement is more restrictive than Section 545.104 of the Transportation Code (Turning at an Intersection), but does not conflict with state law. The Pearland ordinance does not attempt to make legal something the Texas Legislature has explicitly restricted by statute, but instead constitutes a permissible further regulation of traffic as allowed by Section 542.201 of the Transportation Code.

Nichols v. State, 494 S.W.3d 854 (Tex. App.—Houston [14th Dist.] 2016, no pet.)

Nichols was charged with a Class B misdemeanor offense of possession of marijuana (Section 481.121(b)(1), Health and Safety Code). The State offered to reduce the offense to a Class C misdemeanor charge for possession of drug paraphernalia (Section 481.125(d), Health and Safety Code). Nichols accepted the State's offer and pleaded guilty; punishment was assessed at a fine of $500. He also completed a drug awareness class before punishment was assessed.

More than two years later, Nichols filed a post-conviction writ of habeas corpus contending that his guilty plea was involuntary because trial counsel rendered ineffective assistance. His post-conviction writ was denied, and he appealed. The court of appeals affirmed. Nichols' ineffective assistance of counsel claim contended that his guilty plea was involuntary because trial counsel failed to recognize a key legal issue concerning the legality of the traffic stop and counsel erroneously failed to advise Nichols to pursue a motion to suppress evidence obtained from the search of Nichols' car.

Nichols claimed that in light of Section 545.104 of the Transportation Code (requiring an operator to use a turn signal to indicate an intention to turn, change lanes, or start from a parked position when a vehicle is being operated on a highway) and *State v. Ballman*, 157 S.W.3d 65 (Tex. App.—Fort Worth 2004, pet. ref'd)

(holding that Section 545.104 does not apply to vehicles turning from a private parking lot onto a highway), that the police officer who stopped Nichols did not have probable cause or reasonable suspicion for the traffic stop. Nichols argued that, had his trial counsel conducted an appropriate pretrial legal investigation, his trial counsel would have advised him to pursue a motion to suppress the evidence and not plead guilty to the lesser offense.

The State called Nichols' trial counsel as a witness during the hearing on Nichols' writ of habeas corpus. Nichols' trial counsel testified that during his investigation of Nichols' case he reviewed the relevant Section 545.104. He also testified that he was aware of case law indicating that Section 545.104 does not require a driver to signal when exiting a private drive or a parking lot. The trial counsel, however, also testified that he discovered a potentially relevant Section 29-189 of the City of Pearland Municipal Code (requiring drivers to signal at least 100 feet before turning), which appears to apply to all roadways and makes no distinction between drivers already on a roadway and those entering a roadway. Additionally, the State had made it clear that if trial council pursued a motion to suppress that there would be no plea bargain.

Nichols asserted that his trial counsel's reliance on the Pearland municipal code was misplaced and objectively deficient because Section 542.201 of the Transportation Code states that a local authority may not enact or enforce an ordinance or rule that conflicts with Title 7, Subtitle C of the Transportation Code unless expressly authorized by the subtitle. The court of appeals, citing Section 542.201 and *State v. Patterson*, 291 S.W.3d 121 (Tex. App.—Amarillo 2009, no pet.), rejected this argument because local authority may regulate traffic in a manner that does not conflict with Title 7, Subtitle C.

Arguably, Nichols' failure to use a signal when turning onto the highway provided reasonable suspicion for his traffic stop. *Ballman* did not contemplate a city ordinance. His trial counsel could not have known how the trial court would interpret the Pearland municipal ordinance, and therefore could not have known with any reasonable degree of certainty how the trial court would have ruled on a motion to suppress.

Commentary: Let us emphasize that this is an ineffective of assistance of counsel case, not a direct challenge to the authority of a municipality to adopt ordinances that are more restrictive than state law. Prosecutors, and other government lawyers, should carefully consider whether this case stands for the proposition that a municipal traffic ordinance may be more restrictive than the Transportation Code.

It was predicted in 2010 that, in terms of habeas corpus, it was just a matter of time until a court of appeals gave complete consideration to the merits of an ineffective assistance of counsel claim involving a Class C misdemeanor in municipal court. See, Ryan Kellus Turner and Katie Tefft, "Case Law and Attorney General Opinion Update TMCEC Academic Year 2011," *The Recorder* (December 2012) at 12. Consideration of the merits occurred in this case, albeit it was a Class C misdemeanor in a county court. Although it may be overlooked because of the focus on the interplay between state and local laws governing the use of turn signals, *Nichols* is a notable Class C misdemeanor habeas corpus decision.

A person convicted of a misdemeanor who is confined or restrained as a result of that conviction or otherwise subject to collateral legal consequences because of the conviction may challenge the conviction's validity by filing an application for writ of habeas corpus. Articles 11.05 and 11.09, Code of Criminal Procedure; *Ex parte Schmidt*, 109 S.W.3d 480, 483 (Tex. Crim. App. 2003). Albeit rare, habeas corpus can be used to challenge Class C misdemeanor convictions. While there have been previous efforts, in other published opinions, to assert an ineffective assistance of counsel claim in municipal court proceedings, other courts have not reached the merits of such claims. *Ex parte Rinkevich*, 222 S.W.3d 900 (Tex. App.—Dallas 2007, no pet.); *Ogbodiegwu v. State*, 2010 Tex. App. LEXIS 1020 (Tex. App.—Austin February 12, 2010, pet. ref'd), *cert. denied*, *Ogbodiegwu v. Texas*, 2011 U.S. LEXIS 2736 (Apr. 4, 2011)).

The potential for an ineffective assistance of counsel claim stemming from municipal court proceedings is interesting. Consider the facts in *Rinkevich* (the trial lawyer allegedly did not know that appeals from municipal courts of record do not result in a trial de novo). The use of habeas corpus in this context is distinct from cases like *State v. Pierce*, 2013 Tex. App. LEXIS 7421 (Tex. App.—Dallas June 18, 2013, no

pet.) where the court of appeals reversed a county court order granting habeas corpus relief given that (1) the majority of the claims were issues attacking municipal court proceedings that resulted in the judgment of conviction; (2) an out-of-time appeal, if appropriate, would have protected the appellee's ability to challenge the judgment of conviction; and (3) by ordering the municipal court to vacate its judgment, the county court granted the appellee more relief than was needed to preserve his rights, which was an abuse of discretion.

The municipal court did not err in denying a defendant's motion for directed verdict (Article 45.032, Code of Criminal Procedure) because exceptions listed in Section 601.052 of the Transportation Code are not a necessary part of the definition or description of the offense of operating a motor vehicle without financial responsibility (Section 601.191, Transportation Code), and do not need to be alleged in a complaint.

Arias v. State, 477 S.W.3d 925 (Tex. App.—Houston [14th Dist.] 2015, no pet.)

Because Section 601.191 states that a person commits an offense by operating a motor vehicle in violation of Section 601.051, a prima facie case can be made without proof negating the exceptions in Section 601.052. The exceptions are defenses to the offense.

No authorization exists to utilize an automated photographic or similar system to enforce financial responsibility laws in Chapter 601 of the Transportation Code.

Tex. Atty. Gen. Op. KP-0076 (4/25/16)

Commentary: The request for this opinion was made by a county; however, the reasoning applies to all types of local governments. The Legislature has addressed the use of similar automated technology for other enforcement purposes (red light cameras and toll roads for example), but has not enacted a law granting authority for photographic insurance enforcement systems.

C. Domestic Violence

A reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" that prohibits firearms possession by convicted felons under 18 U.S.C. § 922(g)(9) (Enhanced Sentencing for Felons in Possession of a Firearm).

Voisine v. U.S., 136 S. Ct. 386 (2015)

Federal law makes it a crime for felons to possess firearms. In 1996, Congress broadened the federal law to include "misdemeanor crimes of domestic violence," which includes any misdemeanor committed against a domestic relation that necessarily involves the "use … of physical force." In separate unrelated matters, Voisine and Armstrong pleaded guilty to domestic violence assaults under the Maine Criminal Code, which makes it a misdemeanor to "intentionally, knowingly, or recklessly cause bodily injury" to another.

When law enforcement officials later investigated Voisine for killing a bald eagle, they learned that he owned a rifle. While searching Armstrong's home as part of a narcotics investigation a few years later, law enforcement officers discovered six guns and a large quantity of ammunition. Both Voisine and Armstrong were prosecuted for possessing guns. Both contended that a "reckless" assault does not involve the "use" of force. This argument was rejected by the trial court and on appeal. The Court granted certiorari to resolve a disagreement between courts of appeals over whether a misdemeanor conviction for recklessly assaulting a domestic relation disqualifies an individual from possessing a gun under § 922(g)(9).

In a 6-2 decision, the Supreme Court affirmed. Justice Kagan, writing for the majority, explained that the relevant statutory text did not preclude an interpretation that encompasses an act of force carried out recklessly, or with a conscious disregard of the substantial risk of causing harm. Justice Kagan asserted that the legislative history supported this interpretation of the statute because Congress expressly intended for the statute to prevent those convicted of misdemeanors of domestic assault from being able to purchase firearms.

Justice Thomas, joined in part by Justice Sotomayor, dissented. Justice Thomas opined that the term "use of force" requires intentional conduct to trigger the statutory firearm prohibition and the majority opinion conflated recklessly causing force with recklessly causing harm through the intentional use of force. Furthermore, a conviction under the Maine domestic violence statute should not trigger the firearm

prohibition because it encompassed reckless conduct, while the federal statute did not. According to Justice Thomas, to construe the statutes otherwise relegates the 2nd Amendment to a second-class right and that no other constitutional right is treated so cavalierly. Justice Thomas observed that at oral argument, the government could not identify any other fundamental constitutional right that a person could lose forever by a single conviction punishable only by a fine.

Commentary: In Texas, a family violence misdemeanor punishable only by a fine requires a culpable mental state that the act be committed either intentionally or knowingly. Nevertheless, in terms of family and domestic violence in Texas, Section 22.01 of the Penal Code contains other derivatives of assault which include a reckless culpable mental state. Although *Voisine* has to do with federal prosecution of federal law, this case further underscores that there are potentially unforeseen consequences for defendants in federal courts who have previously pleaded guilty to misdemeanor domestic violence charges in state courts. In this sense, *Voisine* builds upon *United States v. Castleman*, 134 S. Ct. 1405 (2014) (holding that when a defendant is convicted under a state's misdemeanor assault law of "intentionally or knowingly causing bodily injury" to anyone in a class of people outlined in 18 U.S.C. § 922(g)(9), the assault constitutes a "misdemeanor crime of domestic violence" under that federal statute and prohibits the possession of a firearm.). See, Ryan Kellus Turner and Regan Metteauer, "Case Law and Attorney General Opinion Update TMCEC Academic Year 2015," *The Recorder* (November 2014) at 27-28.

The evidence was sufficient to support a conviction for violation of a protective order and the appellant was not entitled to a directed verdict because the alleged failure of the magistrate to make a separate record of service as required by Article 17.292(j) of the Code of Criminal Procedure is not an element of the offense and the fact of such a record was shown by the appellant's signature on the protective order, the regularity of which is presumed.

Dunn v. State, 2016 Tex. App. LEXIS 6017 (Tex. App.—Houston [14th Dist.] June 7, 2016, pet. ref'd)

A magistrate issued a Magistrate's Order for Emergency Protection (MOEP) under Article 17.292 of the Code of Criminal Procedure prohibiting the appellant from going to or near the residence of the protected individual, the complainant, or a member of the family or household, the residence specifically described in the MOEP. A deputy responded to a 911 call and, after talking to the complainant outside and verifying the MOEP existed, found and arrested the appellant in the complainant's residence; the complainant called 911 fearing someone was inside her home. The appellant was convicted of violating a protective order and appealed, challenging the sufficiency of the evidence. He argued that there was no proof that he signed the MOEP, specifically the signature is illegible and no handwriting evidence was proffered at trial. The court disagreed in light of the presumption of regularity of the MOEP and the absence of any evidence in the record showing that the signature on the MOEP did not belong to the appellant; the signature on the MOEP is evidence that the appellant signed the MOEP and certified that he was present at the hearing, received a copy of the MOEP in open court, and had knowledge of the issuance of the MOEP. Further, the appellant's attempts to evade suggest he had a consciousness of guilt and knew his presence there was prohibited.

Likewise, the signature on the MOEP certifying that he received a copy of the MOEP in open court provides evidence that the magistrate complied with Article 17.292(j) by serving the MOEP on the appellant personally. However, the court points out that the magistrate's making of a separate record of service is not an element of the charged offense and the appellant does not assert that the MOEP is void on its face.

III. Procedural Law

A. Code of Criminal Procedure

1. Bail

The trial court abused its discretion by imposing the bond condition of home confinement.

Ex parte Allen-Pieroni, 2016 Tex. App. LEXIS 2048 (Tex. App.—Waco February 24, 2016, no pet.)

The defendant was arrested for the possession of a weapon in a prohibited place and evading arrest. The trial court abused its discretion by denying habeas relief on the home-confinement bond condition (Art. 17.44, Code of Criminal Procedure) because she was not charged with an offense involving violence and she was

not a flight risk. The trial court was frustrated with the defendant's exhibition of a gun to her ex-husband while picking up her children, but that conduct should have been addressed in a child-custody proceeding.

The trial court did not improperly take judicial notice of events in the child-custody proceeding, because Rule of Evidence 101(e)(3)(C) provides that the rules of evidence do not apply in habeas proceedings to reduce bail.

Commentary: Setting the novelty of electronic home confinement aside, this is an interesting case in light of increased media coverage regarding bail practices. In addition to the statutory rules for fixing bail in Article 17.15 of the Code of Criminal Procedure, the court of appeals sets out the factors in case law: (1) the possible length of sentence for the alleged offense; (2) the nature and any aggravating factors of the offense; (3) the applicant's employment record, family and community ties, and length of residence in the jurisdiction; (4) the applicant's conformity with previous bond conditions; and (5) the applicant's prior criminal record.

To secure a defendant's presence at trial, a magistrate may impose any reasonable bond condition related to the safety of a victim of the alleged offense or to the safety of the community. Article 17.40(a), Code of Criminal Procedure. While home confinement and electronic monitoring are statutorily authorized bond conditions, bond conditions may not unreasonably impinge on an individual's constitutional rights. The court of appeals reiterates that one of the purposes of release on bail pending trial is to prevent the infliction of punishment *before* conviction. Accordingly, discretion to set the conditions of bail is not unlimited. A condition of pretrial bail is evaluated by three criteria: (1) it must be reasonable; (2) it must be to secure the defendant's presence at trial; and (3) it must be related to the safety of the alleged victim or the community.

The ability to make bond is one of many factors to be considered under Article 17.15 of the Code of Criminal Procedure; however, it does not control the amount of bail and will not automatically render an amount excessive. If the ability to make bond in a specified amount controlled, then the role of the trial court in setting bond would be eliminated, and the accused would be in the position to determine what his bail should be.

Jobe v. State, 482 S.W.3d 300 (Tex. App.—Eastland 2016, pet. ref'd)

Commentary: Given the serious nature of capital murder, the circumstances surrounding the crime, Jobe's potential sentence, the lack of evidence of any effort on Jobe's part to obtain a bond or of the ability of family and friends to help him do so, and the evidence that was presented at the hearing in this case, setting bail in the amount of $1 million was reasonable and not an abuse of discretion. Setting the nature of the offense in this case aside, in the current era of criminal justice reform, there are many who believe that the inability to post bond should in most cases control the amount of bail.

2. Statute of Limitations

The document filed by the State was both an information and a complaint, and therefore, it tolled the two-year statute of limitations under Article 12.02(a) of the Code of Criminal Procedure, which does not prohibit the filing of a single document that meets the requirements of both an information and a complaint to support an information.

State v. Drummond, 2016 Tex. Crim. App. LEXIS 1128 (Tex. Crim. App. September 28, 2016)

In a unanimous opinion, written by Judge Hervey, the Court reversed the court of appeals and concluded that the trial court erred by granting the motion to quash the indictment. The charging instrument presented to the trial court met the legal requirements of *both* a complaint and an information. Thus, the trial court had jurisdiction over the misdemeanor offense of official oppression.

Commentary: In AY 2016, this case was discussed at most TMCEC conferences in conjunction with *Ex parte Heilman*, 456 S.W.3d 159 (Tex. Crim. App. 2015) (overruling *Phillips v. State*, the applicant forfeited his statute of limitations claim by agreeing to waive the defense in a misdemeanor plea bargain to avoid the filing of a felony charge). We look forward to discussing this Court of Criminal Appeals decision throughout AY 17. Frankly, this opinion came as a bit of a surprise, not because of its holding but because the lower court's opinion in *State v. Drummond*, 472 S.W.3d 857 (Tex. App.—Houston [1st Dist.] 2015)

does not seem to contemplate that the document which contained the complaint also contained the proper accusatory pleading, the information.

Why the interest in *Drummond*? Initially, when before the court of appeals, it was because of the State's misinterpretation of Articles 12.02 and 12.05 of the Code of Criminal Procedure. In 2009, the Legislature amended Article 12.02, which now states that a complaint or information for a Class C misdemeanor may be presented within two years from the date of the commission of the offense and not afterward. Prior to 2009, the Code of Criminal Procedure was silent as to whether the filing of a complaint tolled the statute of limitations. In this case, the State confused the implications of the amendment to Article 12.02 and contended that the addition of complaints extended to Class A misdemeanors. The court of appeals properly explained that filing a complaint only tolled the statute of limitations for Class C misdemeanors. We agreed with the court of appeals. In 2009, the Legislature clarified in Article 12.02 of the Code of Criminal Procedure what most assumed. Specifically, a Class C misdemeanor is no different than other misdemeanors; a complaint must be filed within two years from the date of the commission of the offense and not afterward. Yet, despite case law, because of differences between procedures used in municipal courts and county courts, the debate over the law pertaining to complaints and the statute of limitations for Class C misdemeanors is poised to continue. See, Cathy Riedel, "Class C Misdemeanors and the Statute of Limitations: Case Closed?," *The Recorder* (July 2010) at 4.

To be clear, this opinion does not really change the law: in misdemeanor cases, a proper charging instrument must be filed within two years from the date of the commission of the offense. The Court does, however, delineate the role of the complaint in Class C misdemeanors and its other contexts. In the Code of Criminal Procedure, the term "complaint" is used in three different contexts: (1) as a prerequisite to an information; (2) to obtain an arrest warrant, issue a summons, or authorize further detention of a suspect after a warrantless arrest; and (3) as the *sole* charging instrument in municipal and justice courts. *Huynh v. State*, 901 S.W.2d 480, 481 n.3 (Tex. Crim. App. 1995) (emphasis added). This case concerns the first category—complaints used to support an information. See also, Ryan Kellus Turner, "Complaints, Complaints, Complaints: Don't Let the Language of the Law Confuse You," *The Recorder* (July 2004).

At oral argument in the Court of Criminal Appeals, counsel for Drummond was asked whether a single document could meet the statutory requirements of both an information and a supporting complaint. He agreed that such was possible. He also conceded that the document in this case contained all of the necessary elements of both an information and a complaint. His sole argument was that a complaint and an information must be two separate documents.

The Court agreed with Drummond that "the Code of Criminal Procedure contemplates that the complaint and information should be two separate documents and that it is far more preferable to use two separate documents (which would have avoided the unnecessary problems in this case). But the Code does not prohibit the filing of a single document that meets the requirements of both an information and a complaint to support an information."

What can be extrapolated from *Drummond* about charging Class C misdemeanors and the statute of limitations? Let us reiterate the Court's reference to *Huynh*. The formal charging instrument is the complaint, not a citation. Furthermore, Article 27.14(d) of the Code of Criminal Procedure provides that "[i] f the defendant pleads 'not guilty' or fails to appear based on the written notice, a complaint *shall* be filed" (emphasis added). We are not big on reading tea leaves or guessing about possible future case law. However, this decision will certainly lead some to ask: if a document that meets the standards of a "complaint" can also contain the requisites for an "information," could a "citation" (i.e., written promise to appear) possibly meet the requirements for a "complaint?"

3. Pretrial Hearings

Under the plain language of Article 28.01 of the Code of Criminal Procedure, the trial court has discretion to hold an evidentiary hearing on a motion to quash and dismiss and such discretion is not limited based on the defendant meeting a certain threshold evidentiary requirement.

State v. Hill, 2016 Tex. Crim. App. LEXIS 1124 (Tex. Crim. App. September 21, 2016)

Hill filed a motion to quash and dismiss indictments due to prosecutorial misconduct. The State objected to the court's decision to hold an evidentiary hearing arguing the defense team was "trying to develop evidence they d[id]n't have, which is discovery," without the proper showing under Article 39.14 of the Code of Criminal Procedure. The court held the hearing and dismissed the indictments with prejudice. On direct appeal, the State challenged the propriety of the evidentiary hearing, arguing that Hill was not entitled to such a hearing because he failed to provide evidence to establish a constitutional violation.

Judge Richardson delivered the opinion for a unanimous Court. Article 28.01, Section 1 "contains no express legislative intent to deprive trial courts of their discretionary authority to hold pretrial evidentiary hearings on preliminary matters that can, and should be, resolved expeditiously." The Court declined to infer an intent to limit a trial court's discretion to hold an evidentiary pretrial hearing on a motion to quash or dismiss based on the language contained in Article 28.01, Section 1, Subsection (6), expressly authorizing oral testimony at a pretrial hearing on a motion to suppress. Further, the Court found no sense in requiring a defendant to preserve a complaint based on vindictive prosecution by filing a pretrial motion to quash and dismiss (a requirement found in *Neal v. State*, 150 S.W.3d 169 (Tex. Crim. App. 2004)), but then limiting the trial court's discretion to hold an evidentiary hearing on such motion.

As to the State's discovery issue, the Court disagrees that the federal case law cited by the State is controlling because the court of appeals did not expressly or fully address the separate issue of whether the trial court erred because its dismissal of the indictments was, in essence, the equivalent of a sanction against the State for failing to comply with discovery. Additionally, none of the other federal cases cited by the State and relied upon by the court of appeals hold that the State has a right to prevent a trial court from holding a pretrial evidentiary hearing requested by a defendant.

A defendant cannot use a pretrial motion to suppress to determine the sufficiency of the evidence to support an element of the offense; in this case, lawful detention is an element of the charged offense of failure to identify, and is thus, an improperly raised issue in a pretrial motion.

Gonzalez v. State, 2016 Tex. App. LEXIS 9751 (Tex. App.—Corpus Christi-Edinburg September 1, 2016, no pet.)

A trial court improperly granted a pretrial motion to suppress because it was required to provide the State with notice of the pretrial hearing pursuant to Article 28.01 of the Code of Criminal Procedure and failed to do so.

State v. Velasquez, 487 S.W.3d 661 (Tex. App.—San Antonio 2016, pet. granted)

The question before the court in this case was whether Article 28.01, Section 1 of the Code of Criminal Procedure requires the trial court to provide the State with notice prior to holding a pretrial hearing. The court first determines that the hearing conducted immediately before the trial began (the record reflects the matter was "set for trial," but void of any evidence that the case was called for trial) was a pretrial hearing pursuant to Article 28.01 based on the trial court judge's explanation on the record of what was happening. The court then finds that the Code of Criminal Procedure does not require the trial court to set a motion to suppress for a hearing prior to trial; however, when a trial court determines a matter should be heard prior to trial on the merits, Article 28.01 requires the trial court to "direct the defendant and his attorney, if any of record, *and the State's attorney*, to appear before the court at the time and place stated in the court's order for a conference and hearing." Article 28.01, Section 1 of the Code of Criminal Procedure (emphasis added by the court). The trial court was required to provide the State notice of the hearing, and thus erred by proceeding without providing notice.

One judge dissented, agreeing that Article 28.01 requires the trial court to provide the defendant, defense counsel, and the State's attorney with notice of the time and place of a pretrial hearing, but finding that the State was on notice that the trial court had discretion to consider the defendant's pending motion to suppress, filed six weeks earlier and still pending. In response to the State's second argument (not reached by the majority) that Article 28.01 requires notice to the State of the type of evidence to be considered at the pretrial hearing, the dissenting judge finds no such requirement.

4. Plea Bargains

Because a plea bargain was a package deal and part of the plea bargain could not be fulfilled, the entire plea bargain is unenforceable, thus the parties must be returned to their original positions.

Ex parte Cox, 482 S.W.3d 112 (Tex. Crim. App. 2016)

Pursuant to a plea bargain, the applicant pleaded guilty to one count and no contest to another count, both involving contraband, but separate offenses. The trial court found him guilty and sentenced him for both counts, with the sentences to run concurrently. On appeal, he challenged his conviction on the second count, alleging it failed to sufficiently allege an offense. The State argued that the applicant waived his right to appeal as part of the plea bargain. The court of appeals agreed with the State. On review of the application for habeas corpus, the Court granted relief and directed the trial court to allow withdrawal of the plea and return the parties to their original positions.

Presiding Judge Keller filed a concurring opinion, joined by Judges Keasler and Hervey, addressing the questions for the Court in this case: (1) what the proper remedy is when a defendant pleads guilty to multiple counts pursuant to a plea bargain and one of the counts is invalid; and (2) what makes a plea bargain a "package deal." According to the concurring opinion, a defendant's pleas to multiple counts or causes is a package deal when each plea is related to and conditioned on the acceptance of the plea recommendations in the other counts or causes. When the plea offer is "all or nothing," the parties have entered into a package deal. There was a package deal in this case. If a defendant is successful in invalidating part of the plea bargain, two variables affect the remedy: (1) if a defendant establishes that the plea was involuntary, then the contract was never valid, and the entire plea should be set aside; or (2) if the plea was voluntary, but a defendant shows that he is entitled to get out of one part of the plea bargain, he gives up his right to hold the State to its end of the plea bargain—the State is entitled to have the entire plea undone. But the State has another option. If it decides it would rather give up the right to have the entire plea undone and enforce the remaining part of the contract, it should be able to do that instead. The concurring judges agree that the plea here was involuntary, but not for the reason stated by the majority. "A defendant might well enter a voluntary plea, and benefit from it, even when one allegation fails to state an offense."

Commentary: This case has a thorough discussion of the nature of plea bargains as contractual agreements between the State and the defendant, with a focus on multiple-count plea bargains. The Court applies general contract-law principles when reviewing terms of a plea agreement. Plea bargains are not strictly enforced to the detriment of due process. *Cox*, 482 S.W.3d at 116. In order to protect the constitutional rights of the defendant, there are strict federal and state guidelines and requirements regarding the defendant's ability to enter into such an agreement, including a requirement that, if a defendant's plea is made based on a promise given by the State, the State must keep its promise or the plea will be rendered involuntary. *Id*. at 117. When the state breaches its promise with respect to a plea agreement that has been accepted by the trial court, the defendant pleads based on a false premise, and the conviction cannot stand. *Id*.

What is the remedy when, as in this case, only part of a plea bargain is invalidated? The Court held in *Shannon v. State*, 708 S.W.2d 850, 852 (Tex. Crim. App. 1986) that when a defendant who has entered a negotiated plea of guilty challenges his conviction and is successful, the appropriate remedy, if possible, is specific performance of the plea. If specific performance is not available, then the appropriate remedy is withdrawal of the plea, with both parties returning to their original positions, meaning a return to the positions that the parties held before the plea agreement was made and therefore does not bind the state to its previous agreement. *Ex parte Rich*, 194 S.W.3d 508, 514-15 (Tex. Crim. App. 2006). (However, in *Ervin v. State*, 991 S.W.2d 804, 816 (Tex. Crim. App. 1999), the Court held that, in some circumstances, the State may waive an invalid portion of the judgment and retain the remainder of the plea agreement. That decision was based on implications from *Ex parte McJunkins*, 954 S.W.2d 39, 41 (Tex. Crim. App. 1997).)

Multiple-count complaints are rare in Class C misdemeanor cases; however, the law and analysis in this case are still relevant and valuable.

5. Discovery/Michael Morton Act

The State did not violate Article 39.14 of the Code of Criminal Procedure where the record did not

indicate that the defendant ever made a timely discovery request.

Glover v. State, 2016 Tex. App. LEXIS 6516 (Tex. App.—Houston [14th Dist.] June 21, 2016, no pet.)

While the defendant contended that the State had an affirmative duty to produce certain additional information from testifying police officers, regardless of whether he requested it, the Michael Morton Act only imposed such an obligation on the State with regard to exculpatory information, and the information about which defendant complained was not exculpatory. Even if the defendant had complied with the requirements of Article 39.14, he forfeited his complaint that the court erred in admitting certain officer testimony because he failed to bring it to the attention of the trial court.

Relator, the district attorney, was entitled to conditional mandamus relief because the respondent, a district judge, did not have jurisdiction to issue a discovery order compelling relator to comply with Article 39.14(a) of the Code of Criminal Procedure prior to the filing of an indictment.

In re State ex rel. Munk, 494 S.W.3d 370 (Tex. App.—Eastland 2015, no pet.)

A discovery order issued under the auspices of Article 39.14(a) is not a function associated with the role of a magistrate. The court of appeals had mandamus jurisdiction to review the respondent's actions despite her contention that she was acting in her capacity as a magistrate, not a district judge. Despite her contention to the contrary, she was functioning in her capacity as the district judge at the time she considered the defendant's discovery motion. The court of appeals had mandamus jurisdiction per Section 22.221(b) of the Government Code, but refused to issue a writ of prohibition because it had no pending jurisdiction to protect or preserve.

Commentary: The judge's "magistrate" argument is novel, but the court of appeals was hardly enamored by it. Article 39.14(a) does not expressly address the requirement of a formal charging instrument triggering discovery. The court of appeals, however, was not persuaded by such a pedantic argument. "In the absence of express language in Article 39.14(a) authorizing the trial court to issue an order compelling the State to produce discovery prior to indictment, we conclude that the statute does not alter the well-settled requirement that an indictment is essential to the district court's jurisdiction in a criminal case." Notably, this statement does not speak to misdemeanor cases nor does it categorically preclude the possibility that a magistrate could compel compliance with the Michael Morton Act if conducting an examining trial per Article 2.11 of the Code of Criminal Procedure.

This is the second year in a row that the Dawson County District Attorney has had to seek extraordinary relief from the court of appeals. Last year, the same district judge tried to order him to conduct criminal history searches of all non-law enforcement witnesses in various state and federal databases and to provide the results of those searches to a defendant. It was deemed improper because the trial court did not have authority under Article 39.14 to require the State to conduct criminal history searches of the NCIC/TCIC databases or to provide information to the defendant from these databases that it had not already obtained. Such a requirement exceeded the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) because the State would be required to independently seek out exculpatory evidence on behalf of the defendant. *In re State ex rel. Munk*, 448 S.W.3d 687 (Tex. App.—Eastland 2014, no pet.)

The trial court's order that the State disclose prior to trial which specific jail telephone recordings of the defendant it would present as evidence at trial did not improperly require the State to create discovery materials not within its possession, custody, or control in violation of Article 39.14 of the Code of Criminal Procedure. Rather, it required the State to identify which previously-produced discovery materials were likely to be used at trial. The order did not require the State to produce data protected by the work product doctrine.

In re State ex rel. Skurka, 2016 Tex. App. LEXIS 6228 (Tex. App.—Corpus Christi 2016, no pet.)

***Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny do not impose a general duty upon a prosecutor to listen to all recordings of inmate telephone calls held by the county telecommunications provider to search for exculpatory evidence for a defendant; however, a duty exists to discover and disclose whether**

investigators or other employees who do listen to any such recordings find exculpatory evidence.

Tex. Atty. Gen. Op. KP-0041 (10/19/15)

Governing entities that have a contract with a telecommunications provider that gives unfettered access to recordings of inmate telephone calls could mean that such an entity has "possession, custody, or control" of the recordings under Article 39.14 of the Code of Criminal Procedure, based on how those terms are defined by the Texas Supreme Court in an analogous context.

6. Jury Trials

Where a jury submitted an informal verdict with a notation for the two punishments to run consecutively when, by law, they are required to run concurrently, the trial court should have omitted the unauthorized portion of the verdict and entered judgment pursuant to the rest of the sentence rendered.

Nixon v. State, 483 S.W.3d 562 (Tex. Crim. App. 2016)

At Nixon's trial, the jury found Nixon guilty and returned sentences which were to run consecutively. Over Nixon's objections, the trial judge determined that such a verdict was not acceptable under the law. The judge instructed the jury to return to deliberation and that, by law, the sentences had to be concurrent. After additional deliberations, the jury returned verdicts with concurrent sentences greater than had initially been assessed. On appeal, Nixon argued that the judge erred in failing to accept and reform the jury's original verdicts. Article 37.10 of the Code of Criminal Procedure pertains to "informal verdicts." The court of appeals held that Article 37.10(b) of the Code of Criminal Procedure did not require the judge to accept and reform the original verdicts and affirmed the trial court's judgments.

In a 6-3 decision, the Court of Criminal Appeals reversed. Judge Keasler, writing for the majority, explained that Article 37.10(b) created a legislative mandate to trial and appellate courts in addressing partially unauthorized verdicts. If a partially authorized verdict is returned, a trial judge has no choice but to reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. The question in this case was whether the jury's verdict was informal or was at once both authorized and unauthorized. In this case the jury did not return an "informal verdict," which under Article 37.10(a) is one that does not meet the legal requirements of being written or answered as authorized. The jury answered all the questions asked of them and returned a verdict that was within the applicable punishment range for both offenses. The problem was that the jury stacked the sentences. Thus, a portion of the original verdict was unauthorized. The Court concluded the proper remedy was to reform the judgment to reflect the original punishment verdict and omit the jury's unauthorized attempt to stack the sentences.

Judge Alcala wrote a dissenting opinion stating that the jury's first verdict was ambiguous and that the trial court had no choice but to refuse the verdict and order further deliberations under an additional jury charge. Judge Alcala believed the trial court had acted within the authority of Article 37.10(a) of the Code of Criminal Procedure. There was no reason for the Court to reform the judgment and provide Nixon with a "windfall."

Judge Yeary, joined by Presiding Judge Keller, wrote a dissenting opinion stating that Article 37.10(b) had not been triggered because the jury's attempt to stack the sentences was not a "punishment" as referred to in the statute. Thus, Article 37.10(a) was the applicable statute because the verdict strayed from the "formal" verdict form the trial court gave the jury at the conclusion of the jury charge.

Commentary: Case law is seldom seen on informal verdicts. Judges and prosecutors unfamiliar with Article 37.10, or what constitutes an informal verdict, should take the time to read it. While there are exceptions, generally, offenses prosecuted in the "same criminal action" require concurrent sentences. See, Section 3.03, Penal Code. If sentences of incarceration must run concurrently, what about fines? Historically, fines have been assessed concurrently and have not been considered subject to Section 3.03. However, in *State v. Crook*, 248 S.W.3d 172 (Tex. Crim. App. 2008), the Court, in a plurality opinion, concluded that the trial court should have ordered 13 fines arising from 13 convictions for barratry "which arose out of the same criminal episode" to run concurrently. *Crook* generated a lot of chatter because of its debatable implications on the adjudication of Class C misdemeanors. See,

Ryan Kellus Turner, "By Hook or Crook: I Maintain Everything is Fine," *The Recorder* (May 2008) at 3.

The trial court erred in instructing the jury that it could convict the appellant for DWI if it found he was intoxicated by reason of the introduction of drugs into his system where there was no evidence that pills discovered pursuant to a search incident to his arrest contributed to the appellant's intoxication.

Burnett v. State, 488 S.W.3d 913 (Tex. App.—Eastland 2016, pet. granted)

The appellant argued, and the court agreed, that the full definition of intoxication should not have been included in the jury charge, but instead should have been limited to alcohol consumption. Because only a portion of the statutory definition was relevant to the facts of this case, the court held that the trial court erred when it included the whole definition of intoxication in both the definition section and application paragraph of the jury charge.

The court also found abuse of discretion in admitting evidence that the defendant possessed the pills, finding no relevance under Rule 401 of the Texas Rules of Evidence as there was no evidence that (1) the defendant was intoxicated on anything but alcohol; (2) the defendant took any of the pills; (3) the pills were of a type that would have had an intoxicating effect on the defendant; or (4) he was intoxicated as a result of taking the pills. The State filed a petition for review, which the Court of Criminal Appeals granted on September 28, 2016.

7. Probation

The authority to defer proceedings in cases appealed to a county court from a justice court or municipal court pursuant to Article 42.111 of the Code of Criminal Procedure are subject to the statutory limitations placed on a justice of the peace and municipal court judge per Article 45.051 (Deferred Disposition). Thus, the county court at law judge exceeded her authority in granting a deferral for a defendant who held a commercial driver's license and was accused of speeding.

In re State, 489 S.W.3d 24 (Tex. App.—Amarillo 2016, no pet.)

The Potter County Attorney's Office sought a writ of mandamus directing a county court-at-law judge to vacate an order deferring further proceedings without an adjudication of guilt in a Class C misdemeanor speeding offense case.

Jimmie Mark White was originally convicted of the misdemeanor offense of speeding in the Justice of the Peace Court, Precinct 3, of Potter County, Texas and assessed a fine of $116.90, plus costs of court of $100.10. On appeal to the County Court at Law No. 2 of Potter County, Texas, in a de novo trial, White entered a plea of guilty. Having received his plea and having reviewed his motion for "deferred adjudication," the county judge set his fine at $200.00 plus court costs and entered an order deferring proceedings. The county judge signed an order stating, "[p]ursuant to the Tex. Code of Crim. Proc. Art. 45.54," the imposition of that sentence was deferred "for a period of One Hundred Eighty (180) days," on the condition that White (1) pay all court costs "at the time the court grants the deferred disposition," (2) complete an affidavit stating that he "has not been convicted of a criminal or traffic offense during the period of deferral," (3) commit no criminal offense or traffic offense, except parking violations, during the "period of probation," and (4) pay a "special expense fee of $200." The order further provided that, at the conclusion of the deferral period, upon satisfaction of these conditions, the complaint charging the speeding offense would be dismissed.

Before the court of appeals, the State argued the act of suspending the imposition of the sentence and giving assurances of a dismissal of the complaint exceeded the authority of the county court at law judge because the statutory limits placed on a justice of the peace or municipal judge by Article 45.051(f) of the Code of Criminal Procedure (prohibiting the deferral of an adjudication of guilt in a misdemeanor case involving the violation of a law relating to motor vehicle control by a person holding a commercial driver's license) applied equally to a county court at law judge through the provisions of Article 42.111 of the Code of Criminal Procedure. Accordingly, the State requested the court of appeals issue a writ of mandamus to correct the county judge's abuse of discretion unless she vacated the order of "deferred adjudication." In response, the county judge argued that Article 42.111 is ambiguous and created no such statutory limitation.

Agreeing with the State, the court of appeals conditionally granted the petition for writ of mandamus. The court of appeals explained: "Because public safety on Texas roadways is a matter of the highest concern, the State has imposed various licensing requirements and enacted numerous traffic laws. Because a greater risk to the public is involved in the operation of commercial vehicles, the State has imposed even greater safeguards and limitations on the privilege of operating a motor vehicle by someone who holds a commercial driver's license. Therefore, it stands to reason that the State would have an interest in limiting the authority of a justice of the peace or a municipal court judge to permit a commercial driver's license holder to receive deferred adjudication for a violation of a state law or local ordinance relating to motor vehicle control by a person who holds a commercial driver's license. That is exactly what the Legislature did when it enacted … [Article] 45.051(f)."

Commentary: Without a doubt, this is a much needed counterweight to *Hollis v. State*, 327 S.W.3d 750 (Tex. App.—Waco 2010, no pet.), which the Amarillo Court of Appeals described as "a direct appeal by the State of an order granting deferred adjudication." The Amarillo Court of Appeals in footnote 13 states that *Hollis* is of limited precedential value, if any, and was incorrectly decided. While *Hollis* contains an extensive legislative history of the driving safety course statute (Article 45.0511), *Hollis* is like a Rorschach test. When construing the opinion, you can see what you want to see. As a consequence some of us wished back in 2011 that *Hollis* had been designated an unpublished opinion. Ryan Kellus Turner, "Case Law and Attorney General Update," *The Recorder* (December 2011) at 23-24. However, in light of *Hollis*, it is a good thing that *In re State* was designated for publication.

With one major caveat, explained below, *In re State* is a nice addition to Texas case law governing the interplay between county and local trial courts of limited jurisdiction. The State can cite this case if dealing with a local or county court improperly granting a deferred to a commercial driver's license holder.

Unfortunately, like other court of appeals decisions, *In re State* at times uses the term "deferred adjudication" synonymously with "deferred disposition." While these two types of deferred are similar, and the rationale applicable to one may be applicable to the other, because of the Code Construction Act and substantive differences in the statutes, the two terms should not be used interchangeably. See, Ryan Kellus Turner, "Deferred Adjudication is not Deferred Disposition," *The Recorder* (August 2002) at 13.

While by now this contention may seem old and pedantic, *In re State* is a new illustration of why making the distinction and use of careful legal terminology actually matters (and why some of you are likely to be underwhelmed by the implications of this opinion).

Since the Texas Legislature amended Articles 45.051 and 45.0511 of the Code of Criminal Procedure in 2004, municipal and justice courts have been prohibited from granting a commercial driver's license (CDL) holder deferred disposition or a driving safety course for a violation of a state law or local ordinance relating to motor vehicle control. Such changes in state law were required by the federal government under the Motor Carrier Safety Improvement Act (MCSIA). The MCSIA prohibits states from "masking" or deferring imposition of judgment or keeping a CDL holder's conviction for any traffic violation from appearing on the CDL holder's driving record.

In Texas, there is a well-known loop-hole to this prohibition that CDL holders can utilize (excluding traffic offenses filed in municipal courts of record). Here is how the argument goes. Ostensibly, because of the federal definition of "conviction" (which only contemplates courts of original jurisdiction—where the case begins, i.e., in Texas, a non-record municipal court or a justice court), a de novo appeal to a county court and granting of deferred adjudication by that county court do not constitute "masking." See, Ryan Kellus Turner, "Retrospection and New Observations on the Motor Carrier Safety Improvement Act," *The Recorder* (May 2009) at 4. The use of such "leap frog appeals" in Texas by CDL holders has long been the source of frustration to those who believe that either the Texas Legislature or the Federal Government should close what they believe is a loop hole, if not an oversight.

Many in legal and law enforcement circles and traffic safety advocates welcomed the Amarillo Court's decision because it appears to preclude a county court from granting a deferred adjudication subsequent to a leap frog appeal resulting in a trial de novo. It appears to close the CDL leap frog appeal loop hole.

Upon closer examination, however, people may be disappointed by *In re State*. While the court of appeals prohibits county courts from utilizing Article 42.111 to grant "deferred adjudication" (which is actually deferred disposition in Article 45.051), this opinion *does not* prohibit a county court from granting "deferred adjudication." (Yes, you may have to read that last sentence again.) Far from it, the court of appeals in endnote 5 states: "Specifically, we express no opinion as to whether or not a county court at law judge has the authority to defer an adjudication of guilt in a traffic offense case under the provisions of Section 5 of the general community supervision provisions of the Texas Code of Criminal Procedure (citing, Article 42.12, Section 5).

B. Evidence

Because the appellant presented a defensive theory in opening statements that he did not know there was contraband on his property, he opened the door to the admission of evidence that officers had previously found the same contraband on his same property, probative under the Doctrine of Chances.

Dabney v. State, 492 S.W.3d 309 (Tex. Crim. App. 2016)

Rule 404(b) of the Texas Rules of Evidence, which excludes evidence offered solely for proving bad character and conduct in conformity with that bad character, requires the State to provide notice of other crimes, wrongs, or acts it plans to introduce in its case-in-chief. However, an exception to this notice requirement exists when the defense opens the door to such evidence by presenting a defensive theory that the State may rebut using extraneous-offense evidence. The Court also found that there was no evidence that the State's presentation of this extraneous-offense evidence as rebuttal to the defensive theory was an attempt to circumvent the pretrial discovery order.

The State proved a prior conviction beyond a reasonable doubt where the State's proffered documents were sufficiently authenticated under Rule 901 of the Texas Rules of Evidence and the The State's exhibits sufficiently linked the appellant to the prior conviction alleged in the enhancement paragraph.

Haas v. State, 2016 Tex. App. LEXIS 3031 (Tex. App.—Houston [14th Dist.] March 24, 2016, no pet.)

The evidence before the trial court in this case included: (1) a judgment of a prior conviction listing the appellant as the defendant; (2) an order removing the ignition interlock restriction in the prior conviction listing the appellant as the defendant, the defendant's birthdate, and his Texas driver's license number; and (3) a bail bond in this case listing the appellant as the defendant and listing the same birthdate and driver's license number that were listed on the order removing ignition interlock in the prior conviction. The court found this sufficient under the totality of the evidence admitted to show that the appellant was the person convicted of the prior offense.

The court rejected the appellant's argument that the State's exhibits were not admissible during the punishment hearing because they were not self-authenticating. The court's rejection was based on case law holding that no specific document or mode of proof is required to prove a prior conviction exists, *Flowers v. State*, 220 S.W.3d 919, 922 (Tex. Crim. App. 2007), and on Article 37.07 of the Code of Criminal Procedure (applicable to all criminal cases after a finding of guilty), which permits proof of a defendant's "prior criminal record," but does not require the production of a certified judgment to prove that prior criminal record. Further, the fact that the documents were computer print-outs did not make them inadmissible. In this case, the certified document number on each page of each document coupled with the seal contained on the last page of each document satisfied Rule 901 of the Texas Rules of Evidence. The court notes that Rule 901(b)(7) does not require original seals.

C. Appellate Procedure

Pro se filing of a court form for appointment of appellate counsel following conviction with the word "APPEAL" written on the top of the document coupled with actual appointment of counsel was sufficient notice of appeal.

Harkcom v. State, 484 S.W.3d 432 (Tex. Crim. App. 2016)

Harkcom was convicted of possession of a controlled substance and the trial court certified her right to appeal. On the 28th day after her sentence was imposed, Harkcom filed a pro se application for appointment of counsel, writing the word "APPEAL" on the top of the document. The next day, the trial court granted her application and changed the title of the document to reflect its understanding that Harkcom was giving notice of appeal. Appellate counsel was notified of his appointment the next day, 30 days after the sentence was imposed, and filed a more formal notice of appeal seven days past the 30-day deadline. The court of appeals dismissed the appeal for want of jurisdiction due to the lack of a timely notice of appeal.

The Court of Criminal Appeals reversed. Judge Johnson, writing for the majority, explained that the Texas Rules of Appellate Procedure are to be construed in a manner that allows trivial mistakes to not derail a defendant's right to appeal. To provide notice of appeal, all that is required of a defendant is that the notice be in writing, be submitted within the requisite period of time after sentencing, as appropriate, and show the party's desire to appeal from the judgment or other appealable order. Here, Harkcom used the materials available to her while incarcerated and submitted a document with the word "APPEAL" at the top. These facts led the Court to conclude that Harkcom had provided sufficient notice of appeal. Presiding Judge Keller and Judge Yeary concurred without a written opinion.

Commentary: Simply stated, the Texas Rules of Appellate Procedure are to be construed liberally. Can courts that hear appeals from municipal courts of record extrapolate the holding in this decision? Perhaps. Notice of appeal is addressed in Section 30.00014(d) of the Government Code. Section 30.00023 of the Government Code states that except as modified by Subchapter A (General Law for Municipal Courts of Record), the Code of Criminal Procedure and the Texas Rules of Appellate Procedure govern the trial of cases before the municipal courts of record. Municipal courts of record may make and enforce all rules of practice and procedure necessary to expedite the trial of cases before the courts that are not inconsistent with law. Similarly, courts which hear appeals from municipal courts of record may make and enforce all rules of practice and procedure that are not inconsistent with law and that are necessary to expedite the dispatch of appeals from the municipal courts of record.

Extrapolating the holding of *Harkcom* to non-record municipal courts and appeals from justice courts is a different matter. Appeals from such courts are governed solely by the Code of Criminal Procedure, and although an equitable argument can be made that its appellate provisions should similarly be liberally construed, neither Chapter 44 nor Chapter 45 require notice of appeal in order to vest a county court with jurisdiction to conduct a trial de novo. See, Article 45.0426(b), Code of Criminal Procedure.

Article 44.01 of the Code of Criminal Procedure (Appeal by State) does not grant the State the right to appeal an order that, pursuant to Article 18.13 of the Code of Criminal Procedure (requiring a magistrate under certain circumstances to discharge the defendant and order restitution of property taken from him), required the State to return to the appellee's personal property taken from his home on the ground that no good cause supported a search warrant; the appellate court, therefore, lacked jurisdiction.

In re Gambling Devices & Proceeds, 2016 Tex. App. LEXIS 6025 (Tex. App.—San Antonio June 8, 2016, pet. filed)

In this case, agents of the State, pursuant to a search warrant, searched two businesses and a residence and seized gambling devices, among other items. The State filed a forfeiture petition pursuant to Article 18.18(b) of the Code of Criminal Procedure (Disposition of Gambling Paraphernalia, Prohibited Weapon, Criminal Instrument, and Other Contraband), seeking forfeiture of all the personal items found in the residence and all other items found in the two businesses. The appellees sought return of their personal items pursuant to Article 18.13 by filing a motion in a different court. Article 18.13 authorizes a magistrate to discharge a defendant and order restitution of property taken from him, except for criminal instruments, if the magistrate is not satisfied upon investigation, that there was good ground for the issuance of the warrant. Both causes ended up in the same court, which heard the appellees' cause first, found no good cause for the search and seizure, and ordered the return of the property. The State appealed. The court found that Article 44.01(a) of the Code of Criminal Procedure grants the State a limited right of appeal and nothing in that statue expressly authorizes the right to appeal under these circumstances. The

appellate court, therefore, lacked jurisdiction. The court rejects the State's argument that the appeal should be treated as a petition for a writ of mandamus because the trial court did not have authority to issue its order concerning "criminal instruments" expressly excepted from Article 18.13. The State filed a petition for review, which is pending as of this writing.

While appeals courts have jurisdiction over appeals from a final judgment of conviction, they do not have jurisdiction over appeals from orders denying requests for the entry of judgments nunc pro tunc because no statute has been passed creating appellate jurisdiction over such appeals.

Desilets v. State, 2016 Tex. App. LEXIS 5500 (Tex. App.—Beaumont May 25, 2016, no pet.)

The applicant's request seeking a writ of mandamus requiring the presiding judge of the County Court at Law to take certain actions against a justice court was dismissed because the court of appeals did not have authority under Section 22.221(b) of the Government Code to issue mandamus against a statutory county court, based on the definitions of "county court" and "statutory county court" in Section 21.009 of the Government Code.

In re Meyer, 482 S.W.3d 706 (Tex. App.—Texarkana 2016, no pet.)

Commentary: Sovereign defendants are part and parcel of working in local trial courts. While such defendants may not be as common in appellate courts, appellate judges also have to deal with sovereign defendants. Every year we read a number of unpublished appellate decisions where appellate courts expend a lot of energy and care in dealing with the same kind of challenges experienced by municipal courts. It is rare, however, as in this case, for a sovereign defendant's case to be designated for publication. Meyer, a self-proclaimed "sovereign citizen of Texas," received multiple citations for various traffic offenses which were filed in justice court. The core of his claim is that neither the justice court nor the statutory county court provided him, the courts' "employer," a sufficient explanation of what their jurisdiction was as an "administrative tribunal and magistrate;" and what followed were years of inaction by the courts, subsequent mistreatment by law enforcement officers in general, and a conspiracy by both to assassinate his character, by "inflicting great pain, suffering, and injury." According to Meyer, this was "the very same which tactic employed against me by the Marshall Municipal Court to make life as hard as possible and to extort submission." The Texarkana Court of Appeals used Meyer's petition for mandamus as an opportunity to issue a lengthy and detailed explanation as to why appellate courts do not have statutory mandamus jurisdiction over statutory county courts. The Criminal District Attorney of Lubbock County invoked the Texarakana Court's rationale in a discovery dispute and the Court of Criminal Appeals on October 5, 2016 granted review. *In re Powell*, 2016 Tex. Crim. App. LEXIS 907 (Tex. Crim. App. 2016) (not designated for publication). Stay tuned!

IV. Court Costs and Administration

A defendant's challenge to court costs assessed pursuant to Article 102.011 of the Code of Criminal Procedure as a violation of his 6th Amendment rights based on his indigent status could be raised on direct appeal because he had no opportunity to raise it in the trial court.

London v. State, 490 S.W.3d 503 (Tex. Crim. App. 2016)

The trial court entered a judgment, including in the judgment an order to pay $329 in court costs (with no breakdown of how those costs were calculated). The appellant filed a notice of appeal, after which the clerk filed the bill of costs, which included a $35 fee for summoning a witness and mileage pursuant to Article 102.011(a)(3) and (b) of the Code of Criminal Procedure. On appeal, the appellant challenged the statutory $35 witness fee as it applied to him, arguing that it violated his 6th Amendment right of confrontation and compulsory process because it infringes on his right to present a defense as an indigent defendant. The State responded that he failed to preserve his challenge by not raising it at sentencing. The court of appeals agreed. The Court reversed and remanded.

The Court points out that it has consistently held in the context of court cost challenges that an appellant may not be faulted for failing to object when he or she was simply not given the opportunity to do so, citing *Johnson v. State*, 423 S.W.3d 385, 390-91 (Tex. Crim.

App. 2014); *Landers v. State*, 402 S.W.3d 252, 255 (Tex. Crim. App. 2013); and *Wiley v. State*, 410 S.W.3d 313, 321 (Tex. Crim. App. 2013). An appellant may generally challenge the imposition of even mandatory court costs for the first time on direct appeal when those costs are not imposed in open court and the judgment does not contain an itemization of the imposed court costs. *Johnson* at 390-91.

The Court also rejected the State's argument that the appellant did not file a required bill of exception, thus failing to develop additional facts not in the record, unlike the purely legal claims raised in *Johnson* and *Landers*. However, the Court found that the record already contained the relevant facts with no need for further development: (1) the appellant was declared indigent prior to his plea for purposes of appointment of counsel under Article 26.04 of the Code of Criminal Procedure; and (2) he is "presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs" under the same statute. The Court goes on to say that some courts of appeals seem to have held that there would never be a need to develop facts regarding indigency because "[a] defendant's ability to pay is not relevant with respect to legislatively mandated court costs." See, *Martin v. State*, 405 S.W.3d 944, 947 (Tex. App.—Texarkana 2013, no pet.); see also, *Owen v. State*, 352 S.W.3d 542, 546 (Tex. App.—Amarillo 2011, no pet.); and *Williams v. State*, 332 S.W.3d 694, 700 (Tex. App.—Amarillo 2011, pet. denied). The Court finds no need to go that far in this case, leaving it to the lower court to address that on remand.

Commentary: The court of appeals case on remand could be interesting. Though the Court only addressed issues involving preservation of error regarding an appellant's constitutional challenge to court costs based on indigence, the lower court on remand will have to address the merits of those questions. Does assessing a "witness fee after trial" pursuant to Article 102.011 of the Code of Criminal Procedure (Fees for Services of Peace Officers) violate the 6th Amendment right of confrontation and compulsory process? Is a defendant's indigent status relevant to this challenge (i.e., do the challenged fees infringe on his right to present a defense as an indigent defendant)?

The answer to those questions may or may not have implication in municipal courts depending on the nuances of his arguments. In this case, the defendant was appointed counsel due to his indigent status under Article 26.04 of the Code of Criminal Procedure. That statute only authorizes judges of the county courts, statutory county courts, and district courts trying criminal cases in the county (or their designee) to appoint counsel for indigent defendants in the county. Municipal judges are not so authorized under the statute (municipal judges are, however, authorized, but not required, under Article 1.051(c) of the Code of Criminal Procedure to appoint counsel for an indigent defendant if the court concludes that the interests of justice require representation). Nor do defendants have a right to appointed counsel in Class C misdemeanor cases because such cases do not result in punishment by confinement. Article 1.051(c), Code of Criminal Procedure. Indigent defendants are generally only entitled to a court appointed attorney in an adversarial judicial proceeding that may result in punishment by confinement. *Id*. This excludes Class C misdemeanors in which the sentence is limited to the payment of the fine and costs to the state. Article 45.041(a), Code of Criminal Procedure.

The right to *appointment* of counsel should not be confused with the right to *representation* by counsel. A defendant accused of a Class C misdemeanor, like any other defendant accused of a criminal matter in Texas, has the right to be represented by counsel in an adversarial judicial proceeding. Article 1.051(a), Code of Criminal Procedure. The right to be represented by counsel includes the right to consult with counsel in private sufficiently in advance of a proceeding to allow adequate preparation for the proceeding. *Id*. All defendants have the right to retain and be represented by counsel in municipal court cases; this right does not entitle them to have one appointed for them. See, "Setting the Record Straight: Class C Misdemeanors, the Right to Counsel, and Commitment to Jail," *The Recorder*, *Special Edition: Fines, Fees, Costs, and Indigence* (October 2016).

The appellant had an opportunity to object to the court costs of $13.06 allocated to funding rehabilitation. The court costs imposed by Section 133.102 of the Local Government Code are mandatory and convicted persons have constructive

notice of mandatory court costs imposed by statute. Because the appellant had constructive notice of the court costs, he had an opportunity to object in the trial court. The appellant was required to preserve error and by not voicing his complaints in the trial court, he failed to preserve error.

Bonds v. State, 2016 Tex. App. LEXIS 8853 (Tex. App.—Houston [14th Dist.] August 16, 2016, no pet.)

Allocation of court costs collected to fund abused children's counseling, law enforcement officers standards and education, and comprehensive rehabilitation, pursuant to Section 133.102(a)(1) of the Local Government Code, is constitutional because the uses relate to the administration of the Texas criminal justice system.

Salinas v. State, 485 S.W.3d 222, (Tex. App.—Houston [14th Dist.] 2016, pet. granted)

Commentary: In *Peraza v. State*, 467 S.W.3d (Tex. Crim. App. 2015), the Court held that the DNA Record Fee court cost is not an unconstitutional tax that violates separation of powers. In assessing the propriety of court costs, it also overruled the *Carson* "incidental and necessary" test and exported from Oklahoma law the "legitimate criminal justice" test as a replacement. A year ago, we commented that while it was too soon to say that *Peraza* marked the end of the trend in which court cost issues had become "front and center" arguments in direct criminal appeals, it could possibly be the beginning of the end. What is certain is that court costs that are reasonably related to the costs of administering the criminal justice system have new legal footing. In light of *Peraza,* the question is what court costs in Texas, if any, are not reasonably related to the costs of administering the criminal justice system? We also pondered whether, in light of *Peraza*, the Court of Criminal Appeals would grant discretionary review in *Salinas*. It has. A year ago it seemed likely that remanding *Salinas* would only be setting the stage for the Court to reconsider the constitutionality of Section 133.102 (a.k.a., the Consolidated Court Cost statute). The scope of the argument has seemingly narrowed. Among other things, the Court is now being asked to determine whether the court of appeals erred in failing to explain how the "comprehensive rehabilitation" court cost legitimately relates to the administration of the criminal justice system. Stay tuned!

Senate Bill 1876 (84th Legislative Session), concerning the appointment of attorneys ad litem, guardians ad litem, mediators, and guardians, neither violates Article II, Section 1 of the Texas Constitution nor is unconstitutionally vague.

Tex. Atty. Gen. Op. KP-0071 (3/17/16)

Senate Bill 1876, which added Chapter 37 to the Government Code, applies to all courts located in a county with a population of 25,000 or more and requires courts to establish and maintain certain lists of attorneys and mediators (Section 37.003) and to use a rotation system (with exceptions when the parties agree on an attorney not on the list or when the case involves a complex matter) (Section 37.004). According to the opinion, making court appointments of attorneys ad litem, guardians ad litem, mediators, and guardians is not an exercise of a core judicial power. Therefore, Section 37.004 does not infringe on a core judicial power in violation of separation of powers. Further, the fact that Senate Bill 1876 fails to define what attributes are necessary to be considered qualified for inclusion on the various lists does not render it unconstitutionally vague. The term "qualified" has a commonly understood meaning.

V. Local Government

A. Preemption

The Legislature limited the authority of Texas municipalities to enforce air-quality standards criminally. Such enforcement is only allowed when it is not inconsistent with the requirements of the Water Code. Portions of City of Houston Ordinance Section 21-164, inconsistent with the legislative intent favoring statewide consistency in enforcement, are preempted. The registration requirement was preempted by the Texas Clean Air Act. An ordinance that incorporated TCEQ rules as they existed and as they may be amended did not violate the non-delegation doctrine of the Texas Constitution.

BCCA Appeal Grp., Inc. v. City of Houston., 2016 Tex. LEXIS 352 (Tex. April 29, 2016)

Commentary: This is a good example of field preemption and the limitation of home rule power.

Another notable, although unpublished, preemption opinion, is *Laredo Merchs. Ass'n v. City of Laredo*, 2016 Tex. App. LEXIS 8901 (Tex. App.—San Antonio August 17, 2016, no pet.), holding that the City of Laredo's "bag ban" ordinance was inconsistent with Section 361.0961 of the Health and Safety Code (i.e., the Solid Waste Disposal Act (SWDA)), and was therefore unenforceable as it did exactly what the Act intended to prevent, which was to regulate the sale or use of plastic bags for solid waste management purposes. The San Antonio Court of Appeals found that a "checkout bag" as defined by the ordinance was a type of "container" or "package" as those terms were used in Section 361.0961. In a dissenting opinion, Justice Chapa explained that the ordinance advanced the State's public policy goal of requiring commercial establishments to change the process by which they provide checkout services to customers and did not conflict with the SWDA because the ordinance does not apply to solid waste containers.

B. Public Information

The Public Information Act (PIA) exception to disclosure for "an email address of a member of the public" under Section 552.137 of the Government Code does not apply to elected officials because they are not "members of the public" under the PIA. The PIA requires that the public have "complete information about the affairs of government and the official acts of public officials and employees," even if that information is conducted using private email addresses.

Austin Bulldog v. Leffingwell, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.)

Commentary: Private e-mail address, private e-mail service, is there a difference? What difference at this point does it make? Transparency is the standard. Although courts are not subject to the PIA, that does not mean judges in their capacity as public officials are necessarily exempt.

C. Guns

Section 411.209 of the Government Code (Wrongful Exclusion of Concealed Handgun License Holder) does not apply to a municipality that leases property to a non-profit entity that provides notice that a license holder carrying a handgun is prohibited from entry. However, because such property is owned by a governmental entity (as long as it is not a premises or other place prohibited under Sections 46.03 or 46.035 of the Penal Code), Sections 30.06 (Trespass by License Holder with a Concealed Handgun) and 30.07 (Trespass by License Holder with an Openly Carried Handgun) of the Penal Code do not apply to license holders because of the exceptions found in Subsections 30.06(e) and 30.07(e).

Tex. Atty. Gen. Op. KP-0108 (8/9/16)

As long as the state agency or political subdivision leasing the property to the nonprofit entity has no control over the decision to post such notice, the state agency or political subdivision lessor would not be the entity responsible for the posting and would therefore not be subject to a civil penalty under Section 411.209. Whether handgun license holders violate Section 30.06 or 30.07 of the Penal Code by carrying a handgun on property that is owned by a governmental entity but leased to a private, non-profit organization is a different question. The civil penalty in Section 411.209 provides some textual support for the idea that the Legislature did not intend to require private entities leasing property from a governmental entity to allow handguns on that property. However, the plain language of Subsections 30.06(e) and 30.07(e) makes an exception to the offense of trespass by license holder with either a concealed or openly carried handgun if the property on which the license holder carries a gun "is owned or leased by a governmental entity."

The Legislature did not intend in Subsection 46.035(c) of the Penal Code to prohibit carrying handguns throughout an entire building, but only in the specific room or rooms where an open meeting of a governmental entity is held.

Tex. Atty. Gen. Op. KP-0098 (6/27/16)

Subsection 46.035(c) of the Penal Code makes it an offense to carry a handgun "in the room or rooms where a meeting of a governmental entity is held and if the meeting is an open meeting subject to Chapter 551, Government Code" and the entity provided the requisite notice. According to the Attorney General, by limiting the offense to carrying a handgun "in the room or rooms," it did not intend the prohibition to extend to the entire building.

Governmental entities should place their notices that entry with a handgun is prohibited at the entrance to the room or rooms where an open meeting is held. A governmental entity may not provide notice that excludes the carrying of handguns when the room or rooms are used for purposes other than an open meeting.

Commentary: This opinion is not applicable to courtrooms. The prohibition of carrying certain weapons (including firearms) in the court (or offices used by the court) is found in Subsection 46.03(a)(3) of the Penal Code. See, the commentary for *Tex. Atty. Gen. Op. KP-0047* and *KP-0049* (12/21/15), infra.

Chapter 25 of the Texas Parks and Wildlife Code does not authorize a river authority to adopt regulations that prohibit the open carry of handguns on river authority parklands in contravention of Section 30.07 of the Penal Code.

Tex. Atty. Gen. Op. KP-0089 (5/18/16)

Pursuant to Tex. Atty. Gen. Op. KP-0047 (12/21/15), it is only the courtrooms, and those offices determined to be essential to their operations, from which a city or county may prohibit concealed handguns without risk of incurring a civil penalty under Section 411.209 of the Government Code.

Tex. Atty. Gen. Op. KP-0049 (12/21/15)

Commentary: See, commentary for *Tex. Atty. Gen. Op. KP-0047* (12/21/15), infra. Municipal judges, bailiffs, and court staff need to know two things. First, open carry has no effect on the prohibition of weapons in the courtroom and court offices. It is a third degree felony to intentionally, knowingly, or recklessly go with a firearm on the premises of any government court or offices utilized by the court, unless pursuant to written regulations or written authorization of the court (Subsection 46.03(a)(3), Penal Code). However, the interplay of the prohibition on firearms in the court and its offices with the notice prohibition on cities and counties regarding concealed handguns (Section 411.209, Government Code) may cause confusion.

Second, if a building is indeed considered to be the premises of a government court or offices utilized by the court, no sign is required, meaning a person (license holder or not) is prohibited by Subsection 46.03(a)(3) of the Penal Code from going on such premises with a firearm (among other weapons) regardless whether a sign is posted. Posting signs at such a building is not a bad idea, however, to provide notice of the prohibition and prevent potential incidents from occurring. Such a sign does not have to meet the stringent requirements of Section 30.06 or 30.07 of the Penal Code, and including language from those statutes on a sign at the court would arguably be inappropriate (such language could mislead a person to believe bringing a firearm into a court is merely a misdemeanor, whereas a violation of Subsection 46.03(a)(3) is a third degree felony).

For a different discussion of "premises" for purposes of carrying handguns, see also, *KP-0050*, where the Attorney General opined that Subsection 46.03(a)(l) of the Penal Code prohibits handguns from places on which a school sponsored activity is occurring, which places can include grounds otherwise excluded from the definition of "premises" such as public or private driveways, streets, sidewalks or walkways, parking lots, parking garages, or other parking areas.

For purposes of Section 411.209 of the Government Code, the phrase "premises of any government court" used in Penal Code subsection 46.03(a)(3) (Places Weapons Prohibited) generally means either (1) a structure utilized by a court created by the Texas Constitution or the Legislature, or (2) a portion of such a structure.

Tex. Atty. Gen. Op. KP-0047 (12/21/15)

The premises of a "government court or office utilized by the court" means a government courtroom or those offices essential to the operation of the government court. The responsible authority that would notify license holders of their inability to carry on the respective premises must make the determination of which government courtrooms and offices are essential to the operation of the government court, in consultation with the government court.

Commentary: Guns were a predominant theme of legislation in the 84th Legislative Session (2015). The highly anticipated open carry law (H.B. 910, 84th Legislature) went into effect on January 1, 2016. The primary change resulting from H.B. 910 is that there is no longer a license to carry a concealed handgun (CHL). It is now a license to carry a handgun (HL).

The main area of confusion with gun legislation is signage. This confusion, though associated with the open carry law, actually generates in part from another piece of gun legislation, S.B. 273. That bill, effective September 1, 2015, added Section 411.209 of the Government Code, allowing citizens to file complaints against state agencies and political subdivisions (e.g., counties and cities) for unlawfully posting (1) signs (or giving oral notice) that comply with Section 30.06 of the Penal Code (trespass by license holder with a concealed handgun) or (2) signs referring to 30.06 or to a concealed handgun license if the signs prohibit a license holder who is carrying a handgun from entering or remaining on property owned or leased by the entity unless license holders are prohibited from carrying a handgun on such property by Section 46.03 or Section 46.035 of the Penal Code, providing civil penalties. If a license holder is not prohibited by those two Penal Code sections from carrying a concealed handgun on property owned or leased by a government entity, then that entity is liable for civil penalties if it posts the very specific signs described in Section 411.209. Note that neither Section 46.03 nor 46.035 of the Penal Code requires signs be posted. Therefore, prohibition of handguns under Section 46.03 and Section 46.035 (in courts, for example) does not hinge on posting a sign, but posting the wrong sign in the wrong place may result in civil penalties for cities and counties.

Understandably wanting to avoid a lawsuit, government entities began to scrutinize the signage on their buildings. The following dilemma surfaced: What if a building consists of courthouses and court offices, which are expressly listed in Section 46.03 of the Penal Code as places where weapons are prohibited (even by HL holders), but also consists of offices not listed in either Section 46.03 or 46.035 (or to further complicate the dilemma, what if the room the court uses is also itself used for non-court purposes when court is not in session)? Does the presence of a courthouse or court office make the entire building a prohibited place to carry a firearm under Section 46.03 of the Penal Code? Thus, are signs posted in or on the building prohibiting weapons safe from running afoul of Section 411.209 of the Government Code? Or does the building become compartmentalized? What if a person must walk through an area used by the court in order to get to other parts of the building? What about shared areas like waiting rooms and bathrooms?

The Attorney General partially addressed this issue in *KP-0047* and *KP-0049*. The latter was in response to a request for opinion made by Hays County Criminal District Attorney, Wes Mau, asking whether "Weapons Free Zone" signs posted in the parking lot of and at the entrance to the Hays County Government Center violate Section 411.209 of the Government Code. Many of the offices at the Center house courts or court offices, but several offices in the center are unaffiliated with the court. According to the Attorney General, Hays County may only prohibit concealed handguns in courtrooms and those offices determined to be "essential to their operations," relying on the opinion *KP-0047* addressing the relationship between Sections 30.06, 46.03, and 46.035 of the Penal Code. Thus, according to the Attorney General, the signs posted at the Hays County Government Center violate Section 411.209 of the Government Code.

However, Section 411.209 is a statute that prohibits a very specific type of sign. Arguably, a sign reading "Weapons Free Zone" does not violate the statute. Section 411.209 prohibits signs described by Section 30.06 of the Penal Code, which contains prescribed exact language, contrasting colors, and type and size of letters. (Some savvy print shop out there stands to make a killing printing these signs.) It also prohibits signs that expressly refer to Section 30.06 or expressly refer to a concealed handgun license. A sign reading "Weapons Free Zone" neither satisfies the stringent requirements of notice in Section 30.06 nor refers to that statute or a concealed handgun license. To be sure, that sign has no effect on a license holder's ability to carry a handgun on property where he or she is not otherwise prohibited by law to carry. So the sign may be ineffective and unenforceable, but it arguably does not violate Section 411.209.

Whether or not the sign is ineffective and unenforceable hinges on whether or not a license holder is prohibited by law to carry a handgun at the Hays County Government Center. This begs the original question posed: What if a building consists of courthouses and court offices as well as other offices unaffiliated with the court? This was the question posed to the Attorney General in KP-0047. Subsection 46.03(a)(3) of the Penal Code prohibits a person *(license holder or not)* from intentionally, knowingly, or recklessly going with a firearm *(among other weapons)* on the premises of any government court or offices utilized

by the court, unless pursuant to written regulations or written authorization of the court. "Premises" is defined as having the meaning assigned by Section 46.035 of the Penal Code, where it is defined as "a building or a portion of a building," excluding "any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area."

Whether or not an entire building is considered the "premises of any government court or offices utilized by the court" is not clear. Recognizing that the Legislature did not intend to limit its handgun prohibition in Subsection 46.03(a)(3) to only the rooms that house the courts, the Attorney General finds no guidance from the Legislature as to the precise boundary of prohibition in a building or portion of a building, and thus, taking a conservative approach, opines that Subsection 46.03(a)(3) encompasses only government courtrooms and those offices "essential to the operation of the government court." The Attorney General does not state a basis for requiring the "premises of any…offices utilized by the court" to be "essential" to the operation of the court. Previously in the opinion, that phrase was merely construed to mean "a building or portion of a building that is a place where the business of a government court is transacted."

However, *KP-0047* is not the only construction of Subsection 46.03(a)(3). See, Regan Metteauer, "Everything Has Not Changed: What Municipal Courts Need to Know About Guns and New Legislation," *The Recorder* (January 2016) at 8. In light of the new law, Texas cities and counties must examine their own buildings, the position and extensiveness of the presence of court houses and offices utilized by the court within those buildings, and the wording and effectiveness of its signs on those buildings. It is worth noting that though the prohibition on firearms in courts and its offices can be read broadly to include a building that houses a court and/or court offices along with offices unaffiliated with the court, the Attorney General does not read it that way. For signs relating to concealed handguns that trigger civil penalties for cities and counties, the Attorney General opines that cities and counties may only prohibit concealed handguns in courtrooms and those offices "essential to the operation of the government court." That is important to keep in mind because the Attorney General receives complaints from citizens under Section 411.209 of the Government Code and investigates the complaint to determine whether legal action is warranted.

VI. Juvenile Justice

An expunction order issued under Article 45.0541 of the Code of Criminal Procedure (Expunction of Failure to Attend School Records) likely applies to documents in the possession of a juvenile probation department as a result of a referral to the juvenile court under Article 45.050.

Tex. Atty. Gen. Op. KP-0073 (3/28/16)

Such documents could fall under "other documents relating to the offense" under Article 45.0541(c).

Under Subsection 65.251(b) of the Family Code, a truancy court may refer a child to the juvenile probation department for either failure to obey a truancy court order or direct contempt; however, such a referral requires two prior instances of contemptuous conduct regardless of form (either failure to obey a truancy court order or direct contempt).

Tex. Atty. Gen. Op. KP-0064 (2/16/16)

Due to volume, this update does not include blood-draw-related decisions from the intermediate courts of appeals. The January 2017 issue of *The Recorder* will feature case summaries of all blood-draw-related decisions from October 2015 to present, including those decided after the writing of the full Case Law and Attorney General Opinion Update.

Teen Court Update

Ned Minevitz, Program Attorney & TxDOT Grant Administrator

Teen Court News From Around Texas

From November 14-17, 2016, the Teen Court Association of Texas (TCAT) hosted its three-day annual conference in Grapevine, Texas. The conference was a great success. Topics covered included *Enhancing Adolescent Mental Health*, *Services to At-Risk Youth*, *Security for Teen Courts*, *Distracted Driving*, *Motivational Interviewing to Address Substance Abuse and Related Behavior*, and many more. TCAT President Jennifer Bozorgnia said of the conference: "Thanks to our amazing Conference Planning Committee, we had a very successful annual TCAT conference in Grapevine, Texas at the beautiful Embassy Suites. We were excited to welcome the newcomers and welcome back those who have been with us before. Throughout our time together there were excellent training opportunities and fun team-building exercises. It's always a pleasure spending time with such a passionate and dedicated group of professionals. We're definitely looking forward to 2017 and what the year will bring for our Association." For more information on TCAT, visit http://www.txteencourt.com/. TCAT also presented their annual awards at the conference:

2016 Spotlight Achievement Award: Kelly Metress, Harker Heights Teen Court
"Biggest Story Ever Told:" Tammy Hawkins and Rebecca Grisham, Odessa Teen Court
"Biggest Defendant Turnaround Story:" Clara Baker, El Campo Teen Court
"Most Ridiculous Ticket:" Maria Fernandez, Coppell Teen Court
"Best New PR Idea:" Tamisha Fletcher, Arlington Teen Court
"Best Teen Court Website:" Kelly Metress, Harker Heights Teen Court
"Best Teen Court Picture:" Tina Heine, Georgetown Teen Court

The Temple Municipal Court's Teen Court has recently partnered with Temple High School to add some key enhancements to the program. Now held on the high school campus, Temple Teen Court functions much like a school club. With the assistance of a criminal justice partner teacher, information about teen court meetings, trainings, and sessions is made available to the entire student body. Temple High School students who are on a career track are required to perform a "capstone" project before graduation. Teen court has recently been designated as one of the projects available for capstone. A student that uses Temple Teen Court as their capstone project will earn a "cord" upon graduation. To complete the capstone, the student must attend all sessions throughout the year and write a paper about their experience. Temple Municipal Court Judge Kathleen Person said of the program: "Since we have partnered with the local high school, we have seen an almost triple increase in participation in our advocacy program that supports the teen court. Young people listen to young people, so our sentences are also more likely to be meaningful and successful. The high school is constructing a new building and there will be a courtroom-like area where we will move once it is completed. The goal is to institutionalize the changes and improvements that teen court has brought to our community and to become a fixture of change and improvement in the lives of the young people in and around Temple. Incidentally, the program is open to all young people who are enrolled in school, whether they are a student in Temple or are from a neighboring jurisdiction but whose case is being tried in Temple."

Future Teen Court Events

April 10-11, 2017
TMCEC's *Teen Court Planning Seminar* will be held at the Georgetown Municipal Court and the Comfort Suites in Georgetown, Texas. This program, funded by the Texas Department of Transportation, is free of charge to municipal court employees. Travel and meals will be reimbursed based on state and federal guidelines. This seminar is primarily geared toward municipal courts seeking to establish a teen court and those with newly established teen courts. Participants will receive hands-on training in how to effectively manage a teen court as well as observe real teen court proceedings at the Georgetown Municipal Court. Participation is limited to 20, so register today at www.tmcec.com/registration/ or by calling (512) 320-8274!

The 2017 TCAT Annual Mock Trial Competition will be held at the Fort Worth Southwest Court Complex located at 3741 SW Loop 820, Fort Worth, TX, 76133. The cost to register a team is $75.00, which includes lunch and a gift for each participant. The competition's date is to be determined, but will likely be in April, 2017. All teen courts that are members of TCAT are eligible to participate. To register, visit www.txteencourt.com/mock-trial-registration.html.

169 Municipal Courts Participate in National Night Out and 183 in Municipal Court Week!

Thank you to all the municipal courts that reported participating in National Night Out (October 4) and Municipal Court Week (November 7-11)! 169 courts reported participating in National Night Out and 187 courts reporting celebrating Municipal Court Week! If you participated and do not see your name on these lists, let TMCEC know by e-mailing ned@tmcec.com.

National Night Out is an annual community-building campaign that promotes the partnership between local government and its citizens to make their community a safer place to live. For more information, visit www.tmcec.com/mtsi/national-night-out/. Municipal Court Week is a week to show appreciation for the great work that municipal courts across Texas do every day. For more information, visit www.tmcec.com/mtsi/municipal-courts-week/. The following courts confirmed their participation in National Night Out:

- Alba
- Alice
- Alvin
- Anthony
- Arlington
- Austin
- Azle
- Balcones Heights
- Bangs
- Bastrop
- Bertram
- Boyd
- Brazoria
- Breckenridge
- Bremond
- Brenham
- Brookshire
- Brownsboro
- Bryan
- Castroville
- Cedar Hill
- Chandler
- Clear Lake Shores
- College Station
- Collinsville
- Combes
- Conroe
- Converse
- Corpus Christi
- Crowley
- Crystal City
- Dalworthington Gardens
- Dayton
- Decatur
- Double Oak
- Dripping Springs
- Duncanville
- Eagle Pass
- Edgecliff Village
- Edinburg
- Edna
- El Paso
- Elmendorf
- Elsa
- Encinal
- Fairfield
- Florence
- Forest Hill
- Forney
- Fort Stockton
- Fort Worth
- Freer
- Gainesville
- Galena Park
- Garrison
- Gatesville
- Glenn Heights
- Godley
- Grapevine
- Groves
- Groveton
- Hamilton
- Harker Heights
- Harlingen
- Haslet
- Hickory Creek
- Hico
- Holiday Lakes
- Hondo
- Hutchins
- Italy
- Jacinto City
- Jarrell
- Johnson City
- Kempner
- La Coste
- La Grulla
- La Marque
- La Porte
- La Vernia
- Laguna Vista
- Lakeside
- Lakeway
- Lancaster
- Leander
- Liberty Hill
- Linden
- Lometa
- Lone Star
- Lott
- Lyford
- Manor
- Maypearl
- Melissa
- Mesquite
- Mexia
- Midland
- Milford
- Missouri City
- Montgomery
- Moulton
- Nash
- Natalia
- Navasota
- Olmos Park
- Onalaska
- Panorama Village
- Paris
- Parker
- Penitas
- Piney Point Village
- Pleasanton
- Port Neches
- Pottsboro
- Progreso
- Prosper
- Ralls
- Rancho Viejo
- Ranger
- Raymondville
- Reno
- Richland Hills
- Richmond
- Riesel
- Rio Grande City
- River Oaks
- Rosebud
- Sachse
- San Benito
- Sansom Park
- Schertz
- Shepherd
- Sinton
- Smiley
- Snyder
- Somerset
- Somerville
- South Houston
- Southside Place
- Teague
- Terrell Hills
- Thorndale
- Three Rivers
- Tom Bean
- Trophy Club
- Tye
- Tyler
- Uvalde
- Van Alstyne
- Van Horn
- Venus
- Von Ormy
- Wake Village
- Wallis
- Waskom
- West Columbia
- West Orange
- West Tawakoni
- Wharton
- Whitney
- Wilmer
- Windcrest
- Winnsboro
- Woodcreek
- Woodville
- Woodway
- Wylie
- Zavala

Save a Life
Texas Department of Transportation

Dear Texas Municipal Courts:

Municipal Courts Week 2016 was a huge success! Please allow us to congratulate you on your outstanding work. Recognized in Texas House Resolution 1142, Municipal Courts Week is a time to show appreciation for all that municipal courts and their staff do. Municipal courts across the Lone Star State celebrated Municipal Courts Week in various ways from traffic safety and anti-impaired-driving displays for the public to staff appreciation luncheons. For ideas on what your court can do for Municipal Courts Week 2017, please visit www.tmcec.com/mtsi/municipal-courts-week/.

Did you know?

- Municipal courts in Texas hear more than 15 million criminal cases each year and come into contact with more defendants than all other levels of the judiciary combined.
- There were 1,294 municipal judges in Texas as of September 2016 – more than in any other level of the Texas judiciary.
- Municipal courts in Texas have 5,471 excellent staff members without whom municipal courts simply could not function.
- Proportionally, Texas municipal judges receive the fewest complaints against them at the State Commission on Judicial Conduct. There were 71 total complaints in FY16 against municipal judges - a 6 percent rate - yet municipal judges make up 35 percent of the total number of Texas judges.

Please e-mail us with what you did for Municipal Courts Week! We will be posting activities and photos on our website.

The following municipal courts reported their participation in Municipal Courts Week:

- Alice
- Alvin
- Amarillo
- Andrews
- Anna
- Anthony
- Aransas Pass
- Archer City
- Arlington
- Austin
- Azle
- Balcones Heights
- Bastrop
- Bayside
- Baytown
- Boerne
- Bovina
- Bowie
- Boyd
- Brazoria
- Brenham
- Brookshire
- Brownsville
- Bryan
- Buda
- Carrollton
- Cedar Hill
- Charlotte
- Cisco
- Clear Lake Shores
- Cleburne
- Cleveland
- Coffee City
- Coleman
- College Station
- Colleyville
- Columbus
- Combes
- Conroe
- Coppell
- Copperas Cove
- Corpus Christi
- Corsicana
- Crystal City
- Cuero
- Dalworthington Gardens
- Dayton
- Denton
- Dickinson
- Double Oak
- Dripping Springs
- Driscoll
- Duncanville
- Eagle Pass
- East Bernard
- Edinburg
- Edna
- El Campo
- El Paso
- Elgin
- Elsa
- Euless
- Floresville
- Forest Hill
- Forney
- Fort Worth (Southwest)
- Freer
- Friendswood
- Frisco
- Fulshear
- Galena Park
- Georgetown
- Granbury
- Grand Prairie
- Gun Barrel City
- Harker Heights
- Harlingen
- Haslet
- Helotes
- Hickory Creek
- Holiday Lakes
- Hondo
- Hunter's Creek Village
- Hutchins
- Ingleside
- Irving
- Jacinto City
- Johnson City
- Katy
- Keller
- Kennedale
- Killeen
- Kingsville
- La Porte
- La Vernia
- Lake Dallas
- Lakeway
- Lamesa
- Lancaster
- Leander
- Leonard
- Levelland
- Liberty Hill
- Linden
- Lockhart
- Lone Star
- Lufkin
- Magnolia
- Manor
- Mansfield
- Manvel
- Martindale
- McKinney
- Melissa
- Mesquite
- Mexia
- Midland
- Milford
- Mineral Wells
- Mission
- Missouri City
- Morgan's Point
- Natalia
- Navasota
- New Fairview
- New London
- Oak Ridge
- Onalaska
- Paducah
- Pampa
- Pantego
- Parker
- Payne Springs
- Pearland
- Pearsall
- Penitas
- Port Neches
- Pottsboro
- Prosper
- Richardson
- Richland Hills
- Richmond
- Rio Grande City
- Rosenberg
- Round Rock
- Sachse
- San Benito
- Sansom Park
- Santa Anna
- Schertz
- Seabrook
- Seguin
- Sherman
- Smiley
- Smithville
- Socorro
- South Houston
- South Padre Island
- Spearman
- Sugar Land
- Taft
- Temple
- Texarkana
- Texas City
- Texline
- Thorndale
- Three Rivers
- Trophy Club
- Tye
- Universal City
- Uvalde
- Van Horn
- Victoria
- Von Ormy
- Wallis
- Waxahachie
- Weatherford
- West Lake Hills
- West Orange
- West Tawakoni
- Whitewright
- Wills Point
- Wilmer
- Woodville
- Woodway
- Wylie
- Zavala

2017 Municipal Traffic Safety Initiatives Award Applications are Due December 31, 2016!

Purpose:

To recognize those who work in local municipalities and have made outstanding contributions to increase traffic safety by preventing impaired driving in their communities. This competition is a friendly way for municipalities to increase their attention to quality of life through traffic safety activities. Best practices will be shared across the state.

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 a Community Member.

Awards:

Award recipients will be honored at the Texas Municipal Courts Education Center (TMCEC) Traffic Safety Conference that will be held from March 27-29, 2017 in Austin at the Omni Southpark Hotel.

Nine (9) awards are anticipated:

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

For two court representatives, winning courts receive: complimentary conference registration, travel to and from the 2017 Municipal Traffic Safety Initiatives Conference - including airfare and/or mileage within state guidelines, two nights' accommodations at the Omni Southpark, and most meals and refreshments.

Honorable Mention:

Any application that is reviewed and deemed outstanding and innovative may receive honorable mention at the discretion of TMCEC. Honorable mentions will be provided one complimentary conference registration to attend the Traffic Safety Conference and will be recognized at the conference.

Hard copies of the application packet were recently mailed to all municipal courts. Rules, prizes, and other details are provided within the application. To access the application and for other information about the awards, please visit http://www.tmcec.com/mtsi/mtsi-awards/. Should you have any questions at all, please contact Ned Minevitz at Ned@tmcec.com or (512) 320-8274.

MUNICIPAL TRAFFIC SAFETY INITIATIVES

Save a Life™

TEXAS DEPARTMENT OF TRANSPORTATION

Resources for Your Court

New NCSC Publication: *Trends in State Courts 2016*

The National Center for State Courts has a new publication that may be accessed online at: www.ncsc.org/Information-and-Resources.aspx. It covers developments in family law, court communications, and other court improvements, such as communications within courts and with the public (such as Alaska's legal-notice website); and overall court improvement (such as Michigan's performance measures to improve customer service). The keynote article discusses state and federal reform initiatives to address the problems posed by "tough-on-crime" sentencing policies. The article "Should I Tweet That? Communications in the 21st Century" is a must-read for all working in the courts.

Court Security for Judges, Officers and Court Personnel

by Judge Richard W. Carter (Ret.) and Constable Randy Harris

Written as a guide for initiating a court security program and/or improving a current program, *Court Security for Judges, Officers and Court Personnel* provides a general outline for the necessities of a logistical and efficient court security program. Some of the chapters include: Court Security Screening, Bailiff Function in Court Security, Modern Technology in Court Security, and Judicial Protection, all of which contribute to the purpose of creating the framework of a legitimate court security program. Readers can expect to find explanations of seemingly intricate aspects of court security illustrated in an easy-to-follow and practical manner within this informative and necessary handbook.

Available at:

www.lexisnexis.com/store/us/	www.amazon.com	www.barnesandnoble.com
Book & eBook: $42.00	eBook Only: $32.00	eBook Only: $28.49
eBook Only: $32.00		

NACM Resources

The National Association for Court Management (NACM) has over 1,700 members from the United States, Canada, Australia, and other countries. NACM is the largest organization of court management professionals in the world with members from all levels and types of courts. At their Annual Meeting in Pittsburg, Pennsylvania on July 10-14, 2016, a wide range of issues related to court trends were discussed. Some of the videos from the general and breakout sessions may be accessed at no charge at the following link: https://nacmnet.org/educational-opportunities/nacm-midyear-conference-2016-videos.html.

- Challenges and Solutions on Fines, Fees and Bail Practices
- Participatory Defense: Family and Community Involvement in the Courts
- Identifying and Responding to Court Trends: The Next Ten Years
- State of the State Courts: 2015 Poll
- Engaging with Minority Collaborative Leadership: Ferguson and Beyond
- The Role of Court Administrators and Clerks in Developing Effective Partnerships to Close the Access to Civil Justice Gap
- Extending the Core to Your Court: Governance and Purposes & Responsibilities of Courts
- American Judicial Power: The State Court Perspective
- Administering the Courts in a Time of Criminal Justice Reform
- Bail Reform in New Jersey and Elsewhere: Case Studies on the Elements Involved in Instituting Major Change in a Statewide Court System
- The Conservatorship Accountability Project (CAP): Using Software and Data to Modernize Processes
- The Critical Role of IT in Improving Courts: What Court Managers Should Expect
- Criminal Cases: Casefl ow Management in Trial Courts and Appellate Courts
- The Moment You Can't Ignore: Using Culture to Drive Strategic Change
- Tools for Leading Loosely Coupled Systems
- Procedural Justice in Action: Case Studies from the Field

Information about future NACM conferences may be located at https://nacmnet.org/conferences/index.html. Information about membership may be accessed at https://nacmnet.org/membership/index.html.

SHOW CAUSE NOTICE PRIOR TO ISSUANCE OF CAPIAS PRO FINE

CAUSE NUMBER: _____

STATE OF TEXAS	**§**	**IN THE MUNICIPAL COURT**
VS.	**§**	**CITY OF _____**
_____	**§**	**_____COUNTY, TEXAS**

ORDER TO SHOW CAUSE

Name: _____ Offense: _____

Address: _____

You are hereby ordered to appear before the _____ Municipal Court at _____ o'clock ___.m., on the _____ day of _____, 20__, to show cause why you failed to abide by the terms of the judgment rendered against you on the _____, 20__. Specifically, you are accused of failing to:

_____

_____

_____

_____.

If all the terms of the judgment are not timely satisfied on or before the date ordered above, the defendant must appear on the date and time ordered above to show cause why a capias pro fine should not be issued. Failure to appear on this date and time may result in the issuance of a capias pro fine and commitment to jail to discharge the judgment under Article 45.046 of the Code of Criminal Procedure. Additional fees by law may result.

_____
Judge, Municipal Court

City of _____

_____ County, Texas

(municipal court seal)

Editor's Note: This notice should be accompanied by information on what to do if the defendant is unable to pay the fine and costs and/or discharge the judgment through community service. If your court has a "safe haven" policy where a defendant generally will not be arrested if he or she comes to court to discuss their case, consider including that on this form or an accompanying form.

CAPIAS PRO FINE (Art. 45.045, C.C.P.)

UPDATED

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

TO THE CHIEF OF POLICE OF THE CITY OF _____ OR ANY PEACE OFFICER OF THE STATE OF TEXAS – GREETINGS:

Whereas on the _____ day of _____, 20__, before Judge _____ of the Municipal Court of the City of _____, Texas, _____, the Defendant, date of birth _____, was convicted of the offense of: _____ and a judgment was rendered by said Court in favor of the State, against said Defendant for the sum of $_____ and all costs of court; and there is due and unpaid the amount of $_____.

The Court hereby finds that said Defendant has defaulted and failed to wholly satisfy the judgment in the above styled case.

You are therefore COMMANDED to bring said Defendant before the Municipal Court of the City of _____, Texas immediately *[or before a municipal court located in the same municipality if this Court is unavailable]* or place him or her in jail until (he)(she) can be brought before the Court without delay until the next business day following the date of the Defendant's arrest if the Defendant cannot be brought before the Court immediately.

The arresting officer is ORDERED to notify the Court **IMMEDIATELY** upon arrest of the Defendant. If the Defendant is placed in jail, **jail personnel are ORDERED** to notify the Court **IMMEDIATELY** upon placement of the Defendant in jail.

In witness whereof, I have hereunto set my hand at my office in the Municipal Court of the City of _____, Texas this _____ day of _____, 20__.

_____
Judge, Municipal Court

(municipal court seal)

.....

OFFICER'S RETURN

Came to hand the _____ day of _____, 20__, at _____ o'clock ___.m. and executed on the _____ day of _____, 20__, at _____ o'clock ___.m. the same by arresting _____, the named Defendant.

_____
Arresting Officer

Editor's Note: Under Art. 2.16, C.C.P., any sheriff or other officer who willfully refuses or fails from neglect to execute any legal process which it is made his duty by law to execute "shall be liable to a fine for contempt not less than $10 nor more than $200, at the discretion of the court." The importance of the communication by the arresting officer and/or the jail to the court that issued the capias pro fine cannot be overstated. A capias pro fine is not commitment, which requires specific procedural safeguards under the U.S. Constitution and Art. 45.046, C.C.P.

ORDER OF COMMITMENT (Art. 45.046, C.C.P.)

UPDATED

CAUSE NUMBER: _____

STATE OF TEXAS	§	**IN THE MUNICIPAL COURT**
VS.	§	**CITY OF _____**
_____	§	**_____COUNTY, TEXAS**

TO ANY PEACE OFFICER OF THE STATE OF TEXAS – GREETINGS:

You are commanded to take into custody and commit to the jail of your County the above-named Defendant, who was, on the _____, day of _____, 20___, convicted before the Municipal Court in the City of _____, _____ County, Texas of the offense of _____ and was assessed a fine and court costs totaling $ _____, of which $ _____ is unpaid.

The undersigned finds that **EITHER** *(check the applicable one)*:

☐ (1) the arrestee is the same person as the Defendant in the cause described above;
(2) the Defendant has intentionally failed to make a good faith effort to pay said fine and costs; and
(3) the Defendant is not indigent and has failed to make a good faith effort to discharge said fine and costs;

OR

☐ (1) the arrestee is the same person as the Defendant in the cause described above;
(2) the Defendant has intentionally failed to make a good faith effort to pay said fine and costs; and
(3) the Defendant is indigent and:
(a) has failed to make a good faith effort to discharge the fine and costs under Article 45.049, Code of Criminal Procedure, (community service);
(b) could have discharged the fine under Article 45.049, Code of Criminal Procedure, (community service) without experiencing any undue hardship.

Therefore, you are commanded to keep the Defendant in custody until the sum of $ _____ is fully paid or the Defendant is otherwise discharged by law. Unless otherwise specified in the judgment or sentence in said cause, pursuant to Article 45.048(b), Code of Criminal Procedure, the Court specifies that the Defendant remain in jail a sufficient length of time to satisfy the remaining fine and costs at the following rate:

_____ hours (*not less than 8 or more than 24*) to earn
_____ (*minimum dollar amount $50*) to satisfy the fine and costs.

In the event the Defendant is committed for defaulting in more than one judgment, jail credit is to be assessed:

☐ Concurrently (at the same time, per judgment until jail credit exceeds or equals the sum total of fine and costs); or

☐ Consecutively ("stacked," one sentence of confinement is to follow another until jail credit exceeds or equals the sum total of fine and costs) with following cause(s): *List cause number(s), Court(s), date of judgment(s), offense(s), and fine and costs total(s)*

Ordered on this _____ day of _____, 20___.

(municipal court seal)

_____
Judge, Municipal Court
City of _____
_____ County, Texas

TEXAS MUNICIPAL COURTS EDUCATION CENTER
FY16 REGISTRATION FORM:
Regional Judges & Clerks Seminar, Court Administrators, Bailiffs & Warrant Officers, Level III Assessment Clinic, Traffic Safety, and Mental Health Summit

Conference Date: _____ Conference Site: _____

Check one:

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

☐ Traffic Safety Conference - Judges & Clerks ($50)
☐ Level III Assessment clinic ($100)
☐ Court Administrators Seminar ($100)
☐ Bailiff/Warrant Officer ($100)

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: _____ Are you also a mayor?: _____

Emergency contact (Please include name and contact 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 judges and 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 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: _____

***Bailiffs/Warrant Officers:** Municipal judge's signature required to attend Bailiffs/Warrant Officers' program.

Judge's Signature: _____ Date: _____

DOB: _____ TCOLE PID # _____

I have read and accepted the cancelation policy, which is outlined in full on page 10-11 of the Academic Catalog and under the Registration section of the website, www.tmcec.com. **Full payment is due with the registration form. Registration shall be confirmed only upon receipt of the registration form (with all applicable information completed) and full payment of fees.**

_____ _____

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

PAYMENT INFORMATION:

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

☐ 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.

2016 - 2017 Academic Schedule At-A-Glance

Seminar	Date(s)	City	Hotel Information
Regional Judges & Clerks Seminar	January 9-11, 2017 (M-T-W)	San Antonio	Omni San Antonio at the Colonnade 9821 Colonnade Blvd, San Antonio, TX 78230
Level III Assessment Clinic	January 23-26, 2017 (M-T-W-Th)	Austin	Crowne Plaza 6121 IH 35 North, Austin, TX 78752
Regional Clerks Seminar	January 29-31, 2017 (Su-M-T)	Galveston	San Luis Resort 5222 Seawall Blvd, Galveston, TX 77551
Clerks One Day Clinic	February 2, 2017 (Th)	McAllen	Doubletree Hotel 1800 S. 2nd Street, McAllen, TX 78503
New Judges & Clerks Orientation	February 8, 2017 (W)	Austin	TMCEC 2210 Hancock Drive, Austin, TX 78756
Regional Judges Seminar (Waitlist Only)	February 19-21, 2017 (Su-M-T)	Galveston	San Luis Resort 5222 Seawall Blvd., Galveston, TX 77551
Regional Judges and Clerks Seminar	February 26-28, 2017 (Su-M-T)	Houston	Omni Houston Westside 13210 Katy Freeway, Houston, TX 77079
Regional Clerks Seminar	March 6-8, 2017 (M-T-W)	Addison	Crowne Plaza Dallas Galleria 14315 Midway Road, Addison, TX 75001
Regional Judges Seminar	March 8-10, 2017 (W-Th-F)	Addison	Crowne Plaza Dallas Galleria 14315 Midway Road, Addison, TX 75001
Prosecutor's Seminar	March 22-24, 2017 (W-Th-F)	San Marcos	Embassy Suites 1001 E McCarty Ln, San Marcos, TX 78666
Traffic Safety Seminar	March 27-29, 2017 (M-T-W)	Austin	Omni Southpark 4140 Governors Row, Austin, TX 78744
Regional Judges & Clerks Seminar	April 3-5, 2017 (M-T-W)	Amarillo	Ambassador Hotel 3100 I-40 Frontage Rd., Amarillo, TX 79102
Clerks One Day Clinic	April 20, 2017 (Th)	Beaumont	Holiday Inn & Suites 3950 I-10 South, Beaumont, TX 77705
Regional Clerks Seminar	May 1-3, 2017 (M-T-W)	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd, S. Padre Island, TX 78597
Regional Attorney Judges Seminar	May 7-9, 2017 (Su-M-T)	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd, S. Padre Island, TX 78597
Regional Non-Attorney Judges Seminar	May 9-11, 2017 (T-W-Th)	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd, S. Padre Island, TX 78597
Bailiffs and Warrant Officers Seminar	May 15-17, 2017 (M-T-W)	Huntsville	Veterans Conference Center 455 SH 75N, Huntsville, TX 77320
New Judges & Clerk Orientation	May 17, 2017 (W)	Austin	TMCEC 2210 Hancock Drive, Austin, TX 78756
Regional Judges & Clerks Seminar	June 5-7, 2017 (M-T-W)	Odessa	MCM Elegante 5200 E University Blvd, Odessa, TX 79762
Juvenile Case Managers Seminar	June 11-13, 2017 (S-M-T)	Austin	Omni Southpark Austin 4140 Governors Row, Austin, TX 78744
Prosecutors & Court Administrators Seminar	June 26-28, 2017 (M-T-W)	Addison	Crowne Plaza Dallas Galleria 14315 Midway Road, Addison, TX 75001
New Judges & Clerks Seminar	July 17-21, 2017 (M-T-W-Th-F)	Austin	Omni Southpark Austin 4140 Governors Row, Austin, TX 78744
Legislative Update	August 4, 2017 (F)	Lubbock	Overton Hotel 2322 Mac Davis Ln. Lubbock, TX 79401
Legislative Update	August 8, 2017 (T)	Houston	Omni Houston Hotel 13210 Katy Freeway, Houston, TX 77079
Legislative Update	August 15, 2017 (T)	Dallas	Omni Dallas Hotel Park West 1590 LBJ Fwy, Dallas, TX 75234
Legislative Update	August 18, 2017 (F)	Austin	Omni Southpark 4140 Governors Row, Austin, TX 78744

Note: There are special registration forms to be used to register for the New Judges and New Clerks Seminars, Prosecutors Conference, Teen Court Planning Seminar, Mental Health Summit, and Impaired Driving Symposium. Please visit our website at www.tmcec.com/registration/ or email register@tmcec.com for a registration form.

Register Online: 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.

The Recorder is available online at www.tmcec.com. The print version is paid for and mailed to you by TMCA as a membership benefit. Thank you for being a member of TMCA. For more information: www.txmca.com.

Resources on TMCEC Website

Judges and court support personnel working in municipal courts know that the enforcement and collection of various court fines and costs is essential to the integrity of the courts in gaining compliance with the orders of the courts and ensuring that those orders are not violated. On a weekly basis, TMCEC receives notice of media attention on how fines and fees disproportionately impact low income communities and communities of color. To help courts share resources, TMCEC has set up a webpage located at www.tmcec.com/fines/. This webpage contains resources to help courts prepare local forms and handouts that will help defendants understand their rights and responsibilities, as well as the court's procedures. This is a work in progress. TMCEC hopes that courts will submit copies of their materials on these issues by emailing them to tmcec@tmcec.com. TMCEC will then post them on the webpage for other courts to review and adapt for local use. Note: This is in addition to the TMCEC webpage called "Ferguson," which tracks the issues related to fines, fees, and jail practices involving other courts, media coverage, and provides links to webinars and articles of interest. Access the Ferguson page at www.tmcec.com/ferguson/. The updated forms on pages 59-61 in this issue of *The Recorder* are examples of resources you can find on the TMCEC Fines, Fees, & Costs webpage.