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Case Law and Attorney General Opinion Update: Part I*

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Except where noted, the following decisions and opinions were issued between the dates of October 1, 2017 and October 1, 2018. Acknowledgments: Thanks to Judge David Newell, Victoria Ford, Ned Minevitz, and Patty Thamez.

I. Constitutional Issues
A. 1st Amendment

The existence of probable cause for an arrest at a city council meeting for failing to leave the podium when ordered to do so did not bar the arrestee's claim that the arrest was made in retaliation for past speech in violation of the 1st Amendment.

Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018)

After Lozman towed his floating home into a slip in a marina owned by the City of Riviera Beach, he became an outspoken critic of the City's plan to use its eminent domain power to seize waterfront homes for private development and often made critical comments about officials during the public-comment period of city council meetings. He also filed a lawsuit alleging that the city council's approval of an agreement with developers violated Florida's open-meetings laws. In June 2006, the council held a closed-door session, in part to discuss Lozman's lawsuit. He alleged that the meeting's transcript shows that councilmembers

*Part II will be in December Issue

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Fair and Impartial Justice for All

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TMCA Awards: FY 2018

The following award recipients were nominated by their peers and recognized for their contribution to the fair and impartial administration of justice at the Annual Conference of the Texas Municipal Courts Association (TMCA), held in San Antonio on August 2-3, 2018.

Outstanding Judge of the Year

The Honorable Donna Starkey from the City of Alvin was selected by the TMCA to receive the Association's Jurist of the Year Award. Judge Starkey has worked for the City of Alvin for 26 years. She began her career as a court clerk and was later elected as a Justice of the Peace. In 1991, she was appointed as a Municipal Judge. Judge Starkey has served on the TMCA Board of Directors for many years as a Regional Director, President-Elect, and Past-President. During her tenure on the Board of Directors Judge Starkey was instrumental in the purchase of the building that now houses the Texas Municipal Courts Education Center. Judge Starkey has a passion for law and justice, can keep an open mind while being fair and impartial. She is always eager to observe municipal court staff carrying out the daily operations of the court so that staff can better serve the community. Under her direction, the Alvin Municipal Court participates in National Night Out, Municipal Court Week, and the Municipal Traffic Safety program. Her knowledge of the fair court procedures, awareness and implementation of traffic safety initiatives contributed to the City of Alvin being recognized by the Texas Municipal Courts Education Center and the Texas Department of Transportation several times. Along with her undeniable talent, Judge Starkey has always been an absolute joy to work with. She always manages to foster positive discussions and bring out the best in her support staff. She has gained the trust and respect of local law enforcement and the community. Judge Starkey is

Hilda Cuthbertson, Judge, City of Snook; Donna Starkey, Judge, City of Alvin (retired); Glenn Starkey, Alvin; Michael Acuna, Judge, City of Dallas and TMCA President

a very kind, caring, and compassionate person who has served as a Judge with the utmost integrity dedicating her whole life to serving the public and the judiciary. Judge Starkey is a role model and mentor to many judges and clerks throughout her career. Note: Judge Starkey retired in September 2018 but continues to serve on the Board of Directors of the Texas Municipal Courts Foundation.

Outstanding Clerk of the Year

Landra Solansky, Court Administrator for the Seguin Municipal Court, was selected by TMCA to receive the Association's Clerk of the Year Award. Ms. Solansky has worked a total of 13 years in municipal courts. The first three years were as court clerk for the City of Cibolo and the last 10 years as court administrator with Seguin. During her career, she has served on many boards, committees, and panel discussions on various topics related to our profession. She currently serves as the Vice-President of the Texas Court Clerks Association (TCCA) and is running for President of the Freedom Trail Chapter of TCCA. She also currently serves as the representative to the Texas Municipal League for TCCA. She was recently asked to participate in the Office of Court Administration's Centers of Excellence program. All of this as she handles her duties for the Seguin Municipal Court with ease. Early in her career, Ms. Solansky saw a need for education to be offered in her area to judges and court support staff. She approached the City of Seguin and along with the city's support, hosted their 10th annual brunch in which judges, court clerks, prosecutors, bailiffs, and warrant officers were invited to attend and obtain crucial continuing education. She reguarly serves as a faculty member for TMCEC and is a mentor to many clerks across the state. In her spare time she achieved her Level III certification and is a Certified Municipal Court Clerk (CMCC). She graduated last year as a Certified Court Manager (CCM) from the Institute for Court Management in Williamsburg, Virginia. She is always there to lend a hand to another court if asked and takes her role as a CCM very seriously.

Hilda Cuthbertson, Judge, City of Snook; Landra Solansky, Court Administrator, City of Sequin; Joe Solanksy, Sequin; Bonnie Townsend, Judge, City of Luling

Outstanding Prosecutor of the Year

Amy McHugh, city prosecutor for the Lakeway Municipal Court, has been selected by the Texas Municipal Courts Association to receive the Association's Prosecutor of the Year Award. About eight years ago, Lakeway hired Ms. McHugh to serve as the prosecutor for the Lakeway Municipal Court. In short, she is the "gold standard" for what we want all of our governmental prosecutors to be—honest, compassionate, ethical, and fair. If the evidence is not there or if she has a reasonable doubt, she will move to dismiss. If a defendant needs a tailored probation plan, she crafts it. If a defendant has a terrible home situation or illness, she moves to dismiss their case or considers how the outcome may affect their "upside down" life. However, if a case needs prosecuting, she prosecutes it. All defendants regardless of their financial status, faith, gender, or pro-se or represented by legal counsel are treated fairly.

Hilda Cuthbertson, Judge, City of Snook; Amy McHugh, Prosecutor, City of Lakeway; and Stephen Berry.

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Part II or the Case Law and Attorney General Opinion Update will be inlcuded in the December 2018 edition of *The Recorder*. You can also find the course material version online at https://goo.gl/HpiL64.

Legislative Updates

TMCEC is planning four regional, six-hour elective programs in August 2019 after the 86th Legislative Session. The registration fee is $100. For attorneys seeking CLE, there is a voluntary $50 CLE fee (No TCOLE Credit). The one-day sessions will be held from 9:00 a.m. - 5:00 p.m. If you wish to stay at the hotel, you are responsible for your own accommodations. A room block is available at the state rate plus tax under the TMCEC block. Register online at http://register.tmcec.com or download a registration form at http://www.tmcec.com/registration/

August 13, 2019
Overton Hotel
2322 Mac Davis Lane
Lubbock, Texas 79401
806.776.7000
Register by: July 13, 2019

August 16, 2019
Omni Park West
1590 LBJ Freeway
Dallas, Texas 75234
972.869.4300
Register by: July 16, 2019

August 20, 2019
Omni Westside
13210 Katy Freeway
Houston, Texas 77079
281.558.8338
Register by: July 20, 2019

August 23, 2019
Omni Southpark
4140 Governors Row
Austin, Texas 78744
512.448.2222
Register by: July 23, 2019

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devised an official plan to intimidate him, and that many of his subsequent disputes with city officials and employees were part of the City's retaliation plan. Five months after the closed-door meeting, the Council held a public meeting. During the public-comment session, Lozman began to speak about the arrests of officials from other jurisdictions. When he refused a councilmember's request to stop making his remarks, he was ordered by council to be arrested. The State's attorney determined there was probable cause for the arrest, but decided to dismiss the charges.

Lozman then filed a Section 1983 suit alleging a number of incidents he believed showed the City had an "official municipal policy" of intimidation and that the council ordered his arrest in retaliation for previous acts of free speech against the City. The jury returned a verdict for the City. The court of appeals ruled that the existence of probable cause for Lozman's arrest defeated a 1st Amendment claim for retaliatory arrest. Whether that ruling is correct was the question before the Court.

Justice Kennedy delivered the opinion of the Court (8-1), finding that this case does not involve a typical retaliatory arrest claim. For example, Lozman claims the City itself retaliated against him, not the officer. Also, Lozman alleges the City's official policy towards him is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made. The Court places these facts in a unique class of retaliatory claims.

The City and Lozman each argue that different precedents should apply. Lozman argues that the rule in *Mt. Healthy City Bd. of Ed. v. Doyle* should apply, i.e., requiring the city to show the arrest would have been ordered even without reference to previous protected speech, using but-for causation from the law of torts. The City argued that the rule in retaliatory prosecution cases should apply where the existence of probable cause is a bar, stemming from *Hartman v. Moore*.

The Court found that in retaliatory prosecution cases, there is a "presumption of regularity accorded to prosecutorial decisonmaking." That presumption does not apply in this context. Also, there is a risk that some police officers may exploit the arrest power as a means of suppressing speech. The Court declines to decide which case should apply when speech is made in connection with, or contemporaneously to, criminal activity. Here, the alleged free speech was made prior to and apart from his alleged criminal activity of refusing to leave the podium. In cases that fall in the unique type of retaliation claim made in this case, the *Mt. Healthy* rule should be applied. The Court suggests that the court of appeals on remand may want to consider (1) whether any reasonable juror could find that the City actually formed a retaliatory policy to intimidate Lozman during its June 2006 closed-door session; (2) whether any reasonable juror could find that the November 2006 arrest constituted an official act by the City; and (3) whether, under *Mt. Healthy*, the City has proved that it would have arrested Lozman regardless of any retaliatory animus—for example, if Lozman's conduct during prior city council meetings had also violated valid rules as to proper subjects of discussion, thus explaining his arrest here.

As a final matter, the Court underscores the recognition that the right to petition is one of the most precious of the liberties safeguarded by the Bill of Rights. Lozman's speech is high in the hierarchy of 1st Amendment values; when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.

Justice Thomas dissented, finding that no one briefed, argued, or even hinted at the rule the Court "dreamed up" for a "unique class of retaliatory arrest claims." To the contrary, the parties concentrated on resolving the question posing a decades-long disagreement in federal courts: whether the existence of probable cause defeats a 1st Amendment retaliatory-arrest claim as a matter of law. Justice Thomas would have held that Lozman must plead and prove a lack of probable cause as an element of his 1st Amendment retaliatory-arrest claim. This conclusion is based on Section 1983 lawsuits as a "species of tort liability." The closest analogies to this claim under common law are false imprisonment, malicious prosecution,

and malicious arrest, which all emphasize the importance of probable cause. Allowing plaintiffs to bring a retaliatory-arrest claim in circumstances like this case, without pleading and proving a lack of probable cause, would permit plaintiffs to harass officers with the kind of suits that common-law courts deemed intolerable.

An individual subject to a protective order violates the order by "communicating in a harassing manner" when he intentionally or knowingly sends information or messages, or speaks to, the protected person in a manner that would persistently disturb, bother continually, or pester another person.

Wagner v. State, 539 S.W.3d 298 (Tex. Crim. App. 2018)

In an 8-1 opinion, written by Judge Alcala, the Court of Criminal Appeals held that Section 25.07(a)(2)(A) of the Penal Code does not violate the 1st Amendment because it is not overly broad and has narrow applicability in that it applies only in a very precise set of circumstances to a limited group of individuals whose communications have been restricted through one of seven types of judicially imposed bond conditions or protective orders which only prohibits communications that are intentionally or knowingly made in a threatening or harassing manner towards protected individuals.

The statute, as applied to Wagner's conduct, was not impermissibly vague. The common meaning of the term "harassing" is clear enough to afford a person of ordinary intelligence a fair opportunity to know what is prohibited. In this case, Wagner repeatedly communicated with his estranged wife during the duration of a protective order in a manner that a person of ordinary intelligence would know to be persistently disturbing, bothersome, or pestering.

Presiding Judge Keller dissented explaining that Section 25.07 of the Penal Code is probably not facially unconstitutional, even under the Court's construction, but the majority opinion will cause uncertainty as to what conduct the statute prohibits. The Court's definition of "harassing" does not adequately address the intensity and frequency of the conduct necessary to violate Section 25.07.

Presiding Judge Keller's dissent offers an alternative construction of the statute she believes eliminates uncertainty and better conforms to the language of the statute. Specifically, she employs a definition that sets the intensity of the conduct as that which would produce substantial emotional distress. This is preferable because the amount of repetition required to constitute harassing communication may vary based on the context of the communication. Focusing on "substantial emotion distress" avoids reading a repetition element into Section 25.07.

Section 21.16(b) of the Penal Code, known as the "revenge pornography" statute, to the extent it proscribes the disclosure of visual material, is unconstitutional on its face in violation of the Free Speech clause of the 1st Amendment.

Ex parte Jones, 2018 Tex. App. LEXIS 3439 (Tex. App.—Tyler May 16, 2018, pet. granted)

Jordan Bartlett Jones was charged with unlawful disclosure of intimate visual material in violation of Section 21.16(b) of the Penal Code, commonly known as the "revenge pornography" statute. In his appeal from the trial court's denial of his pretrial application for writ of habeas corpus, he alleged that Section 21.16(b) is unconstitutional on its face because it violates the 1st Amendment. Because the photographs and visual recordings are inherently expressive and the 1st Amendment applies to the distribution of such expressive media in the same way it applies to their creation, the court concludes that the right to freedom of speech is implicated in this case. The court also concludes that the statute is an invalid content-based restriction and overbroad.

Commentary: Magistrates should be apprised of criminal statutes held unconstitutional. This is one to watch, however, because the Court of Criminal Appeals granted the State's petition for discretionary review.

Section 551.143(a) of the Government Code (Texas Open Meetings Act (TOMA)), which makes it a criminal offense for a member or group of members of a governmental body to knowingly conspire to circumvent TOMA by meeting in numbers less than a quorum for the purpose of

secret deliberations, is not unconstitutionally overbroad or vague.

State v. Doyal, 541 S.W.3d 395 (Tex. App.—Beaumont 2018, pet granted)

Doyal, a member of the Montgomery County Commissioners Court, was indicted for knowingly conspiring to circumvent the provisions of TOMA by meeting in a number less than a quorum for the purpose of secret deliberations "by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond[.]" In his motion to dismiss, Doyal argued that Section 551.143 of the Government Code burdens free speech and is subject to strict construction. The trial court granted the motion. The State appealed.

The court found that the statute is not a content-based restriction, applying rational basis review. According to the court, the statute is directed at conduct, i.e., the act of conspiring to circumvent TOMA by meeting in less than a quorum for the purpose of secret deliberations in violation of TOMA. The court also concluded that Section 551.143 describes the criminal offense with sufficient specificity that ordinary people can understand what conduct is prohibited; the statute provides reasonable notice of the prohibited conduct; and the statute is reasonably related to the State's legitimate interest in assuring transparency in public proceedings. Although the terms "conspire," "circumvent," and "secret" were not defined, they were terms with plain meanings.

Commentary: Stay tuned. The Court of Appeals granted Judge Doyal's petition for discretionary review.

B. 4th Amendment / Search and Seizure Issues
1. Expectation of Privacy

People maintain an expectation of privacy in the record of their physical movements as captured through cell service location information. Therefore, under the requirements of the 4th Amendment, law enforcement officers must generally obtain a warrant before obtaining such information.

Carpenter v. United States, 138 S. Ct. 2206 (2018)

In a 5-4 decision, the U.S. Supreme Court reversed the decision of the court of appeals and trial court. Writing for a five-judge majority, Chief Justice Roberts explained that acquisition from wireless carriers of Carpenter's historical cell-site location information (CSLI) constituted a search under the 4th Amendment. When law enforcement accessed defendant's CSLI and his physical movements, it invaded his reasonable expectation of privacy and the fact that law enforcement obtained the information from a third party did not overcome Carpenter's 4th Amendment protections.

A court order obtained under the Stored Communications Act (18 U.S.C.S. Sec. 2703(d)) was not a permissible mechanism for accessing historical CSLI because the showing required under the Act (reasonable grounds) fell short of probable cause. A search warrant was necessary to obtain CSLI in the absence of an exception such as exigent circumstances.

Justice Kennedy, joined by Justice Alito, dissented because the scope of the Court's ruling endangered congressionally authorized investigations and because CSLI records are business records in which Carpenter had no reasonable expectation of privacy.

Justice Thomas dissented because the 4th Amendment protects "persons, houses, papers, and effects," not CSLI records. Furthermore, the 4th Amendment contains no express expectation of privacy and that the creation of the expectation of privacy test in *Katz v. U.S.* (1967) was wrongly decided.

Justice Gorsuch also dissented. Although critical of the expectation of privacy test, he acknowledged the application of precedent. He postulated that the CSLI records could arguably constitute "papers or effects" worthy of 4th Amendment protections but that argument was not presented by Carpenter.

Commentary: Seizure of electronic customer data is governed by Article 18.02(a)(13) and Article 18.21 of the Code of Criminal Procedure. Notably, an order for CSLI records under Article 18.21, Section 5, may only be issued by a district judge. It does not require probable cause, only reasonable belief. A search warrant can be obtained from a district judge under Section 5. It is most likely a legislative oversight but neither Article 18.01 nor Article 18.20 of the Code of Criminal Procedure contains an express restriction on who can issue a search warrant under Article 18.02(a)(13) for electronic customer data held in electronic storage, including the records and other information related to a wire communication or electronic communication held in electronic storage. Arguably the search warrant in Article 18.02(a)(13) is the search warrant in Article 18.20. In other words, it is a search warrant that can only be issued by a district judge (which makes sense particularly if the information were located outside of Texas). Hopefully *Carpenter* will prompt some revisions of these provisions in the Code of Criminal Procedure.

A driver in lawful possession or control of a rental car, who is nevertheless not listed as an authorized driver on the rental agreement, still maintains an otherwise reasonable expectation of privacy under the 4th Amendment. Furthermore, the fact that a driver violates the rental agreement signed by a third party does not eliminate any reasonable expectation of privacy that the driver has in the vehicle.

Byrd v. United States, 138 S. Ct. 1518 (2018)

In a 9-0 decision, Justice Kennedy, joined by Chief Justice Roberts and Justices Sotomayor, Breyer, Kagan, and Ginsburg vacated the Third Circuit Court of Appeals' judgment convicting defendant of possession of heroin with intent to distribute and of being a prohibited person in possession of body armor. Justice Thomas filed a concurring opinion in which Justice Gorsuch joined. Justice Alito also filed a concurring opinion.

Latasha Reed rented a car in New Jersey while petitioner Terrence Byrd waited outside the rental facility. Her signed agreement warned that permitting an unauthorized driver to drive the car would violate the agreement. Reed listed no additional drivers on the form, but she gave the keys to Byrd upon leaving the building. Byrd stored personal belongings in the rental car's trunk and then left alone for Pittsburgh. After stopping Byrd for a traffic violation, Pennsylvania State Troopers learned that the car was rented, that Byrd was not listed as an authorized driver, and that Byrd had prior drug and weapons convictions. Byrd also stated he had a marijuana cigarette in the car. The troopers proceeded to search the car, discovering body armor and 49 bricks of heroin in the trunk. The district court denied Byrd's motion to suppress the evidence as the fruit of an unlawful search, and the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car.

The Court held that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. Furthermore, while a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it, see, e.g., *Jones v. United States*, 362 U.S. 257, 259 (1960), legitimate presence on the premises alone is insufficient. The Court held that the expectation of privacy that comes from lawful possession and control and the attendant right to exclude should not differ depending on whether a car is rented or owned by someone other than the person currently possessing it. It disagrees with the Government's contention that Byrd had no basis for claiming an expectation of privacy in the rental car because his driving of that rental voided the agreement. The Government provided no explanation of the bearing that this breach has on expectations of privacy.

It is important to note that the Court remanded two issues. First, whether those who intentionally use a third party to procure a rental car by fraudulent scheme for purposes of committing a crime lack 4th Amendment expectations of privacy, similar to car thieves. Second, even if Byrd had a right to object to the search, whether probable cause justified it in any event.

In his concurrence, Justice Thomas questions the Court's use of the "reasonable expectation of privacy" test from *Katz v. United States*, 389 U.S. 347, 360-61 (1967). Nevertheless, he joins the Court's opinion because he states that it "correctly navigates our precedents, which no party has asked us to reconsider." Justice Alito, in his concurrence, stated that the court of appeals is free to reexamine on remand the question whether petitioner may assert a 4th Amendment claim or decide the appeal on another appropriate ground.

2. Exceptions to the Warrant Requirement
a. Automobile Exception

The partially enclosed top portion of defendant's home driveway, in which defendant's motorcycle was parked, was curtilage, for 4th Amendment purposes. Additionally, the automobile exception to the warrant requirement for searches did not justify the police officer's invasion of curtilage of home.

Collins v. Virginia, 138 S. Ct. 1663 (2018)

In an 8-1 decision, the Court in an opinion written by Justice Sotomayor, joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Kagan, and Gorsuch, reversed the Supreme Court of Virginia's judgment convicting defendant of receiving stolen goods and remanded the case.

During the investigation of two traffic incidents involving an orange and black motorcycle with an extended frame, the officer learned that the motorcycle was likely stolen and in the possession of petitioner Collins. The officer discovered photographs on Collins' Facebook profile of an orange and black motorcycle parked in the driveway of a house, drove to the house, and parked on the street. From there, without a search warrant, the officer walked to the top of the driveway, removed the tarp covering the motorcycle, confirmed the vehicle was stolen by running the license plate and vehicle identification number, took a photograph of the motorcycle, replaced the tarp, and returned to his car to wait for Collins. When Collins appeared, the officer arrested him. The trial court denied Collins' motion to suppress the evidence on the ground that the officer violated the 4th Amendment when he trespassed on the house's curtilage to conduct a search, and Collins was convicted of receiving stolen property.

In crafting the automobile exception to the warrant requirement, the Court emphasized the "ready mobility of the automobile" and "the pervasive regulation of vehicles capable of traveling on public highways," in justifying their different constitutional treatment from homes. See, *California v. Carney*, 471 U.S. 386, 390, 392 (1985). When these justifications are present, officers may search an automobile without a warrant so long as they have probable cause. In contrast, curtilage—"the area 'immediately surrounding and associated with the home'"—is considered "part of the home itself for 4th Amendment purposes." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). Thus, when an officer physically intrudes on the curtilage to gather evidence, a 4th Amendment search has occurred and is presumptively unreasonable absent a warrant.

The Court determined that the partially enclosed top-portion of the driveway where Collins' motorcycle was parked and subsequently searched was curtilage, comparing the area to a front porch, side garden, or area "outside the front window." *Id*. at 7. Those types of areas constitute "an area adjacent to the home and 'to which the activity of home life extends.'" *Id.* An officer does not have the right to enter a home or its curtilage to access a vehicle without a warrant. The Court also disagreed with Virginia's claim that the automobile exception is categorical, and permits a warrantless search of a vehicle at any time, including in a home or curtilage. The Court clarified that curtilage is an afforded constitutional protection, and that creating a carve-out for certain types of curtilage would likely create confusion.

In his dissent, Justice Alito concluded that the officer's search was "reasonable" on 4th Amendment grounds. He continued by stating that the officer had probable cause to believe that the object under the tarp was the motorcycle in question, that the petitioner had been operating the motorcycle, and that a search of the motorcycle would provide evidence that it had been stolen. Ascertaining the

bounds of curtilage determines only whether a search is governed by the 4th Amendment and plays no role in 4th Amendment analysis. Therefore, Justice Alito argues that even though the motorcycle was within the curtilage of the home, the search was nevertheless reasonable because curtilage should have no effect on the reasonableness of the 4th Amendment search.

Probable cause did not exist, on the facts, to search the defendant's vehicle under the automobile exception to the warrant requirement because his short visit to the sports bar, which had a well-documented history of narcotics sales, unsupported by any details concerning the nature of his visit there, did not sufficiently "relate" him to any evidence of crime.

Marcopoulos v. State, 538 S.W.3d 596 (Tex. Crim. App. 2017)

The State also argued that the defendant's furtive gestures when he noticed a patrol car was behind him supported probable cause. Judge Keasler delivered the opinion of the Court. While the Court does not discount the suspiciousness of Marcopoulos' unusually brief appearance within the bar, this behavior does not "warrant a man of reasonable caution in the belief that an offense has been or is being committed." There remains, then, a discernible gap between the reasonable suspicion aroused by Marcopoulos' brief presence at the bar and the proof necessary to establish probable cause. The Court holds that this gap was not bridged by Marcopoulos's furtive gestures.

The Court has held that furtive gestures must be coupled with "reliable information or other suspicious circumstances relating the suspect to the evidence of crime" to establish probable cause. Marcopoulos' short visit to the bar, unsupported by any details concerning the nature of his visit there, did not sufficiently "relat[e]" him to any "evidence of crime." Furthermore, Marcopoulos did not exhibit furtive gestures in response to police action (e.g., wailing sirens or flashing lights), but rather mere police presence. He was situated in front of a marked police car that had not yet indicated an intention to stop him, and beside an unmarked police car driven by an undercover officer. Finally, Marcopoulos' movements were not connected to a known or suspected instrumentality of crime. Under these circumstances, Officer Oliver's notions about Marcopoulos, though certainly providing reasonable suspicion justifying a temporary investigative detention, did not rise to the level of probable cause justifying a full-blown search.

The Court emphasizes three points in its conclusion. First, as with any probable cause determination, this decision is fact-driven. The Court does not hold that observations akin to Officer Oliver's will never meet the standard of probable cause; but simply concludes that Marcopoulos' observed behavior was insufficient in this case. Second, it was only barely insufficient. The Court does not hesitate to say that, had Oliver observed any additional indicators of drug activity, either at the bar or within Marcopoulos's car, the scale would tip in favor of a finding of probable cause. Finally, although probable cause to search the vehicle was lacking on these particular facts, the Court does not conclude that the 4th Amendment was necessarily violated—but decides only that the automobile exception is unavailing. The Court remanded the case back to the court of appeals to review the remaining grounds for challenging the validity of the search of his truck.

Judge Keel filed a dissenting opinion, joined by Presiding Judge Keller. According to the dissent, the Court should either dismiss this petition as improvidently granted or uphold the finding of probable cause to search the appellant's truck. A trial court's ruling on a motion to suppress must be upheld on appeal if any applicable legal theory supports it. *State v. Copeland*, 501 S.W.3d 610, 612-13 (Tex. Crim. App. 2016). Here, the cocaine found on his person was admissible because it was found in a search incident to his arrest. The trial court's ruling was correct on that theory and must be upheld on appeal. The Court does not need to address the legitimacy of the search of his truck.

Alternatively, the totality of these circumstances viewed in the light most favorable to the trial court's ruling — the appellant's brief, repeat visit to a location notorious for drug sales, his behavior there mirroring that of other drug buyers, plus his efforts

to hide something when he realized the police were after him — indicated a "fair probability" of finding contraband in his car. But instead of evaluating the totality of the circumstances, the majority opinion picks them off one by one, viewing them in a light unfavorable to the trial court's ruling and holding each inadequate to support a finding of probable cause.

As to the majority's analysis of furtive gestures, the dissenters find it significant that a marked patrol unit pulled in behind the appellant's truck, the appellant knew that the patrol car was behind him, and his gestures, far from ambiguous, looked as if he were hiding something. Deliberately furtive gestures at the approach of police "are strong indicia of mens rea," and the majority errs to discount them in this case. Even if the law required police "action" for furtive gestures to have incriminating significance, the gestures here would meet that requirement because the appellant continued them after he pulled over in response to the patrol officer's activation of his emergency equipment, a fact ignored by the majority opinion.

Commentary: On remand, the Houston Court of Appeals (1st Dist.) addressed the appellant's four remaining challenges: (1) whether the search of his truck fit within the inventory-search exception to obtaining a search warrant, (2) whether the search could properly be characterized as an inventory-search, (3) whether the Houston Police Department's inventory search requirements were constitutional, and (4) whether the search exceeded the scope of his arrest.

The court found that: (1) the search of the appellant's vehicle incident to his arrest for failing to signal a lane change and a turn exceeded the proper scope of a warrantless search incident to that arrest (the appellant was arrested for the offenses of failing to signal a lane change and a turn, so the officers who arrested him could not have expected to find further evidence of the crime for which he was arrested in the passenger compartment of his vehicle and the appellant was safely secured in police custody and had no further access to his vehicle by the time the officers started searching it); (2) the State failed to carry its burden of establishing the search qualified as an inventory pursuant to an impoundment of a vehicle (lack of testimony on the inventory search and the inventory procedures); harm was established because the appellant pleaded guilty only after the trial court erroneously denied his motion to suppress. The State filed a petition for discretionary review, which the Court of Criminal Appeals refused. *Marcopoulos v. State*, 548 S.W.3d 697 (Tex. App.—Houston [1st Dist.] 2018, pet ref'd).

Officers were not required to cease searching a vehicle without a warrant pursuant to the automobile exception despite identifying the passenger as the perpetrator in the reported crime.

Robino v. State, 548 S.W.3d 108 (Tex. App.—Texarkana 2018, no pet.)

The officers immediately responding to a victim's report of an attempt to pass a counterfeit bill located a car matching the description of the suspect's car travelling on the same street which the victim reported it to be travelling near the location of the offense. During interrogation, Robino offered a story about being given counterfeit currency the night before, which indicated his and the other occupant's probable involvement. Then, as the officers were interviewing the occupants, officers saw a crumpled counterfeit bill on the front passenger's seat. These facts gave the officers a reasonable belief that items connected with the crime of forgery would be found inside the car. Thus, the officers had probable cause to search the entire car and all of its contents that may have concealed evidence of forgery under the 4th Amendment.

Although one of the passengers was identified as the person who attempted to pass the counterfeit bill, this neither exonerated Robino nor required the officers to cease their search of the vehicle and its contents for additional evidence of forgery. Further, a reasonable officer could believe that Robino was also involved in passing the counterfeit bill when he volunteered a story of how they came into possession of the counterfeit currency.

b. Community Caretaking Exception

Defendant waived or forfeited her 4th Amendment expectation of privacy when she asked officers to retrieve things from her car. Lay opinion testimony regarding intoxication was not improper.

Daniel v. State, 547 S.W.3d 230 (Tex. App.—Eastland 2017, no pet.)

Daniel was charged with driving while intoxicated. After her single-vehicle crash, Daniel spoke with a DPS Trooper, where she denied drinking any alcohol that day. However, she did say she was taking several prescription medications and the trooper testified that he observed her crying, that she was unsteady on her feet, and that her speech was slow and slurred. When the trooper asked for the appellant's driver's license, she told him that it was in her vehicle. A sheriff then proceeded to the appellant's vehicle, took several prescription medication bottles from the floorboard and the glove compartment, and placed them in the appellant's purse. Afterward, the trooper attempted to perform a horizontal gaze nystagmus test, but he stopped after the third attempt because the appellant stumbled and he felt that it would not be safe to continue.

Daniel alleged that law enforcement personnel conducted an illegal warrantless search and asked that the trial court suppress photographs of the prescription pill bottles and pills found in her vehicle. The court of appeals concluded that the appellant waived or forfeited any legitimate expectation of privacy in her vehicle when she requested that law enforcement officers go to her vehicle and collect her personal things. Because she lacked a subjective expectation of privacy in her vehicle, Daniel therefore did not have standing to challenge the legality of the search. See, *Matthews v. State*, 431 S.W.3d 596, 606 (Tex. Crim. App. 2014). The appellant also argued that the trial court erred in admitting lay opinion testimony from the arresting officers and a pharmacist concerning her intoxication. The court found that Texas law permits lay opinion testimony by a police officer to prove a person's intoxication. *Emerson v. State*, 880 S.W.3d 759, 763 (Tex. Crim. App. 1994). Furthermore, the court found that the appellant's counsel did not object to the pharmacist's testimony and did not preserve the issue for appeal.

3. Reasonable Suspicion

Based on the totality of the circumstances, the officer did not have reasonable suspicion to stop the defendant's vehicle after it veered onto the fog line. If the defendant's tires touched the fog line at all, which was debatable, that momentary touch, without any other indicator of criminal activity, was not enough to justify a stop for illegally driving on an improved shoulder.

State v. Cortez, 543 S.W.3d 198 (Tex. Crim. App. 2018)

Cortez was stopped by a state trooper for unlawfully driving on the improved shoulder of the highway because the tires on Cortez's minivan purportedly touched the white painted "fog line" separating the roadway from the shoulder. Upon searching Cortez's vehicle, the trooper found drugs and arrested Cortez. The trial court granted the defendant's motion to suppress evidence. The court of appeals affirmed. The Court of Criminal Appeals vacated and remanded. The court of appeals affirmed again. The State petitioned for discretionary review (again).

In a 5-4 decision, the Court of Criminal Appeals affirmed. Writing for the majority, Judge Richardson stated that the officer lacked objectively reasonable suspicion to stop Cortez's vehicle. Given that it is a violation to "drive on an improved shoulder," the officer would have reasonable suspicion to stop the defendant if such an event occurred; however, the Court concluded that it was unclear whether the defendant's vehicle touched the fog line and, even if it did, the defendant was statutorily entitled to do so. During the motion to suppress hearing, the officer testified that he noticed the defendant's vehicle touched the fog line as he drove in the left lane beside the defendant. The Court found that, from the vantage point of driving in the left lane, next to a vehicle in the right lane, it cannot be seen, and there is no way to know, that the vehicle in the right lane is touching the fog line on *that* vehicle's

right. Additionally, although "shoulder" is defined by statute, the statutory definition does not include the term "fog line" or mention the line separating the shoulder from the roadway. The Court therefore rejected the State's argument that driving on the fog line should be considered "driving on the improved shoulder" because the fog line is part of the shoulder itself.

Finally, the Court addressed two justifications for touching the fog line contained in Section 545.058(a) of the Transportation Code. Specifically, that section permits a driver to drive on an improved shoulder to "allow another vehicle traveling faster to pass," and to "decelerate before making a right turn." Because it appeared that the state trooper was intending to pass Cortez's vehicle on the left, Cortez was statutorily permitted to drive on the improved shoulder during that brief period of time. Also, because Cortez was signaling a right turn to exit the highway and turn right, Cortez was statutorily permitted to drive on the improved shoulder during that time as well.

Judge Newell filed a concurring opinion, joined by Judge Keel. Judge Newell noted that even though the court of appeals did not decide whether Cortez drove upon the improved shoulder to allow another vehicle to pass or to decelerate to make a turn, in the interest of judicial economy, it was appropriate to reach that issue in this case. In cases like this where the text, structure, and history of the statute in question provides no resolution to the inherent ambiguity of the statute, the rule of lenity requires the Court to draw the line in favor of the accused. Lastly, Judge Newell noted that the majority opinion is consistent with prior precedent interpreting this statute which rejected a "shifting-burden, self-defense-style framework."

Presiding Judge Keller filed a dissenting opinion, which was joined by Judge Keasler. Presiding Judge Keller opined that it was unclear whether Cortez's vehicle touched the fog line and would have held that any amount of time in which a moving vehicle is in contact with the fog line constitutes driving on the fog line and that the Court should have afforded the parties an opportunity to brief the issue of whether Cortez's driving on the improved shoulder was statutorily permitted.

Judge Yeary filed a dissenting opinion stating that the issue of whether Cortez was permitted to drive on the improved shoulder pursuant to one of the statutorily permitted circumstances was not before the Court. The Court should have limited review to the issue granted and should have remanded the remaining issues to the court of appeals.

An officer did not unduly prolong a traffic stop by questioning the passenger of the vehicle prior to running the driver's license for a warrant check.

Lerma v. State, 543 S.W.3d 184 (Tex. Crim. App. 2018)

Judge Newell wrote for the majority, finding that the officer in this case acted diligently in his investigation into the traffic stop and questioning a nervous passenger making furtive movements in the vehicle. The officer was justified in conducting a pat-down of the passenger and developed reasonable suspicion to continue questioning him. A mere nine minutes passed between the initiation of the stop and when the passenger fled from the officer. Importantly, the officer was joined by backup four minutes after the stop and discovered the passenger had provided a false identity a minute later. All of the officer's actions were connected to the traffic stop. The Court distinguished other cases relied upon by the court of appeals because unlike in this case, the officer's actions occurred after the traffic stop was complete.

The plain feel doctrine did not justify an officer removing a pill bottle from Young's pant pocket while conducting a *Terry* frisk because the officer could not have had a reasonable belief on feel alone that a pill bottle was contraband.

Young v. State, 2018 Tex. App. LEXIS 6424 (Tex. App—Houston [1st Dist.] August 16, 2018, no pet.)

The plain feel doctrine permits an officer who is legitimately conducting a *Terry* frisk to seize an item whose identity is already plainly known through the officer's sense of touch. Central to the plain feel doctrine's application is that, through touch, the officer "plainly know[s]" (i.e., has probable cause that) the object is contraband. A pill bottle is a

common and typically benign object, according to the court of appeals. The totality of the circumstances, taken together, did not create probable cause that the pill bottle contained contraband. Young was a passenger in a car. He was not suspected of any crime, and he committed no alleged infraction. No evidence suggests that drugs or drug paraphernalia were visible in the car. The court also disagreed with the State's argument concerning Young's gestures toward the center console, finding that such gestures were not connected to a known or suspected instrumentality of crime.

The arresting officer did not have reasonable suspicion to initiate a traffic stop that led to the arrest of the defendant because the record showed that the sole reason for the stop was that Smith "banged" on the door of a residence and left in a silver Mercedes after the occupant denied him entry.

State v. Smith, 2018 Tex. App. LEXIS 5597 (Tex. App.—Texarkana July 24, 2018, no pet.)

Terrance Smith knocked on the door of a residence, was refused entry, and then drove away. After the encounter was reported to the Bonham Police Department (BPD), Smith was pulled over and subsequently arrested for driving while intoxicated (DWI). Smith filed a motion to suppress all evidence obtained after the initial stop on the ground that the arresting officer could not reasonably conclude that he was, had been, or would be engaged in criminal activity. The trial court agreed.

Here, the facts before the trial court included that (1) Terrance Smith "banged" on the door of a residence occupied by Shamya Barnett at 8:18 p.m., (2) Barnett denied Smith entry, (3) Smith did not threaten Barnett, (4) Smith left the residence in a silver Mercedes, and (5) Barnett called 9-1-1. Given the absence of evidence showing (1) the nature of Barnett and Smith's relationship, if any, (2) that Smith had threatened Barnett in any manner, or (3) that Smith would return to Barnett's home after he left, there "was no indication of crime being afoot." Moreover, at the suppression hearing, no traffic violation was reported when a vehicle driven by defendant was stopped by the police officer. Rather, the evidence indicated that they merely followed the directive to stop a silver Mercedes.

Officers had reasonable suspicion for an investigatory stop based on a report made to dispatch by a citizen-informant that the defendant was engaging in a pattern of repetitious behavior that was unusual and suspicious, i.e., continuously driving through neighborhood streets and alleyways for an extended period in a manner that was suspicious to a neighborhood resident.

Herrera v. State, 546 S.W.3d 922 (Tex. App.—Amarillo, no pet.)

The detaining officer need not be personally aware of every fact that objectively supports a reasonable suspicion to detain; rather, the cumulative information known to the cooperating officers at the time of the stop is to be considered in determining whether reasonable suspicion exists. A police dispatcher is ordinarily regarded as a "cooperating officer" for purposes of making this determination. Finally, information provided to police from a citizen-informant who identifies himself or herself and may be held to account for the accuracy and veracity of his or her report may be regarded as reliable.

The trial court did not err by implicitly finding that the deputy did not have reasonable suspicion to support the stop based on the deputy's testimony related to the error rate of TexasSure.

State v. Brinkley, 541 S.W.3d 923 (Tex. App.—Fort Worth 2018, no pet.)

Deputy Christopher Kristufek of the Parker County Sheriff's Office stopped Randall Lee Binkley in the Horseshoe Bend area solely because of an "unconfirmed" return from the state vehicle insurance database regarding whether Binkley's vehicle had liability insurance. Deputy Kristufek ultimately arrested Binkley for driving while intoxicated—felony repetition (DWI), a grand jury indicted him, and Binkley filed a motion to suppress all evidence gleaned from the stop. The trial court granted the motion. In its interlocutory appeal, the State contended in its sole point that sufficient reasonable

suspicion existed to stop Binkley's vehicle when the detaining deputy received information from the state vehicle insurance database that the insurance policy on said vehicle had been expired for over five months.

According to the court, cases addressing the validity of stops based on an officer's database-derived suspicion from ambiguous terms like "unconfirmed" that the driver may be committing this misdemeanor fall into two general groups: cases in which the evidence dispels the ambiguity and shows that the data is reliable and cases in which the evidence falls short of doing so. This case does not fall clearly into either group. Rather, the record contains a plethora of information about the database and testimony supporting its reliability, but it also contains evidence casting doubt on the reliability of the database. Presented with a "close case," the court views the evidence in the light most favorable to the trial court's ruling. The trial court attached greater significance and credibility to Deputy Kristufek's testimony indicating a weekly error rate of 33 percent and potentially up to 100 percent in his experience with the database and to database coordinator Burkhardt's inability to explain the error rate experienced by Deputy Kristufek. That evidence supports the trial court's implied finding that the database was not reliable. The undisputed evidence shows that Deputy Kristufek had no basis (reasonable suspicion) for the stop other than the return from the database.

4. Probable Cause

An affidavit contained enough particularized facts given by a named informant to allow the magistrate to determine there was probable cause to issue a search warrant.

State v. Elrod, 538 S.W. 3d 551 (Tex. Crim. App. 2017)

In a unanimous opinion written by Judge Richardson, the Court found that the extensive and detailed statement given by the named informant and witness to the ongoing criminal activity showed that she had personal and direct knowledge of the matters she asserted. This made her a reasonably trustworthy source. The magistrate, therefore, correctly determined that the facts the informant gave established probable cause. The Court also found information in the affidavit that independently corroborated the facts the informant gave in her detailed statement to police.

A police officer had probable cause to arrest a customer for theft from a store for concealing items in her purse although she had not yet exited the store and claimed that she was still shopping and going to pay for the items.

State v. Ford, 537 S.W.3d 19 (Tex. Crim. App. 2017)

Writing for six members of the Court, Presiding Judge Keller opined that the officer had knowledge of undisputed facts that supported a conclusion that Ford exercised control over the items in her purse with the requisite intent to take them from a Dollar General Store. The fact that some items were visible in the cart while others were concealed in Ford's purse caused the officer to infer that she intended to pay for some items while concealing others. The officer could have reasonably believed that a jacket covering the purse was designed to further conceal the items.

Judge Newell concurred without written opinion.

Judge Walker, joined by Judge Alcala, dissented because, although probable cause existed, the officer lacked reasonable suspicion to stop Ford and that the majority opinion failed to show proper deference to the court of appeals decision to uphold the trial court's ruling suppressing the methamphetamine discovered subsequent to her arrest for shoplifting.

Commentary: This case got overlooked in last year's update. It was handed down on September 20, 2017. It is a worthy addition in light of the Legislature's modification of the value ladder for theft offenses. Theft of less than $100 is now a Class C misdemeanor. Section 31.03 (e)(1), Penal Code. The theft in this case involved property worth $75.10, which at the time was a Class B misdemeanor. TMCEC has received a number of phone calls over the years pertaining to this kind of scenario. Notably,

under Texas law, a person does not have to leave a store with the property to commit theft. Nor is appropriation of property or the act of concealing merchandise necessarily tantamount to unlawful appropriation with the intent to deprive. Rather, such a determination has to be made on a case-by-case basis.

The trial court should have granted a motion to suppress surveillance video evidence found on a computer hard drive because the warrant's supporting affidavit did not establish probable cause that surveillance video or equipment existed and would be located at the business searched, and the magistrate could not reasonably infer the existence of such video or equipment.

Foreman v. State, 2018 Tex. App. LEXIS 7264 (Tex. App.—Houston [14th Dist.] August 3, 2018, no pet.)

The core of the 4th Amendment's warrant clause and Article I, Section 9, of the Texas Constitution is that a magistrate may not issue a search warrant without first finding probable cause that a particular item will be found in a particular location. Probable cause must be found within the "four corners" of the affidavit supporting the search warrant affidavit. Magistrates are permitted to draw reasonable inferences from the facts and circumstances contained within the four corners of the affidavit.

In this case, the appellant's issue centers around whether probable cause existed that the surveillance video or surveillance equipment was located at the auto shop, not whether probable cause existed that the surveillance video or surveillance equipment constituted evidence of the charged offenses or evidence that appellant committed the offenses. Nonetheless, the magistrate inferred not only that the surveillance video and surveillance equipment was at a specific location (inside of the auto shop); it also inferred that the surveillance video and surveillance equipment existed.

The court of appeals points out in its analysis that generally, to support a search warrant for a computer, it has held there must be some evidence that a computer was directly involved in the crime. When there is no evidence that a computer was directly involved in the crime, more is generally needed to justify a computer search. Deferring to all reasonable inferences that the magistrate could have made, the court concludes that the affidavit in this case failed to establish probable cause that surveillance video or surveillance equipment existed and would be located at the business. The affiant provided no facts that a computer containing surveillance video was involved in the crime, directly or indirectly, such that the existence of surveillance video or surveillance equipment could be reasonably inferred. The affidavit did not reference any computers or computer hard drives.

"[A]udio/video surveillance video and/or video equipment" was mentioned in the introductory paragraph of the affidavit, but no facts were described to support the conclusion that a video surveillance system existed at the body shop to the text of the note nor were facts included from which it could reasonably be inferred that surveillance video or equipment would probably be found at the shop. Also, the presence of surveillance video or equipment in an auto shop is not so well known to the community as to be beyond dispute.

The affidavit established probable cause to search the appellant's home; additional findings were not required under Article 18.02(c) of the Code of Criminal Procedure because the warrant at issue here was not a "mere evidence" warrant where it authorized a search for both "evidence" and items under Subsection (a)(8).

Jennings v. State, 531 S.W.3d 889 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd)

Jennings argues the trial court erred in denying his motions to suppress because the affidavit used to obtain the search warrant failed to establish probable cause for the search of his home. The court looks at Chapter 18 of the Code of Criminal Procedure to determine whether the supporting affidavit at issue was required to contain evidence establishing certain elements. If the warrant was issued under Article 18.02(a)(10), then the supporting affidavit would need to satisfy the heightened requirements of Article 18.01(c), which provides that a search warrant may not be issued under Subsection (a)(10) unless

the affidavit sets forth sufficient facts to establish probable cause that: (1) a specific offense has been committed, (2) the specifically described property or items that are to be searched for constitute evidence of that offense, and (3) the property or items are located at the place to be searched. These heightened requirements do not apply to warrants issued under Article 18.02(a)(8). Jennings argues that the additional findings under (a)(10) are required here. The State maintains that the search warrant was issued under Subsection (a)(8) and, therefore, the additional findings are not required. The court agrees with the State that because the warrant at issue here was issued under Subsection (a)(8), it is not a mere evidentiary search warrant and is not subject to the heightened requirements of 18.01(c). While the warrant authorizes the search for items that could only be characterized as "evidence," it also authorizes the seizure of property the possession of which is prohibited by law. Accordingly, the warrant seeks more than "mere evidence." Sorting that out, the court concludes that the magistrate had a substantial basis for determining that probable cause existed for the search of Jennings' home.

Based on the odor of alcohol and the defendant's admission that there was an open container in his vehicle, there existed probable cause to search his vehicle for the open container.

Elrod v. State, 533 S.W.3d 52 (Tex. App.—Texarkana 2017, no pet.)

The trooper had sufficient knowledge to believe that the defendant committed DWI, and thus the trooper had probable cause for the warrantless arrest.

Dansby v. State, 530 S.W.3d 213 (Tex. App.—Tyler 2017, pet. ref'd)

A Smith County Sheriff's deputy stopped at a convenience store and noticed an unoccupied vehicle running in the parking lot. In the adjoining Whataburger, Dansby admitted to owning the vehicle and the deputy noted that Dansby's eyes were red and watery, and that he smelled of alcohol. Dansby said that earlier that night he had a few beers at a nearby bar, went home, changed clothes, and returned to Whataburger for food. The deputy, believing that Dansby might be guilty of public intoxication, asked a deputy fire marshal to administer a horizontal gaze nystagmus test. After the test was conducted, Dansby was arrested for public intoxication and a DPS Trooper, upon hearing the facts, decided to investigate for DWI. The trooper conducted standard field sobriety tests and subsequently arrested Dansby for DWI.

The court found that, based on the evidence adduced and the reasonable inferences that can be made from it, the trial court could reasonably conclude that the facts and circumstances within the DPS trooper's knowledge were sufficient to warrant a belief that Dansby committed DWI, and thus the trooper had probable cause to arrest the defendant without a warrant. Sufficient evidence justified findings that (1) Dansby was the driver of the vehicle, (2) Dansby operated the vehicle, and (3) Dansby was intoxicated when he drove the vehicle to the restaurant. Furthermore, the court found that the Whataburger restaurant met the requirements of a statutory suspicious-place exception to the warrant requirement, meaning that the warrantless arrest did not violate Dansby's 4th Amendment rights.

Commentary: This case somehow eluded us last year which is hard to explain because we really like Whataburger.

5. Exclusionary Rule

The prosecution presented sufficient evidence to establish that the recording of private conversations did not violate the Texas wiretap statute or exclusionary rule.

White v. State, 549 S.W.3d 146 (Tex. Crim. App. 2018)

White was convicted of organized criminal activity and money laundering. The trial court assessed punishment in each case at 10 years' imprisonment, suspended for eight years of community supervision and ordered restitution in the amount of $32,822.04.

On direct appeal, White argued that that trial court erred in admitting an audio recording of a conversation between himself, codefendant Robey, and a third party because the recording was unlawfully obtained, was not properly authenticated, and constituted inadmissible hearsay. These and other arguments were rejected by the court of appeals.

The Court of Criminal Appeals granted PDR to address the issue of whether there was sufficient evidence to establish that the recording of private conversations did not violate the Texas wiretap statute (Section 16.02, Penal Code) and whether the recording was barred by the Texas exclusionary rule (Article 38.23, Code of Criminal Procedure).

In a unanimous opinion by Judge Richardson, the Court affirmed the court of appeals' determination that the audio recording was admissible. There was no evidence indicating that the conversation between White, codefendants, and a non-accomplice third party (Brandon) was recorded by someone other than Brandon, or that the record was made without Brandon's consent, or that the recording was furnished by anyone other than Brandon.

By the time the defense objected to the admission of the recording, the prosecution had already presented enough evidence to prove by a preponderance of the evidence that Brandon had recorded the conversation, and that evidence substantiated that the recording had been legally obtained.

Presiding Judge Keller wrote a concurring opinion joined by Judges Keasler, Keel, and Yeary explaining that the rules of admissibility place the burden on the proponent of the evidence to establish admissibility, while rules of exclusion require the opponent of the evidence to establish a basis for exclusion. Because Article 38.23 is a statutory rule of exclusion it was White's burden to establish that the recording was inadmissible.

Commentary: It is too early to call it a trend, but this is the second year in a row that the Court of Criminal Appeals has decided a case with intriguing facts involving the Texas wiretap statute. Judges and prosecutors who attended TMCEC conferences in AY 18 likely recall *Long v. State*, 535 S.W.3d 511 (Tex. Crim. App. 2017) (holding that for purposes of Section 16.02 of the Penal Code, a high school basketball coach had a reasonable expectation of privacy in the team's locker room). Although legally they are dissimilar, both contain unique and memorable facts.

The trial court did not err in failing to suppress images recovered from a phone stolen from the appellant's home because he lacked standing to complain of the search and seizure of a phone that he gave to his girlfriend.

Grant v. State, 531 S.W.3d 898 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd)

A defendant must show that he was the victim of the illegal search and seizure to establish standing to complain about evidence that was obtained in violation of the law. Here, although the appellant purchased the phone, the trial court reasonably could have concluded that appellant did not own it at the time it was stolen because he had given it to his girlfriend, Alisha, and thus, had relinquished any property or possessory right in the phone. The legal right invaded as a result of the theft, if any, was not the appellant's—the victim, if any, was Alisha's.

6. Blood Draws

The Officer had probable cause to arrest Ruiz for driving while intoxicated, but the totality of the circumstances did not justify a warrantless blood draw by exigent circumstances.

State v. Ruiz, 545 S.W.3d 687 (Tex. App.—Corpus Christi 2018, pet. granted)

This is the second time this case has come before this court. See, *State v. Ruiz*, 509 S.W.3d 451, 452 (Tex. App.—Corpus Christi 2015). Since the first case, the Court of Criminal Appeals decided two cases analyzing the issue of exigent circumstances in the context of suppressing blood evidence obtained pursuant to a warrantless draw (*Cole v. State* and *Weems v. State*). Thus, the Court of Criminal Appeals vacated the previous opinion and remanded this case for further analysis in light of those two opinions.

An officer responded to a midnight automobile collision between a Lincoln and a Pontiac. One of the drivers informed the officer that the other driver—later identified as Ruiz—had fled the scene and had run behind a car wash near the area. The officer located Ruiz and described him as "unresponsive," that he "couldn't open his eyes," and "wouldn't respond," also noting a strong odor of alcohol and no apparent injuries on his body. EMS transported Ruiz to the hospital, where the officer placed him under arrest and then gathered and filled out paperwork to order the hospital personnel to perform a blood draw.

The court discussed two main issues: (1) the trial court's ruling on Ruiz's motion to suppress the blood evidence and (2) whether there were exigent circumstances that validated a warrantless search. On the motion to suppress issue, the state stipulated that Ruiz's blood was drawn without a warrant, meaning the burden shifted to the state to establish that the search was reasonable. The state cited Texas' implied-consent framework under Section 724.011(a) of the Transportation Code, which implies consent to search for an individual who has been arrested for driving while intoxicated. The court found that Ruiz was unable to consent freely and voluntarily, or have the opportunity to revoke such consent, due to the fact that he was unconscious and did not respond to the officer. On the exigent circumstances issue, the court found that the officer had probable cause to arrest Ruiz, but the totality of the circumstances did not justify Ruiz's warrantless blood draw because of exigent circumstances. The trial court found that the officer erroneously relied upon the implied consent statute in ordering the hospital staff to draw Ruiz's blood. Therefore, she could not have relied upon the existence of an exigent circumstance in ordering the blood draw.

Commentary: Stay tuned! The State's petition for discretionary review was granted on April 25, 2018.

7. Emergency Detention Warrants

A magistrate may direct an emergency detention warrant to any on-duty peace officer listed in Article 2.12 of the Code of Criminal Procedure, regardless of the apprehended person's location within the county.

Tex. Atty. Gen. Op. KP-0206 (5/16/18)

The opinion also finds that (1) Subsection 573.012(e) of the Health and Safety Code contemplates that the peace officer apprehending the person also takes responsibility for transporting the person; (2) a peace officer may not refuse to transport a person he or she apprehends pursuant to an emergency detention warrant; and (3) a subsequent action for contempt could likely be brought in a court (having jurisdiction over mental health proceedings) to enforce a magistrate's emergency detention warrant issued pursuant to Subsection 573.012(d) of the Health and Safety Code.

TMCEC: This request for opinion stemmed from a dispute between the municipal police department and the sheriff's department revolved around who is responsible for transporting a person apprehended within city limits pursuant to an emergency detention warrant. Chapter 573 of the Health and Safety Code governs the emergency detention of a person evidencing mental illness who may pose a substantial risk of imminent serious harm to himself or others if not immediately restrained. Upon review of a filed written application, if certain requirements are met, the magistrate shall issue to an on-duty peace officer a warrant for the person's immediate apprehension.

8. Qualified Immunity

An officer was entitled to qualified immunity, even assuming a 4th Amendment violation occurred, because no existing precedent squarely governs the specific facts at issue.

Kisela v. Hughes, 138 S. Ct. 1148 (2018)

Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." According to the Court in this per curiam opinion,

it is this part of the qualified-immunity standard that the court of appeals failed to implement correctly.

Officer Kisela said he shot the suspect because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick, a woman standing nearby. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. According to the Court, this is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the 4th Amendment.

The Court rejects the court of appeals conclusion that its own precedent clearly established excessive force. Even "if a controlling circuit precedent could constitute clearly established law," the most analogous circuit precedent favors Kisela. The Court finds that not one of the cases relied on by the court of appeals supports denying Kisela qualified immunity.

Officers were entitled to qualified immunity because they reasonably but mistakenly concluded probable cause was present.

District of Columbia v. Wesby, 138 S. Ct. 577 (2018)

Justice Thomas delivered the opinion of the Court. Officers are entitled to qualified immunity under Section 1983 unless the unlawfulness of their conduct was "clearly established at the time." To be clearly established, a legal principle must be "settled law," and it must clearly prohibit the officer's conduct in the particular circumstances before him. In the warrantless arrest context, "a body of relevant case law" is usually necessary to "'clearly establish' the answer" with respect to probable cause. The lower court failed to identify a single precedent finding a 4th Amendment violation under similar circumstances.

The lower court should have asked whether a reasonable officer could conclude--considering all of the surrounding circumstances, including the plausibility of the explanation itself--that there was a "substantial chance of criminal activity."

Considering the totality of the circumstances, officers in this case made an entirely reasonable inference that the partygoers knew they did not have permission to be in the house. Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several "'common-sense conclusions about human behavior.'" Because most homeowners do not live in such conditions or permit such activities in their homes, the officers could infer that the partygoers knew the party was not authorized. The officers also could infer that the partygoers knew that they were not supposed to be in the house because they scattered and hid when the officers arrived.

Justice Sotomayor wrote separately, joined by Justice Ginsburg, concurring in part and concurring in the judgment. She agrees with the majority that the officers are entitled to qualified immunity, but disagrees with the majority's decision to reach the merits on the issue of probable cause.

Justice Ginsburg also wrote separately, calling for a re-examination in a future case whether a police officer's reason for acting, in at least some circumstances, should factor into the 4th Amendment inquiry regarding the existence of probable cause.

C. Double Jeopardy

Consenting to two trials when one would have avoided a double jeopardy problem precluded any constitutional violation associated with holding a second trial because, in those circumstances, the defendant won a potential benefit and experienced none of the prosecutorial oppression the Double Jeopardy Clause exists to prevent.

Currier v. Virginia, 138 S. Ct. 2144 (2018)

Michael Currier was indicted for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. Because the prosecution could introduce evidence of Currier's prior burglary and larceny convictions to prove the felon-in-possession charge, and worried that evidence might prejudice the jury's consideration of the other charges, Currier and the government agreed to a severance and asked the court to try the burglary and larceny charges first, followed by a second trial on the felon-in-possession charge. At the first trial, Mr. Currier was acquitted. He then sought to stop the second trial, arguing that it would amount to double jeopardy. Alternatively, he asked the trial court to prohibit the State from relitigating at the second trial any issue resolved in his favor at the first. The trial court denied his requests and allowed the second trial to proceed unfettered, which resulted in a conviction. Both the Virginia Court of Appeals and the Virginia Supreme Court affirmed the conviction.

Currier argued that *Ashe v. Swenson*, 397 U.S. 436, (held that the Double Jeopardy Clause barred a defendant's prosecution for robbing a poker player because the defendant's acquittal in a previous trial for robbing a different poker player from the same game established the defendant was not one of the robbers) requires a ruling in his favor.

Justice Gorsuch delivered the opinion of the Court (Parts I and II), joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, concluding that, because Currier consented to a severance, his trial and conviction on the felon-in-possession charge did not violate the Double Jeopardy Clause. According to Justice Gorsuch, this consent is a critical difference between this case and *Ashe*. If consent can overcome a traditional double jeopardy complaint about a second trial for a greater offense, it must also suffice to overcome a double jeopardy complaint under Ashe's more innovative approach. Holding otherwise would be inconsistent Supreme Court case law. The cases relied upon by the defendant merely apply the *Ashe* test and conclude that a second trial was impermissible. They do not address the question whether the Double Jeopardy Clause prevents a second trial when the defendant *consents* to it (emphasis in original). Currier faced a lawful choice between two courses of action that each bore potential costs and rationally attractive benefits. Difficult strategic choices are "not the same as no choice," *United States v. Martinez-Salazar*, 528 U.S. 304, 315, and the Constitution "does not . . . forbid requiring" a litigant to make them, *McGautha v. California*, 402 U.S. 183, 213.

Justice Gorsuch, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, concluded in Part III that civil issue preclusion principles cannot be imported into the criminal law through the Double Jeopardy Clause to prevent parties from retrying any issue or introducing any evidence about a previously tried issue. Currier argues that, even if he consented to a second trial, that consent did not extend to the relitigation of any issues the first jury resolved in his favor. Even assuming for argument's sake that Currier's consent to holding a second trial didn't more broadly imply consent to the manner it was conducted, his argument must be rejected on a narrower ground as refuted by the text and history of the Double Jeopardy Clause and by the Court's contemporary double jeopardy cases.

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. The dissenters would hold that Currier's acquiescence in severance of the felon-in-possession charge does not prevent him from raising a plea of issue preclusion based on the jury acquittals of breaking and entering and grand larceny. The question presented in *Ashe* was whether issue preclusion is not just an established rule of federal criminal procedure, but also a rule of constitutional stature. The Court had no hesitation in concluding that it is. Since *Ashe*, the Court has reaffirmed that issue preclusion ranks with claim preclusion as a Double Jeopardy Clause component.

Virginia courts hold that unless the government and the defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction due to the hugely prejudicial effect introduction of prior felony convictions has on juries. Currier and the Government acceded to the default rule and the trial court accordingly severed the possession charge. The Court has found waiver of fundamental constitutional rights *by conduct* only where a defendant has engaged in conduct

inconsistent with the assertion of the right (emphasis is the writer's). Where a defendant takes no action inconsistent with the assertion of a right, the defendant will not be found to have waived the right. Here, Currier took no action inconsistent with the assertion of an issue-preclusion plea. Unlike the right against a second trial for the same offense (claim preclusion), issue preclusion prevents relitigation of a previously rejected theory of criminal liability without necessarily barring a successive trial. Issue preclusion bars only a subset of possible trials—those in which the prosecution rests its case on a theory of liability a jury earlier rejected. That being so, consenting to a second trial is not inconsistent with—and therefore does not foreclose—a defendant's gaining the issue-preclusive effect of an acquittal.

The first trial established that Currier did not participate in breaking and entering the Garrisons' residence or in stealing their safe. The Government can attempt to prove Currier possessed firearms through a means other than breaking and entering the Garrisons' residence and stealing their safe. But the Government should not be permitted to show in the felon-in-possession trial what it failed to show in the first trial, i.e., Currier's participation in the charged breaking and entering and grand larceny, after a full and fair opportunity to do so.

Commentary: How might issue preclusion manifest itself in municipal court? One example is junk vehicle cases where the ordinance provides that each day of violation is a separate offense. Would a favorable ruling in a case adjudicating an offense involving a junk vehicle (i.e., that the vehicle was not in violation of the ordinance) preclude litigating the issue resolved in the defendant's favor in a trial involving a subsequent offense for the same vehicle? The issue in this case, the effect of consent to severance of offenses into more than one trial on the applicability of the Double Jeopardy Clause, might surface in municipal courts, especially because complaints in municipal courts generally charge the defendant with one offense at a time, even where the defendant was cited for multiple offenses during a single encounter.

A city ordinance conviction for failure to obtain a building permit violated the defendant's double-jeopardy rights.

Rodriguez v. State, 2018 Tex. App. LEXIS 7240 (Tex. App.—Austin Aug. 31, 2018) (mem. op., not designated for publication)

The case involved the same 2006 wall/fence-building activities of which Rodriguez was previously found not guilty. In absence of additional construction or changes to the property, there could not be an ongoing failure to first obtain the appropriate permit for the same wall and fence. With regard to Rodriguez's conviction for failure to obtain a site plan, the previous complaints alleging that Rodriguez had violated an ordinance were dismissed by the municipal court on the prosecutor's motion before trial on the merits had begun. Accordingly, jeopardy had not yet attached. The court of appeals affirmed in part; reversed and rendered in part.

Double jeopardy barred the defendant's prosecution for aggravated assault of a public servant under Subsections 22.02(a)(2) and (b)(2)(B) of the Penal Code because he had already been convicted of the same offense in an adjacent county.

Marson v. State, 2018 Tex. App. LEXIS 6522 (Tex. App.—Eastland August 16, 2018, no pet.)

Here, the accused discharged a firearm toward two troopers during a pursuit that spanned Andrews and Ector counties. Whether the appellant's double jeopardy claim succeeds depends upon the allowable unit of prosecution (i.e., for each victim or each discharge of the firearm). The State argued that double jeopardy did not bar the appellant's prosecution in Ector County (following two convictions in Andrews County) because the appellant committed multiple offenses of aggravated assault of each complainant because he fired numerous shots in their direction and each shot "was the result of a separate impulse." The State urged the court to hold that each time the appellant pulled the trigger, he was committing a separate criminal act, requiring a separate culpable mental state. The court of appeals disagreed.

Here, the State charged the appellant with four violations of the same statute (two in Andrews County and two in Ector County). The prosecutions against the appellant must be viewed as the acts of a single sovereign under the Double Jeopardy Clause. If each alleged violation of the statute involved a separate "allowable unit of prosecution," the appellant's claim of double jeopardy must be rejected. Looking at legislative intent, the court found that the allowable unit of prosecution for the aggravated assaults with which the appellant was charged is each victim, not each discharge of the firearm.

Jeopardy did not attach because the trial court did not dismiss the first case with prejudice.

State v. Atkinson, 541 S.W.3d 876 (Tex. App.—Houston [14th Dist.] 2017, no pet.)

When Atkinson's case was called for trial, the State moved for a continuance. Atkinson objected and announced ready for trial. The trial court denied the State's motion for continuance. The prosecution moved to dismiss and filed a motion captioned "Motion to Dismiss," in which he requested the court dismiss the case "with leave to refile." On the same page as the motion's text appeared a proposed order stating that the cause was dismissed with leave to refile. Atkinson objected to the motion to dismiss and again announced ready for trial. The State re-urged its motion for continuance or dismissal. The trial judge offered the prosecutor two options: (1) come back after lunch for trial or (2) dismiss with prejudice. Faced with these alternatives, the prosecutor told the court to "dismiss the case." The trial judge wrote on the State's motion to dismiss, "/w prejudice" directly following the words "Motion to Dismiss" in the caption of the State's motion. The judge made no other alterations to the motion. The judge then signed the State's proposed order dismissing the case, which said dismissed *with leave to refile* (emphasis added).

The court of appeals concluded that changing the caption, which was altered by the trial judge (not the prosecution), did not change the substance of the motion. Accordingly, it reversed the trial court's order granting Atkinson's special plea of double jeopardy and remanded this case for trial.

D. 6th Amendment

The 6th Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.

McCoy v. Louisiana, 138 S. Ct. 1500 (2018)

Over McCoy's repeated objections, his defense attorney conceded his guilt during trial and at the penalty phase. The jury convicted him and he unsuccessfully sought a new trial. The Louisiana Supreme Court affirmed the trial court's ruling that the defense attorney had authority to concede guilt, despite McCoy's opposition.

Justice Ginsburg delivered the opinion of the Court, joined by the Chief Justice and Justices Kennedy, Breyer, Sotomayor, and Kagan. The defendant does not surrender control entirely to counsel. The lawyer's province is trial management, but some decisions are reserved for the client, including whether to plead guilty, waive the right to a jury trial, testify on one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in this reserved-for-the-client category. Justice Ginsburg notes that McCoy opposed the assertion of guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. This is in contrast to the defendant in *Florida v. Nixon*, 543 U.S. 175 (2004), who was unresponsive. The Court's ineffective-assistance-of-counsel jurisprudence does not apply here, where the client's autonomy, not counsel's competence, is in issue. Finding this to be structural error, it is not subject to harmless-error review.

Justice Alito dissented, joined by Justices Thomas and Gorsuch, finding that the majority changed the facts of the case. The defense counsel did not admit that McCoy was guilty. Instead, faced with overwhelming evidence, counsel admitted that petitioner committed one element of that offense. But he strenuously argued that McCoy was not guilty

because he lacked intent. According to Alito, "the Court's newly discovered fundamental right simply does not apply to the real facts of this case."

The real case is far more complex and the result of a "freakish confluence of factors that is unlikely to recur." Likewise, the "constitutional right that the Court has now discovered—a criminal defendant's right to insist that his attorney contest his guilt with respect to all charged offenses—is like a rare plant that blooms every decade or so. Having made its first appearance today, the right is unlikely to figure in another case for many years to come." This is because the right is only likely to come into play in a capital case where the jury must decide both guilt and punishment, few rational defendants are likely to insist on contesting guilt under similar circumstances, conflicts with counsel like in this case generally result in a parting of ways, substitute counsel will likely be appointed, and the defendant has to expressly protest counsel's strategy (the right would be waived if the defendant is silent or equivocal).

A claim to habeas relief based on affirmative mis-advice from an attorney regarding possible deportation is congnizable and not barred as a non-retroactive *Padilla* claim.

Ex parte Garcia, 547 S.W.3d 228 (Tex. Crim. App. 2018)

The United States Supreme Court held in *Padilla v. Kentucky*, 559 U.S. 356 (2010), that defense attorneys have a duty to advise their clients regarding immigration—of the possibility of deportation if immigration law is not succinct and straightforward and if the law is truly clear to give correct advice that is equally clear. In *Ex parte De Los Reyes*, 392 S.W.3d 675 (2013), the Court of Criminal Appeals decided that the duty announced in *Padilla* is not retroactive. Thus, if Garcia's claim is a *Padilla* claim, it is not cognizable.

Judge Hervey delivered the opinion of a unanimous Court. The Court agrees with the court of appeals' thorough and well-reasoned opinion making a crucial distinction between *Padilla* and Garcia's claim: *Padilla* imposed an affirmative duty to advise a client that he would be deported in certain cases, but Garcia's claim is not that his attorney had an affirmative duty to advise him (like Padilla); rather, he is arguing that when his attorney rendered immigration advice, which he was under no obligation to render, he had a duty to state the law correctly. This is more akin to bad-probation-advice claims and bad-parole-eligibility claims, which the Court has entertained for a number of years. The Court sees no reason to treat Garcia's claim differently than a similarly situated ineffective-assistance-of-counsel claim.

The trial court erred by failing to obtain a written waiver of jury trial, but that error was harmless because the judgment stated that Hinojosa waived his right to a jury trial, and he did not present any evidence to the contrary.

Hinojosa v. State, 2018 Tex. App. LEXIS 4822 (Tex. App.—Houston [1st Dist.] June 28, 2018, no pet.)

Every criminal defendant has the fundamental right to a trial by jury. Unless a defendant is facing the death penalty, he or she may waive his right to a jury trial, and the record must reflect that he or she made an express, knowing, and intelligent waiver. Under Texas law, such a waiver must be made in person, in writing, and in open court. Because neither the state nor the federal constitution requires that this waiver be written, a violation of this aspect of Article 1.13(a) of the Code of Criminal Procedure constitutes a statutory error rather than a constitutional error. When there is no written jury waiver, a defendant is not harmed by the violation if the record otherwise reflects that he knew about his right to a jury trial, and that he waived this right. In this case, the document that Hinojosa references as the only evidence that he waived his right to a jury trial is titled "JUDGMENT OF CONVICTION BY COURT—WAIVER OF JURY TRIAL." It specifically stated: "Defendant waived the right of trial by jury. . . ."

Hinojosa does not claim in his brief that he actually wanted a jury trial, and despite a discussion on this very subject at the hearing to correct the judgment, his counsel did not dispute the trial judge's observation that a bench trial had been requested, nor did counsel present any evidence that Hinojosa did

not knowingly and intentionally waive his right to a jury trial, or any evidence that he wanted anything other than a bench trial.

E. 10th Amendment

The Professional and Amateur Sports Protection Act (PASPA) violates the 10thAmendment, specifically by its provision prohibiting states from authorizing sports gambling schemes.

Murphy v. NCAA, 138 S. Ct. 1461 (2018)

Justice Alito wrote for the majority. As the 10th Amendment confirms, all legislative power not conferred on Congress by the Constitution is reserved for the States. Absent from the list of conferred powers is the power to issue direct orders to the governments of the States. The anticommandeering doctrine that emerged in *New York v. U.S.*, 505 U. S. 144 (1992), and *Printz v. U.S.*, 521 U. S. 898 (1997), simply represents the recognition of this limitation. Thus, "Congress may not simply 'commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.' " *New York*, at 161.

The Court also found that (1) the anti-authorization (which includes authorization by repealing a statute that prohibited gambling as New Jersey did in this case) is not a valid preemption provision; (2) PASPA's provision prohibiting state licensing of sports gambling schemes also violates the anticommandeering rule; and (3) no provision of PASPA is severable from the provisions directly at issue.

Justice Thomas wrote separately to express his "growing discomfort" with the Court's modern severability precedents. He agreed with the majority that PASPA exceeds Congress' Article I authority to the extent it prohibits New Jersey from authorizng or licensing sports gambling. Under the Court's current severability precedents, the Court must make the severability determination by asking a counterfactual question: "'Would Congress still have passed' the valid sections 'had it known' about the constitutional invalidity of the other portions of the statute?" Justice Thomas believes the Court gave the best answer it can. But in future cases, the Court should take another look at its severability precedents, which are in tension with traditional limits on judicial authority.

Justice Breyer concurred in part and dissented in part, joined by Justice Ginsburg, finding part of of the Act to be severable, i.e., Section 3702(2), which applies to individuals and not the states.

Justice Ginsburg dissented, joined by Justice Sotomayor, finding no cause, in light of the question presented to the Court (does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States) to "deploy a wrecking ball destroying" PASPA in its entirety. Two federal edicts should remain intact. First, PASPA bans States themselves (or their agencies) from "sponsor[ing], operat[ing], advertis[ing], [or] promot[ing]" sports-gambling schemes. Second, PASPA stops private parties from "sponsor[ing], operat[ing], advertis[ing], or promot[ing]" sports-gambling schemes if state law authorizes them to do so. Section 3702(2). Nothing in prohibitions commands States to do anything other than desist from conduct federal law proscribes. Nor is there any doubt that Congress has power to regulate gambling on a nationwide basis, authority Congress exercised in PASPA.

Commentary: Chapter 47 of the Penal Code (Gambling) criminalizes gambling (including sports gambling), promoting gambling, keeping a gambling place, communicating gambling information, and possessing gambling devices, equipment, or paraphernalia. Attorney General Ken Paxton joined a brief of amici curiae with 20 other states in support of New Jersey's repeal of its sports gambling laws, however, that brief was more in favor of states' rights than the practice of sports gambling. An attorney general opinion in 2016 found participation in paid fantasy sports leagues to be akin to gambling because it involves "partial chance." (*Tex. Atty. Gen. Op. KP-0057* (1/19/16)). Legislation filed in the 85th Legislature addressing that opinion was not successful (i.e., H.B. 1418, 1422, and 1457). It is not likely that Texas will join other states in legalizing sports gambling in light of the Court's opinion, but only time will tell.

F. 14th Amendment

The federal trial court properly found Harris County's bail setting procedures violated Due Process and Equal Protection in the United States and Texas Constitutions because indigent misdemeanor arrestees were unable to pay secured bail, which resulted in a deprivation of basic liberty interests.

ODonnell v. Harris County, 882 F.3d 528 (5th Cir. 2018), opinion withdrawn and superseded on rehearing, *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018)

Affirming and reversing in part the trial court's conclusions of law, the 5th Circuit Court of Appeals held that Harris County's bail system violated due process because Texas law created a protected liberty interest in the right to bail and the current procedure did not sufficiently protect detainees from magistrates imposing bail as an instrument of oppression. The 5th Circuit, however, stopped short of accepting the trial court's assertion that inability to pay a bail bondsman or post bail constitutes an automatic order of detention without due process and in violation of equal protection or that the matter of willful non-payment, which governs fines and costs, should also apply to bail. Thus, the trial court's injunction was overbroad because instead of simply establishing a system for a case-by-case evaluation, including ability to pay, and appropriate hearing procedures, the injunction amounted to outright elimination of secured bail for indigent misdemeanor arrestees despite the fact that there was no fundamental substantive due process right to be free from any form of wealth-based detention.

Commentary: Subsequently, on August 14, 2018, the 5th Circuit granted Harris County judges' motion for stay, pending appeal, because the federal judge's sweeping and overly expansive injunction entered on remand entirely precluded the possibility of secured bail for indigent misdemeanor arrestees and presupposed a nonexistent fundamental substantive due process right to be free from any form of wealth-based detention. *Odonnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2018). On September 20, 2018, citing *Odonnell*, the United States District Court for the Northern District of Texas, granted the plaintiff's preliminary injunction against Dallas County and motion of class certification. *Daves v. Dallas County*, Civil Action No. 3:18-CV-0154-N, (N.D. Tex. 2018). Although similar to *ODonnell*, *Daves* differs in that it includes felony arrestees and the plaintiffs raise a substantive due process argument not raised in *ODonnell*. Bail reform impact litigation is seemingly in full bloom. Bail reform is certain to be one of the biggest issues when the 86th Texas Legislature convenes in January 2019. Stay tuned!
(Cont. in December issue)

Fines, Fees, Costs, and Indigence Revisited

ONE DAY CLINIC
10:00 a.m. – 3:00 p.m.
December 3, 2018 – Austin

Presented by Ryan Kellus Turner, General Counsel & Director of Education and Regan Metteauer, Program Attorney, TMCEC

What a difference a year makes!
The 85th Legislature's answer: H.B. 351 and S.B. 1913. This clinic will reexamine fines, fees, costs, and indigence in light of recent events and new laws regarding sentencing, community service, and enforcement. Designed for judges, prosecutors, and court support personnel.

Registration: The cost to register is $20. Hotel rooms will be provided for participants residing 30 miles or more from the hotel. There is no single room fee. This clinic counts for four hours of judicial education credit, clerk certification credit, and for licensed attorneys, CLE credit (No TCOLE credit). There is no additional cost for CLE credit.

Register online at http://register.tmcec.com or download a registration form at www.tmcec.com.

What: TMCEC is pleased to offer the Court Security Officer Certification Course (10999) online through our Online Learning Center (OLC).

Who: This course is open to court security officers who serve in municipal courts in Texas.

Where: TMCEC's Online Learning Center (OLC)

When: TMCEC plans on launching the course by the end of 2018, pending approval by the Texas Commission on Law Enforcement.

How: Once the course becomes available, go to www.online.tmcec.com. A username and password is required. These are the same as your TMCEC registration login and password. If you need a username and password or are experiencing difficulty, contact Crystal Ferguson or Lily Pebworth at TMCEC (800.252.3718). Upon logging in, click on Courses. The title of the course is TMCEC Court Security 10999. You will be prompted to enroll. Click on Enroll Me. A TCOLE PID is required in order for TMCEC to report your credit to TCOLE.

There is no cost to take this course.

Why: Completion of this course satisfies the mandate in S.B. 42 (85th Legislature) that all court security officers be certified. This platform is perfect for cities and courts unable to send their bailiffs to live training. The course can be completed at the student's own pace. However, each course will begin on the first day of the month and must be completed by the last day of the month in order to receive credit and certification.

Watch for the launch of this course coming soon! TMCEC will spread the word once the course becomes available.

TEXAS MUNICIPAL COURTS EDUCATION CENTER
FY19 REGISTRATION FORM:
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Conference Date: _____ Conference Site: _____

Check one:

☐ Non-Attorney Judge ($100)
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☐ Traffic Safety Conference - Judges & Clerks ($100)
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TMCEC will make all hotel reservations from the information you provide on this form. **TMCEC will pay for a double occupancy room for two nights with another seminar participant at all regional judges and clerks seminars.** To share with a specific seminar participant, you must indicate that person's name on this form. If you do not wish to share, please add $50 a night for a single room. 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 two double beds*) is dependent on hotels availability. Special Request: _____

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

Judge's Signature: _____ Date: _____

TCOLE PID: _____ BAILIFF DOB FOR TCOLE PID # _____

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2018 - 2019 TMCEC Academic Schedule At-A-Glance

Seminar	Date(s)	City	Hotel Information
New Judges & Clerks Seminar	November 26-30, 2018	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Fines, Fees, Indigence Clinic	December 3, 2018	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Regional Judges & Clerks Seminar	January 7-9, 2019	San Antonio	Omni at Colonnade 9821 Colonnade Blvd. San Antonio, TX 78230
Procedural Justice Clinic	January 11, 2019	Round Rock	Allen R. Baca Senior Center 301 W. Bagdad Ave, Bldg. 2. Grand Room Round Rock, TX 78664
Regional Clerks Seminar	January 14-16, 2019	Galveston	San Luis Resort 5222 Seawall Blvd. Galveston, TX 77551
One Day Clinic - Laredo	January 25, 2019	Laredo	La Posada 1000 Zaragoza Street, Laredo TX
Level III Assessment Clinic	January 28-31, 2019	Austin	6121 N IH 35 Austin, Texas 78752
Regional Judges Seminar	February 3-5, 2019	Galveston	San Luis Resort 5222 Seawall Blvd. Galveston, TX 77551
Regional Judges & Clerks Seminar	February 13-15, 2019	Houston	Omni at Westside 13210 Katy Freeway Houston, TX 77079
New Judges & Clerks Orientation	February 22, 2019	Austin	TMCEC 2210 Hancock Drive, Austin, TX 78756
Procedural Justice Clinic	March 1, 2019	McAllen	Doubletree Hotel 1800 S. 2nd St., McAllen, TX 78503
Regional Clerks Seminar	March 4-6, 2019	Addison	Crowne Plaza 14315 Midway Road, Addison, TX 75001
Regional Judges Seminar	March 6-8, 2019	Addison	Crowne Plaza 14315 Midway Road, Addison, TX 75001
Traffic Safety Conference	March 25-27, 2019	Houston	Omni at Westside 13210 Katy Freeway Houston, TX 77079
Teen Court Conference	April 1-2, 2019	Georgetown	Comfort Inn & Suites 11 Waters Edge Cir, Georgetown, TX 78626
Prosecutors Conference	April 1-3, 2019	Dallas	Omni Park West 1590 Lyndon B Johnson Fwy, Dallas, TX 75234
Motivational Interviewing (MTSI)	April 3, 2019	Dallas	Omni Park West 1590 Lyndon B Johnson Fwy, Dallas, TX 75234
Fines, Fees, Indigence Clinic	April 5, 2019	TBD	TBD
Regional Judges & Clerks Seminar	April 8-10, 2019	Lubbock	Overton Hotel 2322 Mac Davis Ln, Lubbock, TX 79401
Procedural Justice Clinic	April 23, 2019	White Oak	Jim Nall Training Center 100 S. Church St., White Oak, TX 78155
Regional Clerks Seminar	April 29-May 1, 2019	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd. S. Padre Island, TX. 78597
Regional Attorney Judges Seminar	May 5-7, 2019	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd. S. Padre Island, TX. 78597
Regional Non-Attorney Judges Seminar	May 7-9, 2019	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd. S. Padre Island, TX. 78597
New Judges & Clerks Orientation	May 17, 2019	Austin	TMCEC 2210 Hancock Drive, Austin, TX 78756
Procedural Justice Clinic	May 17, 2019	Seguin	Seguin Events Complex 950 S. Austin St., Seguin, TX 78155
Bailiffs & Warrant Officers Conference	May 20-22, 2019	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Regional Judges & Clerks Seminar	June 3-5, 2019	Abilene	MCM Elegante Suites 4250 Ridgemont Drive, Abilenen, TX 79606
Juvenile Case Manager Conference	June 10-12, 2019	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Court Administrators & Prosecutors Conference	June 17-19, 2019	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Judges & Clerks: Fines & Fees	May 28-30, 2018	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
New Judges & Clerks Seminar	July 8-12, 2019	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Procedural Justice Clinic	July 25, 2019	Midland	Midland Municipal Court 201 E. Texas Ave., Midland, TX 79701
Impaired Driving Symposium	July 25-26, 2019	Austin	Doubletree by Hilton 6505 Interstate Hwy-35 North Austin, TX 78752
Legislative Update	August 13, 2019	Lubbock	Overton Hotel 2322 Mac Davis Ln, Lubbock, TX 79401
Legislative Update	August 16, 2019	Dallas	Omni Park West 1590 Lyndon B Johnson Fwy, Dallas, TX 75234
Legislative Update	August 20, 2019	Houston	Omni at Westside 13210 Katy Freeway Houston, TX 77079
Legislative Update	August 23, 2019	Austin	Omni Southpark 4140 Governor's 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, 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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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.

Texas Municipal Courts Education Center

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Questions? Contact Ned Minevitz at ned@tmcec.com or (512) 320-8274.

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