Important Information Inside: What Magistrates Need to Know About S.B. 6 Bail Training

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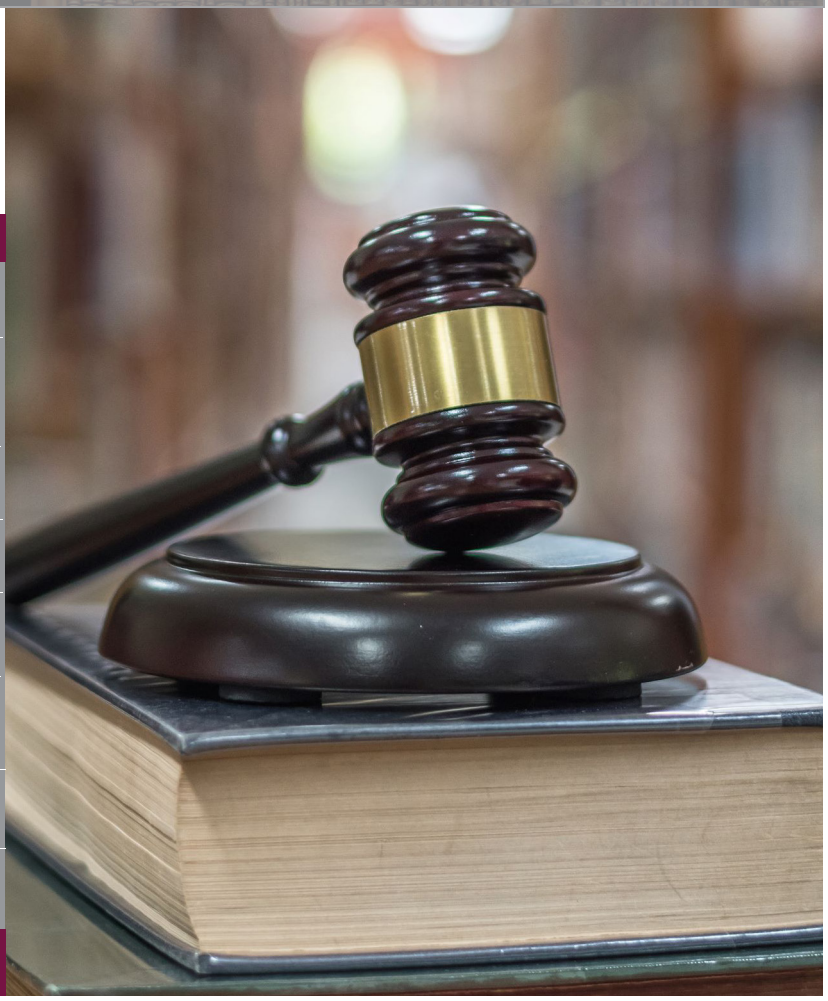


FROM THE CENTER

What Magistrates Need to Know About S.B. 6 Bail Training

The topic of bail reform has been part of the national and state criminal justice reform conversation for the last five years.

This past summer, during the 2021 TMCEC Legislative Updates and in the August 2021 issue of The Recorder, we shared information about 155 bills of interest that were about to become law. At the Legislative Updates, we did something almost unprecedented: we prognosticated about what we anticipated bail reform would likely look like in Texas.

Passed in the Second Special Session of the 87th Legislature, S.B. 6 (The Damon Allen Act) creates new requirements and procedures for setting bail for criminal offenses other than Class C Misdemeanors. The governor signed S.B. 6 in September. Since then, like many of you, TMCEC has been working to understand all its implications, not just because many municipal judges perform magistrate duties for all types of criminal offenses, but because S.B. 6 specifically contemplates the involvement of TMCEC in providing training.

Typically, each year, one issue of this publication features a summary of case law and attorney general opinions. This issue is no exception. However, because S.B. 6 is a significant change in Texas law, this issue also features a TMCEC summary of the bill (see Page 43).

New Required Training Courses for Magistrates

By virtue of holding judicial office, municipal judges are magistrates for the county (or counties) in which the municipality is located. Among the new provisions related to bail are required courses of training regarding a magistrate's duties, including setting bail in criminal cases. By April 1, 2022, the Office of Court Administration (OCA) must develop or approve an eight-hour initial training course and a two-hour continuing education course. A defendant charged with a felony or misdemeanor punishable by confinement may only be released on bail by a magistrate who, among other requirements, complies with the training requirements.

In a nutshell, here is what magistrates need to know about required S.B. 6 training:

- Magistrates serving on April 1, 2022 have until December 1, 2022 to complete the eight-hour training course (to be considered in compliance with Art. 17.024, C.C.P.).

- Magistrates who begin serving after April 1, 2022 have until the 90th day after the date he or she takes office to complete the course (to be considered in compliance with Art. 17.024).
- After completing the eight-hour course, magistrates must successfully complete the two-hour continuing course in each subsequent state fiscal biennium in which the magistrate serves.
- Magistrates must demonstrate competency of the course content in a manner acceptable to OCA, which must create a method to certify completion of the courses and competency.

How TMCEC Plans to Help Magistrates Complete the Required Training

Discussion regarding S.B. 6 training began in October. TMCEC met with OCA in December. In January, a proposal, titled Meeting S.B.6 Training Needs, was presented by TMCEC and approved by the Municipal Courts Education Committee. Subsequently, TMCEC submitted for OCA's approval a proposed 8-hour course of instruction, entitled Magistrate Duties: Setting Bail in Criminal Cases.

Our proposal to OCA recognizes that municipal judges face unique challenges in complying with the S.B. 6 training requirement. First, municipal judges constitute the largest segment of the Texas judiciary. Potentially training as many as 1,300 judges between April and December is no small task. Second, while some municipal judges are elected, the vast majority are appointed to a term of office. This makes it possible for every day of the year to be some municipal judge's first day in office. However, it also makes it difficult, if not practically impossible, for municipal judges to timely complete the prescribed training within 90 days of taking office. To solve this problem, and to accommodate the number of municipal judges needing to be trained, TMCEC is proposing that the training be offered online.

For the eight-hour initial training course:

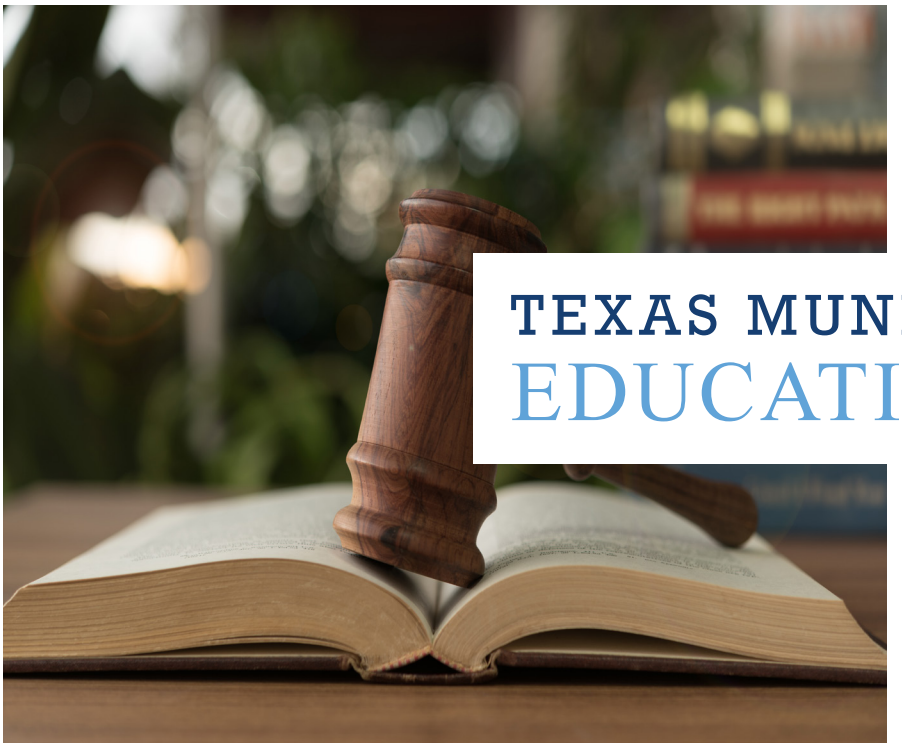
- TMCEC plans to host a one-day virtual course in June 2022 (primarily to meet the needs of those magistrates who take office on April 2, 2022 but also those who are serving on April 1, 2022 who want to attend a live event).
- Following this live virtual course, the event would be available on-demand on TMCEC's Online Learning Center (OLC).

For the two-hour continuing education course (required in each subsequent state fiscal biennium) municipal judges can complete proscribed magistrate training via:

- Approved TMCEC webinars (two-separate one-hour webinars or one two-hour webinar) OR
- Approved in-person content.

Stay Tuned

What you read about S.B. 6 in this issue is just our opening foray. In the months ahead, be on the lookout for additional S.B. 6 related information from TMCEC. (It is going to be a hot S.B. 6 Summer!)



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CASE LAW AND ATTORNEY GENERAL OPINION UPDATE

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Except where noted, the following decisions and opinions were issued between the dates of October 1, 2020 and September 30, 2021. Acknowledgments: Thanks to Judge David Newell, Lynda Hercules Charleson, Regan Metteauer, and Patty Thamez.

I. First Amendment

While public schools may have a special interest in regulating some off-campus student speech, in this case, the special interests offered by the school were not sufficient to overcome a student's interest in free expression.

Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038 (2021)

B. L. was a ninth-grade student at Mahanoy Area High School, a public school in Schuylkill County, Pennsylvania. At the end of her freshman year, B. L. tried out for a position on the school's varsity cheerleading squad and for right fielder on a private softball team. She did not make the varsity cheerleading team or get her preferred softball position, but she was offered a spot on the cheerleading squad's junior varsity team.

B. L. was incensed in part because coaches had placed an entering freshman on the varsity team. On a weekend while B. L. and a friend visited a local convenience store, she used her smartphone to post two photos on Snapchat, a social media application that allows users to post photos and videos that disappear after a set period. The message included a picture of B. L. raising her middle finger and captioned "F*** school" and "f*** cheer." The second image contained a caption, which read: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" The caption also contained an upside-down smiley-face emoji. B. L. posted the images to her Snapchat "story," a feature of the application that allows any person in the user's "friend" group to view the images for a 24-hour period. B. L. had about 250 "friends" which included classmates and teammates. Images of both messages were captured and shared by teammates and parents of Mahony Area High School.

School cheerleaders were required to agree in writing to a written code of conduct. The code of conduct was written by previous cheerleading coaches and approved by the school board. It required squad members to show respect for their teammates, coaches, the school, teachers, and other schools' cheerleaders. It also prohibited the use of profanity and posting "negative information" about "cheerleading, cheerleaders or coaches" on the internet. After learning of the Snapchat posts, the cheerleading coach issued B. L. a one-year suspension from the cheerleading squad. B. L.'s parent brought suit on her behalf in federal court.

Affirming the decision of the Court of Appeals, on alternate grounds, Justice Breyer delivered the opinion of the Court in an 8-1 decision. In *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), the Court recognized that schools have a special interest in regulating on-campus student speech that materially disrupts classwork or involves substantial disorder or invasion of the rights of others. The special characteristics that allow schools to regulate student speech do not always disappear when speech takes place off campus (e.g., serious, or severe bullying or harassment; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices).

Three features of off-campus speech typically distinguish schools' efforts to regulate off-campus speech. (1) A school will rarely stand *in loco parentis* when a student speaks off campus. (2) From the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. (3) Schools have an interest in protecting a student's unpopular expression, especially when the expression takes place off campus, because America's public schools are the nurseries of democracy. These three features, considered collectively, diminish the leeway given to schools.

In this case, because B. L.'s social media posts are protected by the First Amendment, the school violated her rights when it suspended her from the junior varsity cheerleading squad. Her statements made via Snapchat reflect criticism of the rules of a community in which B. L. was a member. Neither of B. L.'s messages involved features that place it outside the ordinary protection of the First Amendment. Furthermore, the circumstances of B. L.'s speech diminish the school's interest in regulation. The posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B. L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. The school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community is weakened considerably by the fact that B. L. spoke outside the school on her own time. B. L. spoke under circumstances where the school did not stand *in loco parentis*. The vulgarity in B. L.'s posts encompassed a message of criticism. And the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom. The school's interest in preventing disruption is not supported by the record. Some members of the cheerleading team were upset about the content of B. L.'s Snapchats. However, there is little to suggest a substantial interference in, or disruption of, the school's efforts to maintain cohesion on the school cheerleading squad. Discussion of the matter took, at most, 5 to 10 minutes of an Algebra class over the course of a couple of days. Considered together, these do not satisfy *Tinker*'s demanding standards.

Justice Thomas, in a dissenting opinion, states that the Court's decision places intuition over history when it comes to student speech. The Court reaches its decision without even mentioning 150 years of history supporting the conduct and decision of school officials. Using broad brushstrokes, the majority outlines the scope of school authority. When students are on campus, the majority says, schools have authority *in loco parentis*—that is, as substitutes of parents—to discipline speech and conduct. Off campus, the authority of schools is somewhat less. But the majority leaves important questions unanswered. What authority does a school have when it operates *in loco parentis*? How much less authority do schools have over off-campus speech and conduct? And how does a court decide if speech is on or off campus? Disregarding these important issues, the majority simply posits three vague considerations and reaches an outcome. A larger problem is that the Court's student-speech cases are untethered from any textual or historical foundation. That failure leads the majority to miss much of the analysis relevant to these kinds of cases. A more searching review reveals that schools historically could discipline students in circumstances like those presented here. The majority does not attempt to explain why we should not apply this historical rule and does not attempt to tether its approach to anything stable.

Commentary: The facts of this case could have easily found their way into a municipal court in Texas from 1995 to 2007. It has been 14 years since the Texas Legislature amended Section 37.102 of the Education Code, scuttling the authority of school districts to make violations of school rules punishable as Class C misdemeanors. Today, such authority is limited to parking and moving violations. In 2013, the offense

of Disruption of Class (Section 37.124, Education Code) was amended so that the offense could only be committed by someone other than a student. While some types of disorderly behavior by students still fall within the parameters of Section 42.01 of the Penal Code (Disorderly Conduct), this case is a reminder that a school's interest in maintaining order and imposing discipline on students must be weighed against the student's right to free speech. The balancing of these interests is made more complicated by novel and unresolved related issues unique to social media. In *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), the Court held unconstitutional a state statute prohibiting registered sex offenders from accessing "commercial social networking" websites that permit use by minors on the grounds that Facebook, Twitter, and other platforms are the "modern public square." *Packingham*'s expansive language, conceptualizing the internet as a public space, is a Pandora's box of First Amendment issues. While the primary thrust of *Mahanoy Area Sch. Dist. v. B. L.* is student free speech and school discipline, it is also relevant in understanding how social media figures into the bigger discussion about public discourse.

A municipal political sign ordinance providing unfettered discretion to the city council to approve or deny signs on public property posed both content-based restrictions and prior-restraint concerns that violated the First Amendment.

Baker v. City of Fort Worth, 506 F. Supp. 3d 413 (N.D. Tex. 2020)

Brookes Baker placed 18-inch crosses in a public right-of-way in front of an abortion clinic in the City of Fort Worth. The city code mandated that any person seeking to place signs in a right-of-way of a public street or upon any public property must first seek approval from the city council—excepting only government employees performing their duties and those placing political signs in accordance with another section of the code. After officers cited Baker for placing the crosses in a public right-of-way, he sued the city under 42 U.S.C. § 1983 arguing that the ordinance was unconstitutional. On motion for summary judgment before the U.S. District Court for the Northern District of Texas, Baker argued that the city's ordinances governing signs on public property violated the First Amendment's Free Speech Clause as (1) content-based restrictions and (2) prior restraints on speech.

To determine whether the ordinance was an impermissible content-based restriction, the court looked to *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015). *Reed* states that content-based laws are presumptively unconstitutional and may be justified only if they are narrowly tailored to serve compelling state interests. A law is content based when it "target[s] speech based on its communicative content," or when it "applies to particular speech because of the topic discussed or the idea or message expressed." The court identified that the ordinance's exception for political signs posed content-based concerns. Specifically, any sign placed in a public right-of-way outside an election polling location would be subject to a determination of whether its content was political or non-political. Here, the ordinance's exception for political signs was a content-based distinction subject to strict scrutiny.

Next, the court turned to the prior-restraint issue, noting that a prior restraint is an administrative or judicial order forbidding certain communications when issued in advance of the time that such communications are to occur. *Alexander v. U.S.*, 509 U.S. 544, 550 (1993). There are two common pitfalls for prior-restraint limitations. The first involves situations where licensors exercise excessive discretion. The second crops up where content-based prior restraints lack adequate procedural protections. Here, the ordinance required nearly all signs to receive permission from the city council. On its face, the ordinance provided unfettered discretion to the city council to approve or deny signs on public property or to delegate that unchecked discretion to the city's departments while offering no procedural safeguards. Even overlooking the political

sign exception to the ordinance, the city council's permission-granting scheme acted as a prior restraint on speech, subject to strict scrutiny.

The city argued that its ordinance met strict scrutiny by serving the compelling interests of eliminating trash and preserving aesthetics. The court determined that—even if the city's interest in aesthetics and trash control rose to the level of compelling—the permission-granting scheme was not narrowly tailored to achieve the interest. Therefore, the city's sign ordinance failed strict scrutiny and so violated the First Amendment.

Commentary: This opinion applies *Reed v. Town of Gilbert*, which created a sea change in the realm of content-based discrimination analysis for sign ordinances. The federal court demonstrates the pitfalls for crafting a municipal sign ordinance that passes constitutional muster in the wake of *Reed*. Here, the political-content distinction drawn by the city's sign ordinance seemed entirely reasonable, but (as the *Reed* majority warned) even laws that seem "entirely reasonable" may be struck down because of their content-based nature.

II. Fourth Amendment

A. Warrantless Searches & Seizures

Pursuit of a fleeing misdemeanor suspect does not categorically justify a warrantless entry into a home.

Lange v. California, 141 S. Ct. 2011 (2021)

Arthur Lange drove by a California highway patrol officer while playing loud music with his windows down and honking his car horn. The officer began to follow Lange and soon after turned on his overhead lights to signal that Lange should pull over. By that time, Lange was only about a hundred feet (about a four second drive) from his home. Lange turned into the driveway. The officer followed. After Lange drove into an attached garage, the garage door began to close. The officer exited his vehicle and approached the garage door. The door would have closed had the officer not stuck his foot in front of the sensor attached to the garage door opener. This caused it to reopen. The officer went into the garage to speak to Lange. The officer asked Lange if he noticed the officer. Lange said he did not.

The officer questioned Lange and, after observing signs of intoxication, put him through field sobriety tests. A later blood test showed that Lange's blood-alcohol content was three times the legal limit. Lange was charged with two misdemeanor driving under the influence (DUI) violations and the infraction of operating a vehicle's sound system at excessive levels. Later the prosecutor added an allegation that Lange had a prior DUI conviction. Lange moved to suppress evidence. The trial court denied the motion and the appellate court affirmed. Lange subsequently pled no contest to the misdemeanor DUI and then appealed the denial of his suppression motion a second time. The appellate division affirmed Lange's judgment of conviction.

The California Court of Appeals held that Lange's failure to immediately pull over when the officer flashed his lights created probable cause to arrest him for a misdemeanor and that a misdemeanor suspect could not defeat an arrest set in motion in a public place by retreating into a house or other private place. Furthermore, an officer's hot pursuit into the house to prevent the suspect from frustrating the arrest is always permissible under the exigent circumstances exception to the warrant requirement. The California Supreme Court denied review; the U.S. Supreme Court did not.

In a 9-0 decision, the U.S. Supreme Court vacated the California Court of Appeals' judgment and remanded. Writing for the Court, Justice Kagan explained that the Fourth Amendment requirement that a law enforcement officer obtain a warrant before entering a home without permission is subject to the exigent circumstances exception (i.e., the situation makes the needs of law enforcement so compelling that a warrantless search is objectively reasonable considering the totality of the circumstances). In the past, the Court has identified and upheld exigent circumstances involving warrantless home entries by law enforcement to give emergency assistance to an injured occupant, provide protection of an occupant from imminent injury, prevent imminent evidence destruction, and prevent a suspect's escape. The Court rejected the California Court Appeals flat rule permitting warrantless home entry when police officers with probable cause are pursuing any suspect. Flight of a suspected misdemeanant does not always justify a warrantless entry into a home. Consequently, an officer must consider all the circumstances—including the nature of the crime, the nature of the flight, and other facts surrounding the pursuit—to determine whether exigency justifies a warrantless entry into a home stemming from a misdemeanor.

There are two primary reasons for the Court's decision. First, Fourth Amendment precedent supports a case-specific approach that differentiates misdemeanors from felonies. Misdemeanors run the gamut of seriousness and may be minor. States generally classify less violent and less dangerous crimes as misdemeanors. The Court has previously held that when a minor offense (and no flight) is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. While a suspect's flight changes the calculus, it is not enough to justify a categorical rule. In many cases, flight creates a need for police to act swiftly. No evidence suggests that every case of misdemeanor flight creates such a need. Consider, for example, a teenager driving without taillights. Upon seeing a police signal, the teenager does not stop but drives two blocks to his parents' house, runs inside, and hides in the bathroom. This type of non-emergency situation may not be common, but it reveals the fatal overbreadth of a categorical rule that would treat a dangerous offender and scared teenager the same.

Second, there is no common law basis for a categorical rule allowing warrantless home entry for fleeing misdemeanants. The common law afforded the home strong protection from government intrusion and generally required a warrant before a government official could enter the home. There was an exception to the warrant requirement: an officer could enter a house to pursue a felon. Commentators differed on the scope of this exception but agreed that its scope was limited to felonies. Authority to intrude on a fleeing suspect's home in misdemeanor cases was even more limited. In misdemeanor cases, justification hinged on the circumstances. Flight alone was not enough. Warrantless entry depended on other circumstances suggesting a potential for harm and a need to act promptly.

Three members of the Court wrote separate opinions.

Justice Kavanaugh joined the majority's opinion but wrote separately to underscore that, in his view, there was practically little difference between the Court's opinion and Chief Justice Roberts's opinion because cases of fleeing misdemeanants will almost always also involve a recognized exigent circumstance—such as a risk of escape, destruction of evidence, or harm to others—that will still justify warrantless entry into a home.

Justice Thomas, joined by Justice Kavanaugh, joined the majority's opinion, except for the portion regarding assessing exigencies on a case-by-case basis. The majority correctly rejected the argument that suspicion that a person committed any crime justifies warrantless entry into a home in hot pursuit of that person. But he wrote separately to note two things. First, the general case-by-case rule that the Court announced here was subject to

historical, categorical exceptions. Second, under the Court's precedent, the federal exclusionary rule does not apply to evidence discovered while pursuing a fleeing suspect.

In an opinion that trends in tone towards dissent, Chief Justice Roberts, joined by Justice Alito, concurred in the judgment. The Fourth Amendment, the Court's precedent, and common sense clearly provide that an officer can enter the property to complete the arrest he lawfully initiated outside but the Court's decision has a different take. Holding that flight, on its own, can never justify a warrantless entry into a home (including its curtilage), the Court requires that the officer: (1) stop and consider whether the suspect—if apprehended—would be charged with a misdemeanor or a felony, (2) tally up other "exigencies" that might be present or arise, and (3) decide whether he can complete the arrest or must instead seek a warrant—one that, in all likelihood, will not arrive for hours. Meanwhile, the suspect may stroll into the home and then dash out the back door. Or, for all the officer knows, get a gun, and take aim from inside. The Constitution does not demand this absurd and dangerous result. Hot pursuit is not merely a setting in which other exigent circumstances justifying warrantless entry might emerge. It is itself an exigent circumstance. The Court has never held that whether an officer may enter a home to complete an arrest turns on what the fleeing individual was suspected of doing before he took off, let alone whether that offense would later be charged as a misdemeanor or felony. It is the flight, not the underlying offense, that has always been understood to justify the general rule: Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. The Court errs by departing from this well-established rule.

Commentary: So-called "minor crimes" undoubtedly pose potential unique challenges to individuals accused of their commission. And conviction for such offenses entail the imposition of consequences that, debatably, are not minor. Honoring the constitutional rights of defendants in such misdemeanor cases is of paramount importance. Are members of the U.S. Supreme Court downplaying the significance of misdemeanors in the same way some criminal justice reform advocates have in recent years? While this decision wanders onto a new avenue requiring misdemeanors to be distinguished from felonies in a specific constitutional context, the Court is not downplaying misdemeanors or their importance. The presentation of this case to the Court was unique. Because neither Lange nor the State of California supported the decision of the California Court of Appeals, the Court appointed Amanda K. Rice, former legal assistant to Judge Kagan, to argue that misdemeanors warranted warrantless entry. Justice Kagan rejected this categorical position. Meanwhile, Chief Justice Roberts made a passionate argument justifying the warrantless entry in this case. The Chief Justice also reportedly wanted the case returned for further proceedings to consider a different issue: did Lange flee? During oral arguments, Chief Justice Roberts and Justice Alito expressed qualms on the same point after reviewing the body camera footage. It makes us wonder, is this case resolved?

Supreme Court precedent does not justify a warrantless search and seizure at a person's home under the community caretaking exception to the Fourth Amendment's warrant requirement.

Caniglia v. Strom, 141 S. Ct. 1596 (2021)

During an argument with his wife, Kim, Edward Caniglia placed a handgun on the dining room table and asked her to "shoot [him] and get it over with." Kim instead left the home and spent the night at a hotel. The next morning, she was unable to reach her husband by phone. She called the police to request a welfare check. Responding officers accompanied Kim to the home, where they encountered Caniglia on the porch. He appeared agitated and angry. The officers called an ambulance based on the belief that Caniglia posed a risk to himself or others. Caniglia agreed to go to the hospital for a psychiatric evaluation on the condition that the officers not confiscate his firearms. Once Caniglia left, the officers entered the home—guided by

Kim, whom they allegedly misinformed about his wishes—and seized two handguns. Caniglia sued, claiming that the officers had violated the Fourth Amendment when they entered his home and seized him and his firearms without a warrant. The district court granted summary judgment for the officers. Relying on the Supreme Court's decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973) (holding that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment), the 1st Circuit Court of Appeals affirmed because the decision to remove Caniglia and his firearms from his home fell within a "community caretaking exception" to the warrant requirement. The *Cady* court held that police officers often have noncriminal reasons to interact with motorists on "public highways." Here, the court of appeals extrapolated a freestanding community-caretaking exception that applied to both cars and homes.

In a unanimous opinion, the U.S. Supreme Court vacated and remanded. Justice Thomas, writing for the Court, concluded that *Cady*'s acknowledgment of "caretaking" duties did not create a standalone doctrine that justified warrantless searches and seizures in the home. The Court has recognized some permissible invasions of the home and its curtilage (i.e., searches and seizures pursuant to a valid warrant; exigent circumstances, such as entry to render emergency assistance to an injured occupant or to protect an occupant from imminent injury; and when officers take actions that any private citizen might do, such as approaching a home and knocking on the front door). However, the court of appeals' "community caretaking" rule in this case went beyond anything the Court had previously recognized. It assumed that the officers lacked a warrant or consent, expressly disclaimed the possibility that they were reacting to a crime, declined to consider whether any recognized exigent circumstances were present because the officers had forfeited the point, and did not find that the officers' actions were akin to what a private citizen might have had authority to do if Caniglia's wife had approached a neighbor for assistance instead of the police. Neither the holding nor logic of *Cady* justified such warrantless searches and seizures in the home. As *Cad*y makes clear, searches of vehicles and homes are constitutionally different. The performance of "community caretaking" by police officers, like rendering aid to motorists in disabled vehicles, is not an open-ended license. What is reasonable for vehicles is different from what is reasonable for homes. The Court has repeatedly declined to expand the scope of exceptions to the warrant requirement to permit warrantless entry into the home.

Chief Justice Roberts filed a concurring opinion, which Justice Breyer joined, reiterating that a warrant to enter a home is not required when there is a need to assist persons who are seriously injured or threatened with such injury.

Justice Alito wrote a separate concurring opinion to explain his understanding of the Court's holding, emphasize that there is no special Fourth Amendment rule for a broad category of cases involving community caretaking, and to point out situations that the Court was not deciding (i.e., scenarios such as conducting a search and seizure on a suicidal person, red flag laws, and warrantless searches to check on a resident's medical condition).

Justice Kavanaugh filed a concurring opinion to underscore and elaborate on Chief Justice Robert's point that the Court's decision does not prevent police officers from taking reasonable steps to assist those who are inside a home and in need of aid.

Commentary: *Caniglia* should be read in the context of current events. In the opinion, some are expressly mentioned, some are tangentially touched upon, while others are alluded to. Mental health issues, "red flag" laws (state enactments that enable the police to seize guns pursuant to a court order to prevent their use for suicide or the infliction of harm on innocent persons), and Second Amendment considerations are all issues at the forefront of national legal conversations. And then there is the big question: What is the proper role of

the police? For more than a year, this question has been at the forefront of debates about policing. As stated by Bianca Tomassini, "The right to be free from government intrusion within one's home is guaranteed under the Constitution. However, this right should not be diminished because of the ambiguity surrounding the community caretaking exception. For the past 34 years, courts had the discretion to extend the community caretaking exception to homes, which essentially created arbitrary invasions that the Fourth Amendment attempts to prevent. Ultimately, the Supreme Court's decision to overturn the First Circuit's ruling and provide more guidance on this doctrine was the essential remedy necessary to uphold the Constitution." *Case Comment: Constitutional Law – Fourth Amendment Community Caretaking Exception Analysis Against the Community – Caniglia V. Strom*, 26 Suffolk J. Trial & App. Adv. 253, 264.

The application of physical force by law enforcement, even if it is unsuccessful in subduing a suspect, is a "seizure" for Fourth Amendment purposes.

Torres v. Madrid, 141 S. Ct. 989 (2021)

Police officers in Albuquerque, New Mexico approached a vehicle without a warrant to investigate Roxanne Torres, a person of interest. It was nighttime and the officers were wearing dark clothing. When an officer reached the vehicle and attempted to speak with her, Torres mistook the situation as a carjacking. Torres began driving and the other officers believed she was driving towards them. They opened fire and hit Torres multiple times. Torres evaded the immediate pursuit by police but was eventually captured. Torres sought damages under 42 U.S.C. Section 1983, which provides a cause of action for the deprivation of constitutional rights by persons acting under color of state law. In order for her excessive force theory to prevail, there first had to be a "seizure." Both the trial court and Tenth Circuit Court of Appeals ruled in favor of the police. On final appeal, the U.S. Supreme Court addressed whether this encounter amounted to a "seizure" for Fourth Amendment purposes.

In a 5-3 decision, with Justice Roberts writing for the majority, the Supreme Court held that "the application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person." Historical case law held that laying hands on a suspect to start the arrest process amounted to a seizure—actual custody was not required. In this case, the Supreme Court extended past precedent to situations where there was not body-to-body contact, but rather the use of guns to start the apprehension process. The majority clarified, however, that Torres was only seized "for the instant that the bullets struck her" because seizure by force "lasts only as long as the application of force." The Court did not reach the question of whether this seizure was unreasonable—its analysis was limited to whether or not there was a seizure at all.

Justice Gorsuch, joined by Justices Thomas and Alito, dissented. He wrote, "It's a seizure even if the suspect refuses to stop, evades capture, and rides off into the sunset never to be seen again. That view is as mistaken as it is novel." In Justice Gorsuch's view, for there to be seizure, possession of someone or something must be taken. Simply touching a person with one's hand or an object such as a bullet is insufficient.

Commentary: This holding, as the Court states, is narrow. The seizure's duration was extremely short. This holding seems to imply that if the bullets had missed Torres, a seizure would not have occurred—but that is another question for another day.

Plain view observations made during a warrantless entry into an apartment were properly included in a probable cause affidavit to search the apartment because the warrantless entry was based on exigent circumstances.

Martin v. State, 620 S.W.3d 749 (Tex. Crim. App. 2021)

Firefighters were called to extinguish a stovetop fire in an apartment in Bedford, TX. After the fire was extinguished and the firefighters were working to ventilate the apartment, they saw, in plain view, what they believed to be drug paraphernalia and illicit drugs. Also, while kneeling on a futon to open a window to help ventilate the apartment, a firefighter discovered a rifle under the futon cushions. Concerned for their safety, the fire department contacted the police department for assistance given the police department's expertise in handling drugs and firearms. There was concern that drugs, such as fentanyl, could be dangerous when exposed to fire. An officer arrived and entered the apartment without asking the tenant, who was outside on the grass. He testified that he did not ask because he was called to ensure the safety of the firefighters. He conducted a "protective sweep" and saw the same contraband that the firefighters did. He testified that he was not told beforehand that there may have been contraband in the apartment. The tenant was arrested for possession of drug paraphernalia and a search warrant was obtained from a magistrate to search the apartment. The search warrant application was completed by a narcotics expert that arrived at the scene to examine the drugs shortly after the other officers. The probable cause affidavit included observations from the officer, firefighter, and narcotics expert. When the search warrant was executed, methamphetamine was discovered, which led to the criminal charges.

The defendant argued that the search warrant violated the Fourth Amendment because the fire had been fully extinguished, and the apartment fully ventilated, before the officer's arrival. Thus, there were no exigent circumstances that allowed the officer and narcotics expert to enter the apartment without a search warrant. He argued that, because the eventual warrant's probable cause affidavit contained information gathered during an unlawful entry, the warrant, too, was unlawful. The State countered that the entry was justified because it was in response to the fire department's call to ensure their safety—an exigency. Alternatively, the State relied on *Michigan v. Taylor*, 436 U.S. 499 (1978), contending that the firefighters' lawful entry into the apartment extended to the police. Both the trial court and the court of appeals denied the suppression motions.

In a unanimous opinion written by Judge Slaughter, the Court of Criminal Appeals affirmed the court of appeals and upheld both the initial warrantless entry into the apartment and the subsequent entry under warrant. The initial entry was justified based on exigent circumstances, to wit, the safety of the firefighters. Therefore, any evidence observed by the officer in that initial entry could have been used as probable cause for the search warrant. As a result, the Court did not reach the question of whether *Michigan v. Taylor* alone justified the initial entry. The Court did, however, mention one salient point from *Michigan v. Taylor*: "where fire or police officials enter a structure during or in the immediate aftermath of a fire to conduct legitimate duties connected to the original exigency of the fire, no search warrant is required." As to the second entry under warrant, because the search warrant was based on evidence lawfully observed, the second entry likewise did not violate the Fourth Amendment. The Court did not reach the question of whether the narcotics expert's observations contained in the probable cause affidavit were permissible because the observations of the firefighter and the officer alone were sufficient to establish probable cause.

Exigent circumstances existed to perform a warrantless blood draw on an unconscious impaired driving suspect where there were only two officers on duty in the jurisdiction, the suspect needed immediate medical attention, and obtaining a warrant would have taken over two hours.

State v. Ruiz, 622 S.W.3d 549 (Tex. App.—Corpus Christi 2021, no pet.)

An impaired driving suspect fled the scene of a collision and was subsequently found "unresponsive" behind a car wash. He was transported to a hospital where a warrantless blood draw was performed.

In the original appeal, the court of appeals found that the defendant being unconscious and unable to consent was not an exigent circumstance justifying a warrantless blood draw. In 2016, the Court of Criminal Appeals granted a petition for discretionary review. In 2017, the Court of Criminal Appeals vacated and remanded the case without a written opinion because, while *Ruiz* was on its docket, it had decided two cases related to exigent circumstances and blood draws, *Cole v. State*, 490 S.W.3d 918 (Tex. Crim. App. 2016), and *Weems v. State*, 493 S.W.3d 574 (Tex. Crim. App. 2016). In 2018, the court of appeals, hearing the case for the second time, again concluded that exigent circumstances did not justify a warrantless draw. The Court of Criminal Appeals again granted a petition for discretionary review in 2018. While on the Court of Criminal Appeals' docket in 2019, the U.S. Supreme Court, in *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), decided that exigent circumstances generally exist justifying the warrantless blood draw of an unconscious impaired driving suspect. The Court of Criminal Appeals again remanded the case to the court of appeals to determine whether exigent circumstances existed in light of *Mitchell*. This opinion in 2021 marks the third time the court of appeals heard *Ruiz*.

Based on *Mitchell*, the court of appeals—in a reversal of its previous holdings—found that exigent circumstances existed. The U.S. Supreme Court held that when there is an unconscious impaired driving suspect—as there was in *Ruiz*—the exigent circumstances rule "almost always" permits a warrantless blood draw. The U.S. Supreme Court also directs state courts, in performing such analyses, to examine whether law enforcement has sufficient manpower, time, resources, and access to a magistrate to seek a blood warrant while ensuring that the defendant receives proper medical care and the crash scene is properly managed. In *Ruiz*, there were only two officers on duty, sternum rubs did not wake the defendant up (indicating a need for immediate medical attention), there was an active crash scene, and officers testified that obtaining a warrant would take over two hours. On balance, the court of appeals concluded that *Ruiz* was precisely the type of exigent circumstance that *Mitchell* contemplated.

Commentary: *Ruiz* has been bouncing around Texas courts since the underlying incident in 2012. This reflects numerous recent decisions by the Court of Criminal Appeals and U.S. Supreme Court related to exigent circumstances in blood draw cases. Given the fact-based, case-by-case nature of Fourth Amendment cases, it is likely that state and federal high courts will continue rendering decisions that will determine the admissibility of warrantless blood draw evidence in new fact patterns.

B. Warrant Affidavits

There is probable cause for a magistrate to issue a warrant for surveillance video and/or video equipment when a warrant affidavit articulates sufficient facts to build a reasonable inference that a search of the target business would turn up evidentiary surveillance equipment.

Foreman v. State, 613 S.W.3d 160 (Tex. Crim. App. 2020)

In a criminal transaction gone awry, Nathan Foreman and some accomplices captured, tied up, and tortured two other men at an auto-body shop. The men escaped and contacted the police, who in turn applied for a warrant to search the body shop. In addition to relating details of the captives' ordeal, the warrant affidavit described the location to be searched as an "autobody shop" in "a single-story building complex…made of metal and brick with dark tinted glass windows." The warrant did not explicitly mention the existence of any surveillance equipment. Based on this affidavit, a magistrate issued a warrant for the police to search for and seize any and all evidence that may be found at the auto shop including, among other things, "audio/video surveillance video and/or video equipment."

When surveillance footage from the search was introduced at trial, Foreman filed a motion to suppress, arguing that the warrant affidavit failed to set forth sufficient facts to establish probable cause that audio and video surveillance equipment could be found at the auto shop. The trial court and the court of appeals disagreed. On petition for discretionary review, the State argued that—despite the affidavit's silence as to the existence or presence of a surveillance system—a magistrate could permissibly infer from the warrant affidavit that an auto body shop would have a surveillance system.

The Court of Criminal Appeals pointed to established Fourth Amendment precedent from *State v. McLain*, 337 S.W.3d 268, 271-72 (Tex. Crim. App. 2011) that "while a magistrate may not baselessly presume facts that the affidavit does not support, the magistrate is permitted to make reasonable inferences from the facts contained within the affidavit's 'four corners.'" In this case, the test would be whether the affidavit "read in a commonsensical and realistic manner and afforded all reasonable inferences from the facts contained within" provided the magistrate with probable cause that a search of the listed location would yield evidentiary video equipment.

In its analysis, the Court rejected the State's argument that video surveillance systems should be treated as common knowledge. Instead, the opinion focused on identifying information explicitly stated in the affidavit that could give rise to the inference that this auto shop in particular had a video surveillance system. The Court noted that the affidavit described the location as an auto shop, a business with a high likelihood of handling cash and tangible goods. The affidavit also described the existing security features: a brick-and-mortar building with dark tinted glass windows. Under these circumstances, a magistrate could infer "to the degree of certainty associated with probable cause" that the target business had a unique need for security and was likely equipped with a video surveillance system.

Commentary: It should be noted that rulings on the Four Corners Rule are inherently fact specific and tied to what is (and is not) contained in a warrant affidavit. This was a unanimous opinion, but the Court acknowledged that it was a close call. The Court was careful not to permit a blanket inference as to the existence of video surveillance equipment. Instead, the Court carefully traced the magistrate's permissible inferences to explicitly stated facts in the warrant affidavit. Additionally, the Court leaned on the high degree of deference afforded to magistrates' determinations of probable cause "if for no other reason than that such deference is likelier to foster the constitutionally preferred warrant-application process."

While the inferences in this warrant affidavit were ultimately successful in establishing probable cause for the search of video surveillance evidence, it is a better practice to include direct facts to support the object of a search. Relying on inferences alone could weaken probable cause determinations and may run afoul of the Four Corners Rule.

C. Reasonable Suspicion

Reasonable suspicion existed to perform a temporary investigative stop where a vehicle was parked in a secluded area of a park-and-ride after midnight without its lights on.

Johnson v. State, 622 S.W.3d 378 (Tex. Crim. App. 2021)

During a routine patrol around midnight, an officer noticed a car with no lights on parked away from where other cars were parked in a park-and-ride. While the park-and-ride was normally used for daytime commuter parking, a nearby bar's patrons would often park there at night if the bar's lot was full. The park-and-ride did not have set hours, so it was never technically closed. According to the officer, criminal activity was common at the park-and-ride and he had responded to countless calls there in his 10 years patrolling the area. Detecting movement within the car, the officer activated his overhead emergency lights, parked about 15 feet from the car, and approached on foot. An occupant rolled down the window and the officer smelled marijuana. Criminal charges ensued. The issue was whether reasonable suspicion existed to make the stop.

The trial court concluded that reasonable suspicion was not required because this stop started as a consensual encounter with a citizen. It did not evolve into an investigative detention until after the officer detected the odor of marijuana. Activating the overhead emergency lights did not alone create a seizure. However, if the initial encounter was a seizure, the facts in the record supported a reasonable suspicion finding. The court of appeals disagreed, concluding that in this case, the overhead emergency lights signified that the car's occupants were not free to go and there was thus a seizure requiring reasonable suspicion. The court of appeals determined that there were no particularized facts supporting criminal activity and thus reasonable suspicion did not exist.

The Court of Criminal Appeals reversed the judgment of the court of appeals and affirmed the trial court. The opinion, written by Presiding Judge Keller and joined by five members of the Court, did not reach the question of whether a seizure occurred because they concluded that reasonable suspicion existed. Given the case-by-case nature of reasonable suspicion analyses, the Court examined all the information available to the officer at the time of the stop. The officer believed that after midnight, law-abiding people normally did not loiter in their vehicles without the headlights or interior lights on. The lights being off suggested that the occupants did not plan on leaving soon and were not waiting for someone to pick them up in another vehicle. At least one occupant was not asleep because the officer saw movement. The secluded parking spot of the car suggested secretive behavior. These factors led to an objective reasonable suspicion that "something of an apparently criminal nature [was] brewing" (*see Derichsweiler v. State*, 348 S.W.3d 906 (Tex. Crim. App. 2011)).

Judge Richardson concurred without written opinion.

Judge Walker issued a dissenting opinion asserting that this situation was neither odd nor out of the ordinary. The park-and-ride was open 24 hours a day. Nothing in the officer's testimony indicated that the car was parked in a manner seeking to avoid detection. Judge Walker also took issue with the majority's reliance on the lack of the headlights and interior lights. Just because the officer believed that an innocent person would have lights on does not lead to a rational inference that someone engaged in or contemplating a crime would have their lights off. Simply seeing movement by a vehicle's occupants is not suggestive of criminal behavior. Justice Walker writes, "It seems to me that, in order to uphold the detention in this case, the Court [had] to resort to stereotypes about light and dark, day and night, good and evil." Finally, Judge Walker wrote that there may

have been reasonable suspicion in this case if the officer had taken more time to observe the vehicle and made a more thorough assessment of the presence of potentially criminal activity. According to the record, he made the decision to activate his overhead emergency lights almost immediately upon viewing the vehicle.

Judge McClure dissented without written opinion.

A DWI conviction was upheld where a citizen called 911 reporting a car being operated erratically and police—who did not witness the conduct—initiated a stop when the car was stopped at a gas station with the defendant buckled into the driver's seat.

Harrell v. State, 620 S.W.3d 910 (Tex. Crim. App. Apr. 21, 2021)

The Van Alstyne Police Department received a call that a vehicle was being operated erratically at 4:00 a.m. The caller followed the vehicle to a gas station where the vehicle subsequently parked, told police the license plate number and where the vehicle was parked, then hung up. The caller did not describe what the driver looked like. A few minutes later, police spotted the vehicle with the engine off but the defendant buckled into the driver's seat. While there was no evidence that the keys were in the ignition, the defendant admitted that he had been driving and a passenger stated that the driver was "supposed to be the sober one." These facts led to a DWI conviction (and public intoxication convictions for the two passengers). Based on insufficient evidence, the court of appeals reversed the DWI conviction.

For cases involving extrajudicial confessions with a "beyond a reasonable doubt" burden, the evidence must be legally sufficient under *Jackson v. Virginia*, 443 U.S. 307 (1979), and must tend to show the corpus delicti of the offense (*see Hacker v. State*, 389 S.W.3d 860 (Tex. Crim. App. 2013)). Corpus delicti means concrete facts and circumstances that prove that a criminal act has been committed.

In an opinion delivered by Judge Hervey with six judges joining and two concurring, the Court of Criminal Appeals reversed the court of appeals' decision. The Court concluded that the court of appeals improperly "blended" the *Jackson* and corpus delicti analyses in reversing the trial court's conviction. For example, in its corpus delicti analysis, the court of appeals focused on a lack of evidence proving that the defendant was the one operating the vehicle. The Court of Criminal Appeals, however, said that identity is not part of corpus delicti analyses—it is part of the *Jackson* test. When viewed independently, the Court found both tests satisfied. The *Jackson* test was satisfied because a rational jury could have found each element of DWI met beyond a reasonable doubt based on the admitted evidence: the defendant's confession (which was consistent with the 911 caller's account of the events), the passenger's statement, the defendant being in the driver's seat with a seatbelt on, a failed field sobriety test, and a blood alcohol content of over .09. The corpus delicti test was satisfied because the evidence tended to show that the someone was operating the vehicle identified by the 911 caller. While the evidence indicated that it was indeed the defendant, proof of identity is not required in a corpus delicti analysis. If either of the passengers had been driving, they too were intoxicated and could have been found guilty of DWI. This was sufficient to conclude that the offense of DWI had been committed.

D. The Exclusionary Rule

The good-faith exception to the Texas Exclusionary Rule does not allow admission of blood-alcohol evidence seized from a search warrant issued with an unsworn probable-cause affidavit because the oath requirement is so fundamental that no objectively reasonable officer could believe that an oath was not required to support his affidavit.

Wheeler v. State, 616 S.W.3d 858 (Tex. Crim. App. 2021)

On July 9, 2016, Officer Tyler Bonner arrested Chase Erick Wheeler on suspicion of driving while intoxicated. When Wheeler refused to submit to field sobriety tests and refused a blood or breath test, Officer Bonner applied for a blood-search warrant. Bonner used preprinted, fill-in-the-blank forms which included statements indicating that an oath was required and must be sworn before another person. Despite this, Bonner never swore to the affidavit before anyone. Instead, he merely signed as the affiant, filled in the blanks for the date in the jurat, and left the signature for the jurat blank. The document was submitted to a magistrate, who signed it and issued a search warrant. Bonner then executed the warrant and collected blood-alcohol evidence.

At trial, Wheeler filed a motion to suppress this evidence, claiming that—because Officer Bonner's affidavit was not sworn under oath as required by the Texas Constitution and Code of Criminal Procedure—it must be excluded under the Texas Exclusionary Rule (Article 38.23(a) of the Code of Criminal Procedure). Under the rule, evidence obtained in violation of any provision of state or federal law cannot be used at trial in a criminal prosecution. The State argued that this case fell under the good-faith exception to the rule whereby evidence "obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause" may still be admitted. The trial court held that the situation fell within the good-faith exception, but the court of appeals reversed.

On petition for discretionary review, the Court of Criminal Appeals sided with the court of appeals. It held that the good-faith exception "plainly requires objective, rather than subjective, good-faith reliance upon a search warrant." Here, no objectively reasonable officer would execute a search warrant knowing that it was procured through an unsworn probable-cause affidavit. In reaching this outcome the Court noted the longevity and pervasiveness of the oath requirement, its prevalence in officer training, its explicit inclusion on the warrant paperwork at hand, and its fundamental nature. Accordingly, the Court held that the good-faith exception did not apply and the ill-gotten blood evidence was improperly admitted.

Judge Hervey's dissent takes exception to the majority's analysis that Officer Bonner's conduct was objectively unreasonable. She posits that it is the magistrate's job to refrain from issuing a warrant unless all the necessary requirements have been met. While officers should know that a probable-cause affidavit must be sworn, the officer cannot reasonably be expected to second-guess a magistrate's decision to issue a warrant unless the search warrant is facially deficient in a way that precludes probable cause.

Commentary: This opinion sets down a near-categorial rule that the good-faith exception cannot remedy a warrant issued without a sworn affidavit. The Court declares that sworn affidavits are an indispensable constitutional and statutory requirement and that proceeding without one is beyond the scope of valid law enforcement conduct that would implicate the good-faith exception.

Mechanics working on a truck did not commit a crime leading to the exclusion of evidence when viewing the contents of a thumb drive found in a cupholder, because the thumb drive was not a "computer" for purposes of Section 33.02(a) of the Penal Code.

Salinas v. State, 625 S.W.3d 203 (Tex. App.—Corpus Christi 2021, pet. denied)

Antonio Salinas dropped off his truck at a repair shop for a diagnostic check and maintenance work. After Salinas left, mechanics removed a loose USB thumb drive from one of his truck's cup holders. The thumb drive was not connected or interconnected to any computer or device and was not marked with any identifying marks or names. The mechanics chose to plug the thumb drive into one of their personal computers to see if

there was any music on the drive (not for any purpose required to complete the tasks for which the truck was delivered to the shop).

The thumb drive did not have a password and was not encrypted. Upon plugging it in, the mechanics observed images they believed to be child pornography and called 911. Officers arrived and observed the images on the mechanic's computer. With the mechanic's consent, the computer along with the thumb drive were then taken for forensic analysis. Following the forensic analysis, Salinas was indicted on multiple counts of possession of child pornography. At trial, he moved to suppress the underlying evidence arguing that (1) the evidence was obtained by a private person in violation of the law and (2) law enforcement performed an illegal warrantless search. The trial court ultimately denied the motion.

On appeal, the court of appeals found that, to prevail on an alleged violation of the Texas Exclusionary Rule, a defendant must first establish that he had a legitimate expectation of privacy in the place invaded. Here, the Court found that Salinas had both a subjective and an objectively reasonable expectation of privacy in the thumb drive. The thumb drive was clearly his personal property; he had turned over the truck to the mechanics for a limited purpose unrelated to the thumb drive; he never consented to the use of the thumb drive; and he did not leave the thumb drive in a place where private parties (apart from the mechanics for a limited purpose) would come into contact with it.

With the expectation of privacy firmly established, the Court turned to whether the Texas Exclusionary Rule under Article 38.23(a) of the Code of Criminal Procedure required the evidence to be excluded. The rule states that no evidence obtained by an officer or other person in violation of any laws of the State of Texas shall be admitted in evidence against the accused on the trial of any criminal case. Under Section 33.02(a) of the Penal Code, it is a crime to knowingly access "a computer… without the effective consent of the owner." Salinas argued that his thumb drive was a "computer" and that the mechanics committed the crime of Breach of Computer Security when they accessed it. Under the statute, a "computer" is defined as "an electronic, magnetic, optical, electrochemical, or other high-speed data processing device that performs logical, arithmetic, or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, or communication facilities that are connected or related to the device." Turning to the plain meaning of "data processing," the Court determined that a thumb drive—by itself—lacked the capacity to act as a computer. As such, the unconnected thumb drive could not be considered a "computer" for purposes of Art. 33.02(a).

Finally, the Court examined Salinas's claim that the officer's subsequent search of the thumb drive was an unreasonable warrantless search. Looking to the "private search" doctrine, it held that the Fourth Amendment is wholly inapplicable to a search (even an unreasonable one) effected by a private individual who is not acting as a government agent. In other words, once a private individual conducts a search—even one that frustrates a defendant's reasonable expectation of privacy—the 4th Amendment does not forbid law enforcement from replicating the search to confirm its findings. The only limitation is that law enforcement officials must constrain their search to the parameters of the search conducted by the private individual. The Court found that this limitation was met. Neither the exclusionary rule nor the Fourth Amendment required the suppression of the images found in the warrantless search.

Commentary: This case turned on whether or not a USB drive was a "computer" for the purpose of determining the exclusionary rule question. The Court did not examine whether the mechanics may have violated a different property crime when they searched the USB drive (such as theft).

III. Fifth Amendment

A confession was inadmissible when a 19-year-old defendant was illegally arrested in the middle of the night, was handcuffed to a bench in a holding cell, and flagged down an officer to give a confession despite having been given two *Miranda* warnings.

Martinez v. State, 620 S.W.3d 734 (Tex. Crim. App. 2021)

A 19-year-old was arrested after midnight in connection with the murder of a friend. Officers testified that the defendant was arrested based on incriminating statements by co-defendants in the case. The defendant was taken to the police station, read his *Miranda* rights, and then invoked his right to counsel, which terminated the initial interview. Less than 15 minutes later, while handcuffed to a bench, the defendant "flagged down" an officer and said that he would give a statement. He was read his *Miranda* rights a second time and proceeded to give an hour-long videotaped statement recounting the events of the day his friend was killed. Although officers did not provide specifically what the co-defendants' statements were that led to the arrest, they said that they implicated the defendant in "the same fashion" as the defendant's own account of the events. The officers said that they could have obtained an arrest warrant but had not yet done so when they arrested the defendant. The defendant was ultimately convicted of murder. On appeal, he argued that his confession was the result of an illegal warrantless arrest and should have been suppressed.

The court of appeals conceded that the arrest was unauthorized by Chapter 14 of the Code of the Criminal Procedure. The court then analyzed the four factors from *Brown v. Illinois*, 422 U.S. 590 (1975), to determine whether the confession was sufficiently attenuated from the illegal arrest: (1) the giving of *Miranda* warnings, (2) the temporal proximity of the arrest and confession, (3) the presence of intervening circumstances, and (4) the flagrancy of the official misconduct. After applying the four factors, the court of appeals concluded that the confession was sufficiently attenuated from the illegal arrest to preclude suppression.

In an 8-1 decision written by Judge Keel, the Court of Criminal Appeals reversed the court of appeals' judgment and remanded the case to the trial court. A confession may be voluntary for Fifth Amendment purposes if *Miranda* warnings are given, but a *Miranda* warning alone does not necessarily overcome the taint of an illegal arrest and the Fourth Amendment's exclusionary rule. Enter the *Brown* factors, which "ensure that 'the State cannot cure Fourth Amendment violations simply by administering the Fifth Amendment warnings required by *Miranda*.'" The Court agreed with the court of appeals' analysis of factors (1) and (2): *Miranda* warnings were given, which favors attenuation, but the time between the illegal arrest and confession was very short, which disfavors attenuation. They disagreed, however, on factors (3) and (4). The Court did not view the defendant flagging down the officer as an intervening circumstance because the record suggested that the flag down was the result of fear and distress caused by police misconduct. An example of an intervening circumstance favoring attenuation would be the defendant meeting with a lawyer and determining that it would be in his best interest to confess. As for factor (4), the Court looked at the circumstances surrounding the defendant's custody and concluded that they were designed to cause fear, surprise, shock, and confusion. The defendant was taken in the middle of the night and handcuffed to a bench in a holding cell despite there being no evidence that he was a flight risk. Because three of the four *Brown* factors disfavored attenuation, the Court ruled that the confession was inadmissible.

Police are not required to give *Miranda* warnings to a suspect who is in custody before asking him the location of a kidnapped child.

State v. Mata, 624 S.W.3d 824 (Tex. Crim. App. 2021)

A 15-year-old girl was kidnapped. Ricardo Mata called the girl's mother and demanded a ransom of $300 for her release. After pinging Mata's phone and discerning his location, officers arrived on the scene and questioned him about the girl's location. They did not administer *Miranda* warnings but, after aggressive interrogation, Mata eventually revealed the girl's whereabouts. At trial, Mata moved to suppress his statements to law enforcement due to the officers' failure to Mirandize him. The trial court suppressed the statements and the court of appeals affirmed.

On petition for discretionary review to the Court of Criminal Appeals, the State argued that the questioning of Mata fell within the "public safety exception" to the *Miranda* warnings requirement and that the resulting statements were admissible. In a majority opinion penned by Presiding Judge Keller, the Court looked to *New York v. Quarles*, 467 U.S. 649, 655 (1984), which stated that the public safety exception recognizes narrow circumstances where the threat to the safety of officers and the general public outweighs the need for giving *Miranda* warnings. In *Quarles*, officers forwent *Miranda* warnings when seeking to determine the location of a weapon while apprehending a suspect. The Supreme Court justified this oversight, holding that "the need for answers to questions in a situation posing a threat to the public safety outweigh[ed] the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."

In this case, the court of appeals restricted the public safety exception only to situations in which a weapon was involved. The Court of Criminal Appeals declined this limitation, holding that "everything the Supreme Court said in *Quarles* applies with at least as much force to the kidnapping of a child." The Court concluded that *Miranda* posed no bar to the admission of Mata's statements and remanded the case.

Judge Walker concurred with the judgment but focused on the purposes of the public safety exception, stating that, "[t]he public safety exception is intended to prevent the *Miranda* warnings themselves from endangering the public." At the time of the interrogation, the safety of the kidnapped child (herself a member of the public) was not confirmed. Under the reasoning of *Quarles*, it was reasonable for the police to conduct the roadside interrogation of Mata without giving him *Miranda* warnings. Therefore, Mata's statement was admissible.

Commentary: The Court of Criminal Appeals notes that the public safety exception creates a lack of clarity to the requirements of *Miranda*. The *Quarles* Court did not engage in discussion of what constitutes a situation posing a threat to the public safety. The Court of Criminal Appeals also declined to do so in this case. Instead, it determined that the public safety concern was self-evident since "the State's interests are at their zenith" when a child has been kidnapped.

IV. Sixth Amendment

No public policy existed in permitting a witness in a Texas trial to testify from out-of-state via FaceTime that outweighed the defendant's Sixth Amendment right to confront witnesses against him.

Haggard v. State, 612 S.W.3d 318 (Tex. Crim. App. 2020)

In a Texas trial for sexual assault of a child, a Sexual Assault Nurse Examiner (SANE) in Montana testified against the defendant via a two-way video system (FaceTime). The SANE, DeVore, was in Texas at the time of the offense but had relocated to Montana before trial. Although the State agreed to pay her travel expenses, she decided that she could not travel to Texas for economic and personal reasons. DeVore was never subpoenaed. After she notified the State that she would not voluntarily appear and testify in person in Texas, the State requested a virtual appearance because DeVore's testimony was crucial to prove the chain of custody

of the SANE kit and its contents. The motion was granted. The issue was whether the Sixth Amendment's Confrontation Clause was violated.

In a majority opinion written by Judge Hervey, the Court of Criminal Appeals reversed the court of appeals. The Court concluded that this testimony violated the Sixth Amendment because permitting remote testimony did not further any important public policy that outweighed the defendant's Sixth Amendment rights. In *Maryland v. Craig*, 497 U.S. 836 (1990), a child victim was allowed to testify via one-way, closed-circuit television because the public policy of protecting the child's psychological well-being outweighed the defendant's right to face his accuser in court and the reliability of the testimony was ensured because the child was under oath. Later, the Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), overruled the reliability prong of *Craig*. The majority in *Haggard* thus utilized only the *Craig* balancing test in reaching its decision. The Court concluded that it was not an important public policy to allow a State's witness to testify remotely where the State had sufficient time to subpoena the witness but chose not to. Furthermore, while it may have been inconvenient for DeVore to travel to Texas, this did not outweigh the defendant's Sixth Amendment right to confront witnesses against him. And unlike in *Craig*, the witness was not a child victim whose psychological well-being was a concern. Nothing else, such as being ill, overseas, or outside the court's subpoena power, was present in this case. The Court wrote that "…the right to physical, face-to-face confrontation lies at the core of the Confrontation Clause and cannot be so readily dispensed with based on the mere inconvenience to a witness." Consequently, a harm analysis was required. The Court concluded that allowing this remote testimony was not harmless error.

Judge Keller and Judge Keel concurred without written opinion. Judge Yeary concurred with a written opinion. He agreed that the case should be remanded but disagreed with the Court's discussion of the merits of the Confrontation Clause issue because he did not believe the merits were addressed by the court of appeals.

Judge Slaughter dissented opining that modern technology ensured reliability and clarity and thus the defendant was able to adequately confront the SANE. Judge Slaughter was skeptical of the majority's use of a balancing test, citing inconsistent and contradictory precedent on this issue.

Commentary: Notably, the remote testimony in *Haggard* occurred prior to the COVID-19 pandemic and ensuing Supreme Court of Texas emergency orders permitting (in certain situations) remote trials. By the time the Court of Criminal Appeals handed down its decision, remote proceedings due to the COVID-19 pandemic were common in Texas. The COVID-19 emergency orders would undoubtedly have changed the Court's analysis in *Haggard*, but to what extent? So far, there have been no marquee challenges to the emergency orders based on the Sixth Amendment's Confrontation Clause. The longer the COVID-19 pandemic persists, the more likely it is that such a marquee challenge will emerge.

V. Substantive Law

An individual "exceeds authorized access" when the user accesses a computer with authorization but subsequently obtains information, such as files, folders, or databases, that are off-limits to the individual.

Van Buren v. U.S., 141 S. Ct. 1648 (2021)

Nathan Van Buren was a sergeant with the Police Department in Cumming, Georgia. He used his patrol car computer to access a law enforcement database to retrieve information about a particular license plate number in exchange for money. Although Van Buren used his own valid credentials to perform the search, his conduct

violated a department policy against obtaining database information for non-law-enforcement purposes. Van Buren's actions were part of a Federal Bureau of Investigation sting operation. Van Buren was charged with a felony violation of the Computer Fraud and Abuse Act of 1986 (CFAA), which subjects to criminal liability anyone who "intentionally accesses a computer without authorization or exceeds authorized access." 18 U. S. C. §1030(a)(2). The term "exceeds authorized access" is defined to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." §1030(e)(6). A jury convicted Van Buren, and the district court sentenced him to 18 months in prison. Van Buren on appeal argued that the "exceeds authorized access" clause applies only to those who obtain information to which their computer access does not extend, not to those who misuse access that they otherwise have. The 11th Circuit Court of Appeals affirmed his conviction for violating the CFAA.

In a 6-3 decision, the U.S. Supreme Court reversed his conviction. Justice Barrett, writing for the majority, opined that 18 U.S.C.S. § 1030(e)(6) covered those who obtained information from areas in the computer, such as files, folders, or databases, to which their computer access did not extend. However, it did not criminalize the conduct of those who had improper motives for obtaining information that was otherwise available to them. It was undisputed that Van Buren was allowed to use the system to retrieve license plate information, Accordingly, under the CFAA he did not exceed authorized access to the database even though he had obtained information from the database for an improper purpose.

Justice Thomas penned a dissenting opinion, joined by Justice Alito and Chief Justice Roberts. Justice Thomas opined that the law has long punished those who exceed the scope of consent when using property that belongs to others (e.g., a valet may take possession of a person's car to park it, but he cannot take it for a joyride). He posits that the CFAA extends that principle to computers and information, limiting the scope of consent when using a computer or database that belongs to another. It punishes anyone who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains" information from that computer. As a police officer, Van Buren had permission to retrieve license plate information from a government database, but only for law enforcement purposes. However, he disregarded this limitation in exchange for money. It is undisputed that Van Buren exceeded authorized access to the database when he used it under circumstances that were expressly forbidden. According to the dissent, the problem with the majority opinion is that "the text, ordinary principles of property law, and statutory history [of the CFAA] establish that the definitional provision is quite consistent with the term it defines." The CFAA may or may not cover a wide array of conduct because of changes in technology that have occurred since its inception. Regardless, Justice Thomas opines, the text makes clear that using a police database to obtain information in circumstances where that use is expressly forbidden is a crime.

Commentary: The improper use of databases by government officials warrants careful and continuing legal and ethical consideration. Judges admonish jurors not to go online to independently research the facts or people involved in the case they are hearing. TMCEC admonishes judges and court personnel to consider the ethical implications of going online and conducting similar online fishing expeditions. The language in the CFAA is distinct from that in Chapter 33 of the Penal Code (Computer Crimes). Rather than focusing on whether a user exceeds authorized access, Texas law focuses on effective consent. Notably, however, consent is not effective if used for a purpose other than that for which effective consent was given (Section 33.01(12)(E) of the Penal Code).

An officer had reasonable suspicion to make a traffic stop when a vehicle's wheel drifted into the next lane despite no other vehicles being in the vicinity.

Dugar v. State, 629 S.W.3d 494 (Tex. App.—Beaumont 2021, pet. ref'd)

A Beaumont police officer observed a southbound vehicle "drift partially" into another southbound lane. There were no other vehicles in the immediate vicinity. A stop was initiated, which led to a DWI conviction. The defendant moved to suppress evidence gathered during the stop, arguing that the officer lacked reasonable suspicion to make the stop in the first place because his failure to maintain a single lane did not endanger any other cars.

The court of appeals rejected this argument. A police officer may initiate a stop without a warrant if he or she has articulable facts and reasonable inferences from those facts that would lead him or her to reasonably suspect that some crime has been or will soon be committed. In this case, the stop was initiated based on the officer's suspicion that Section 545.060(a) of the Transportation Code had been violated. Section 545.060(a) states: "An operator on a roadway divided into two or more clearly marked lanes for traffic (1) shall drive as near as practical within a single lane; and (2) may not move from the lane unless that movement can be made safely." As discussed in the commentary below, there is an unsettled circuit split concerning what constitutes a violation of Section 545.060(a). The *Dugar* court determined that because the law was unsettled, it was reasonable for the officer to believe that a violation may have been committed. The court acknowledged, however, that their circuit's interpretation of Section 545.060(a) would result in no violation in this case. But because the Fourth Amendment tolerates reasonable mistakes, the court declined to rule that the trial court erred in denying the defendant's motion to suppress.

Commentary: The main point of disagreement amongst intermediate courts of appeal in Texas is whether, based on the language of Section 545.060(a), a vehicle may enter a parallel lane if it does not put other vehicles in danger. For example, has a traffic violation occurred if a driver's wheel accidentally crosses a clearly marked lane divided for one second if there are no other cars in the vicinity? Interested parties hoped that the Court of Criminal Appeals would foreclose the issue when they heard *Leming v. State*, 493 S.W.3d 552 (Tex. Crim. App. 2016). In *Leming*, however, the Court handed down a plurality opinion that it is indeed a violation of Section 545.060(a) if a car drifts into a parallel lane even if it does so safely. Being a plurality opinion, many intermediate courts of appeal that do not agree with the Court of Criminal Appeals have declined to extend the *Leming* holding to their region. Such is the case with the *Dugar* court. Despite finding reasonable suspicion in this case, the court is still awaiting firmer guidance from the Court of Criminal Appeals on what constitutes a failure to maintain a single lane violation.

Section 521.021 of the Transportation Code requires individuals operating a golf cart on a public roadway to hold a driver's license.

Tex. Att'y Gen. Op. No. KP-0364 (2021)

A Montgomery County District Attorney requested an opinion from the Attorney General whether a driver's license is required to operate a golf cart on a public roadway in Texas. Golf cart operation is authorized on certain public roadways by Sections 551.403 and 551.404 of the Transportation Code. However, these statutes are silent as to whether a golf cart operator must hold a driver's license to operate a golf cart on these roads.

In responding, the Attorney General pointed out that Section 521.021 of the Transportation Code provides that "[a] person, other than a person expressly exempted under [Chapter 521 of the Transportation Code], may not operate a motor vehicle on a highway in this state unless the person holds a driver's license issued under this chapter." Chapter 551 of the Transportation Code defines golf cart as a "motor vehicle." Thus, according to the opinion, Section 521.021 applies.

Furthermore, Section 551.402(a) of the Transportation Code exempts golf carts from registration requirements, but there is no such exemption for driver's licensing requirements. The Attorney General opined that "we must assume that the lack of an exemption was intentional." In conclusion, the Attorney General determined that a valid driver's license was required to operate a golf cart on a public road in Texas.

VI. Procedural Law

A. Magistrates

The terms "bail" and "bond" are interchangeable in Chapter 17 of the Code of Criminal Procedure (referring both to the amount set and the amount posted, depending on the context) and a trial court's authority to revoke and raise bond is not conditioned on "good and sufficient cause."

Ex parte Gomez, 624 S.W.3d 573 (Tex. Crim. App. 2021)

Joseph Gomez was charged by complaint with two felonies. A magistrate set his bonds at a combined total of $40,000. Gomez obtained surety bonds in that amount and was released from jail. On his first appearance, the trial court revoked his bonds, ordered him rearrested, and set a higher bond of $150,000. Gomez filed an application for a writ of habeas corpus seeking reinstatement of his original bonds. At the habeas hearing, the trial court found that the decision to revoke the original bonds and increase the amount was appropriate because the court deemed the original bond insufficient after evaluating the circumstances and the adequacy of the original bond. But the court of appeals reversed, stating that the "bail" was set at $40,000 total and that since Gomez posted "bond" in that amount, the bond could not be deemed insufficient. Additionally, the appellate court found there was no "good and sufficient cause" to revoke the original bonds under Article 17.09 of the Code of Criminal Procedure.

On appeal, the Court of Criminal Appeals observed that Article 17.09 lays out the "one bond rule" and its exceptions. Generally, a defendant who has posted bond may not be required to post another bond in the same criminal action. However, if the judge or magistrate "finds that the bond is defective, excessive or insufficient in amount, or that the sureties, if any, are not acceptable, or for any other good and sufficient cause," the court may order the defendant rearrested and require the defendant to "give another bond in such amount as the judge or magistrate may deem proper." Chapter 17 does not define "insufficient" bond, but Article 17.15 sets out rules for fixing the amount of bail.

The court of appeals understood "bail" to be the amount set by the magistrate and "bond" as the amount of security posted by Gomez or his sureties. In its reading, if the bond equaled the bail, then it could not (by definition) be insufficient. However, the Court of Criminal Appeals found that this reading produced a nonsensical result. Under the appellate court's definitions, insufficiency under Article 17.09 would only come up in situations where a defendant tendered an amount lower than the amount fixed by the magistrate. Jailers, as a rule, cannot release defendants when they do not post the proper amount; so there would never be a situation where bail/bond could be adjusted. Referring to the statute, the Court held that the terms "bail" and "bond" in Chapter 17 were used interchangeably to refer both to the amount set and the amount posted depending on the context. Therefore, the lower court erred to draw a distinction between them in Article 17.09.

Additionally, the court of appeals erred in suggesting that a trial court needed finding of "good and sufficient

cause" to raise bail. This is the wrong standard. The phrase "any other good and sufficient cause" in Article 17.09 is not an independent standard of review but rather a catch-all, granting trial courts the discretion to revoke bond for reasons not enumerated in the statute. The Court held that, as long as a trial court did not set bail in an excessive amount under Article 17.15, it would not abuse its discretion to find the original bond insufficient under Article 17.09. Here, the new bail was not excessive so the trial court was within its authority to change the original bond.

Commentary: This case affirms the broad discretion of trial courts in setting bail. The powers under Article 17.09 were preserved amidst many changes to bail procedures coming out of the 87th Legislative Session. The opinion also does a neat job of parsing the terms "bail" and "bond" as used in Chapter 17 of the Code of Criminal Procedure.

A municipal judge, in his capacity as a magistrate, properly signed a search warrant to search a location that was subject to a previous search because it was tied to a different underlying offense and was based on information not known when the first warrant was signed.

Megwa v. State, 633 S.W.3d 653 (Tex. App.—Fort Worth 2021, pet. ref'd)

Megwa, who owned a pharmacy, was convicted of delivery of a controlled substance. On appeal, she argued that her conviction was based in part on an invalid search warrant signed by a municipal judge acting in his capacity as a magistrate. Megwa contended that the search warrant was rendered invalid by Article 18.01(d) of the Code of Criminal Procedure because a district court judge signed similar warrants in May 2014. The search warrant issued by the municipal judge was issued in June 2014.

Article 18.01(d) provides that subsequent search warrants to search the same person, place, or thing that were subject to a prior search warrant under Article 18.02(a)(10) may only be issued by a judge of a district court, a court of appeals, the Court of Criminal Appeals, or the Supreme Court. Article 18.02(a)(10) permits "mere evidence" or "evidentiary" search warrants for "property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense."

The State argued that the subsequent warrant was valid since the warrants were issued for different underlying offenses and the June warrant was based on information not known in May. The Court of Appeals agreed, finding that the search warrants for the defendant's pharmacy, home, bank accounts, and vehicles in May were supported by probable cause affidavits that the defendant was engaged in the "diversion of controlled substances for unlawful use by virtue of [her] employment" and money laundering. In June, the search warrant to search the pharmacy was supported by a probable cause affidavit which stated that the defendant "knowingly diverted to the unlawful use or benefit of another person a controlled substance which [she had] access by virtue of [her] profession or employment." Furthermore, some of the items listed in the search warrants possibly fell outside Article 18.02(a)(10), but the Court stopped short of making this express determination. It suggested that it was Court of Criminal Appeals' prerogative to draw a bright line as to what constitutes "subsequent." The Code of Criminal Procedure is silent as to whether "subsequent" is only for the same underlying offense and whether there are any time limits. In the absence of guidance, the court applied a "flexible" approach to Article 18.01(d). It opined that the intent of Article 18.01(d) is to "prevent repeated and harassing general exploratory searches of the same person, place, or thing…"

Commentary: Until the Court of Criminal Appeals or the Legislature clarifies the meaning of "subsequent" for the purposes of Article 18.01(d), courts do not have clear guidance as to when most magistrates may or may

not sign a search warrant for the same person, place, or thing that has previously been subject to a separate search warrant.

B. Pre-Trial

Failure to give deportation admonishments under Article 26.13 of the Code of Criminal Procedure is harmless error when the defendant is already susceptible to removal and is aware of deportation consequences based on prior convictions.

Loch v. State, 621 S.W.3d 279 (Tex. Crim. App. 2021)

At a pre-trial arraignment hearing for a murder charge, Vith Loch, a Cambodian national, received a perfunctory admonishment before entering a plea of guilty. During this time, the trial court failed to admonish him about the possibility that his plea might result in his deportation. On appeal, Loch complained that this failure rendered his plea involuntary. The court of appeals agreed, holding that the trial court erred by failing to include the admonishment, and that this error was harmful.

On petition for discretionary review, the State argued that Loch was already removeable before he pled guilty due to several prior convictions (including felonies in both Florida and Texas) which rendered the trial court's failure to give admonishments as to possible deportation consequences harmless.

The Court of Criminal Appeals began its analysis by examining Article 26.13(a)(4) of the Code of Criminal Procedure. It states that, prior to accepting a plea of guilty, the court shall admonish the defendant of the fact that if the defendant is not a citizen of the United States of America, a plea of guilty for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law. Failure to give Article 26.13 admonishments is non-constitutional error subject to a harmless error analysis under Texas Rule of Appellate Procedure 44.2(b). *VanNortrick v. State*, 227 S.W.3d 706, 708 (Tex. Crim. App. 2007). Rule 44.2(b) examines whether the defendant's substantial rights were affected. *Davison v. State*, 405 S.W.3d 682, 688 (Tex. Crim. App. 2013). The important question in examining admonishment harm under Rule 44.2(b) is whether the court has "fair assurance that the defendant's decision to plead guilty would not have changed." *VanNortrick*, 227 S.W.3d at 709.

The Court identified three parts to a "fair assurance" inquiry: (1) whether an appellant knew the consequences of his plea; (2) the strength of the evidence of an appellant's guilt; and (3) an appellant's citizenship and immigration status. VanNortrick, 227 S.W.3d at 712.

The Court dealt with the first two prongs in quick order. While the Court could not infer that Loch was actually aware of the immigration consequences of his plea, it determined that the evidence of his guilt was "quite strong." The third prong required more extensive examination. Loch argued that, despite his criminal history, he did not affirmatively know that he was removable. The Court held that the critical inquiry is not whether a defendant will in fact be deported, but only whether he is appreciably more susceptible to deportation after he enters a guilty plea. When Loch entered his plea in the instant case, he knew he was not a citizen of the United States (having identified himself as Cambodian and seeking consular notification). Additionally, Loch knew that he had prior convictions. He also knew of an active ICE detainer against him in Florida seeking to arrest and deport him. The Court ultimately held that, under these facts, Loch likely knew he was already susceptible to deportation at the time of his plea so the lack of an admonishment in this case could not have been harmful.

Commentary: Although it is not constitutionally required for misdemeanors, it is still a good practice to admonish all defendants of possible immigration consequences. *State v. Jimenez*, 987 S.W.2d 886 (Tex. Crim. App. 1999). Particularly since Class C offenses may create a basis for enhancement to higher charges.

Citizenship status is also newly important in the context of bail. Effective December 2, 2021, the citizenship status of the defendant must be considered when setting the amount of bail under Article 17.15 of the Code of Criminal Procedure. Tex. S.B. 6, 87th Leg., 2d C.S. (2021).

Booking records, pen packets, judgments, and sentences offered during the punishment phase of a trial were required to be disclosed during discovery under Article 39.14 of the Code of Criminal Procedure. "Material" as used in Article 39.14 is synonymous with "relevant."

Watkins v. State, 619 S.W.3d 265 (Tex. Crim. App. 2021)

Defense counsel made a pretrial discovery request for, among other things, "any other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the case." During the punishment phase of the trial, the State sought to introduce 34 new, undisclosed exhibits, including booking records, pen packets, judgments, and sentences, for the purpose of enhancement. The defense attorney objected that these exhibits had not been disclosed following his discovery request. The prosecutor acknowledged that he did not disclose these exhibits because he did not believe Article 39.14 of the Code of Criminal Procedure applied to evidence only to be used in the punishment phase of trial. Whether the disclosure of these exhibits was required hinged on an interpretation of Article 39.14. Specifically, what is the scope of the phrase "material to any matter involved in the action?"

In a 7-2 decision, Judge Newell, writing for the majority, reversed the judgment of the court of appeals and remanded the case for a harm analysis. The Court examined whether the "Prior Construction Canon" applied. The Prior Construction Canon is the rule that when a high court interprets a statute's language, repetition of the language in a new statute or a new version of the same statute is presumed to have the same interpretation (*see Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015)). Article 39.14 was amended by the 83rd Texas Legislature's Michael Morton Act. In looking at precedent, the Court found that no previous decision interpreted the precise phrase in question. Furthermore, previous interpretations of Article 39.14 generally focused on when trial courts were required to order disclosure of specific evidence—not whether that evidence was "material."

The Court also reviewed the legislative history of Article 39.14, which was proposed in 1963 and enacted in 1965. The Court examined case law precedents available when the law was proposed in 1963 and determined that none of it clearly defined materiality in this context. The Court did note, however, that bill analyses frequently referred to the disclosure of "relevant" evidence. Still, the Court did not find the legislative history of Article 39.14 to be of assistance in this case. Because the Court found no persuasive authority grounded in case law or the legislative history, they were "simply left with the text."

In looking at the ordinary meaning of the word "material" in Black's Law Dictionary, the Court concluded that the exhibits at issue in this case were material because they had a "logical connection to a consequential fact." The Court also concluded that, for the purposes of Article 39.14(a), "material" is synonymous with "relevant." Furthermore, the phrase "any matter involved in the action" dispelled the State's argument that Article 39.14(a) does not apply to the punishment phase. The State also argued that because the evidence in question was extraneous and related to the defendant's criminal history, it was not material to the action currently before the

Court. The Court disagreed, concluding that it was material in determining the degree of punishment, which is part of the present case. The exhibits in question were "at least 'subsidiary facts' that could assist the fact-finder in finding normative facts such as the commission of prior offenses, both extraneous and enhancement." The Court reversed and remanded, concluding that the State erred by failing to produce the exhibits in question.

Judge Keller dissented. She took issue with the majority's conclusion that "material" was synonymous with "relevant" because the 83rd Legislature affirmatively rejected the change from "material" to "relevant" leading up to the passage of the Michael Morton Act.

Judge Yeary echoed Judge Keller in his own dissent, stating, "Statutory law is what it says, not what the Legislative might have intended to say. In the context of Article 39.14(a), the 'material' simply means 'material'—no more and, certainly, no less."

An intermediate court of appeals improperly granted mandamus relief disqualifying an entire law firm from representing a criminal defendant because it did so in the absence of unequivocal, well-settled law.

In re Meza, 611 S.W.3d 383 (Tex. Crim. App. 2020)

The Bexar County District Attorney (DA), Nicholas LaHood, called Assistant District Attorney, Saenz, into his office to discuss an ongoing family violence assault case. They reviewed photographs and case records and exchanged opinions, but LaHood did not direct Saenz how to prosecute the case. Less than two weeks later, Saenz moved to a different court. At this point, LaHood's term as DA had ended and he became a partner at a private law firm. Soon after, a partner at the firm, Goss, was substituted in as defense counsel in the family violence assault case. The new prosecutor in the case, Giovenco, testified that one day at the courthouse Goss told her he had information that would "kill the case." LaHood overheard a conversation between Giovenco and Goss and subsequently told Giovenco that that information could not be shared. When LaHood, Goss, and one other partner requested discovery in the case, the State filed a motion to disqualify the entire firm based on LaHood's prior involvement in the case when he was the DA.

The trial court denied the motion. The State filed a writ of mandamus with the court of appeals. The court of appeals granted mandamus, determining that both LaHood and the entire firm should be disqualified. The trial court then petitioned the Court of Criminal Appeals for a writ of mandamus to require the court of appeals to withdraw its writ of mandamus.

In a unanimous opinion, written by Presiding Judge Keller, the Court denied relief. The two-pronged test for mandamus relief requires (1) that the relator has no adequate remedy at law and (2) what the relator seeks is a ministerial act not involving discretionary or judicial decision. Prong (1) was not contested. For Prong (2), the Court analyzed whether unequivocal, well-settled law required LaHood and/or the entire firm to be disqualified.

Article 2.08 of the Code of Criminal Procedure states that district and county attorneys shall not "after they cease to be such officers, be of counsel adversely to the State in any case in which they have been of counsel for the State." Despite testimony that LaHood did not actively participate in the case, the Court determined that he was indeed of counsel in this case by virtue of discussing and reviewing the case with Saenz. Thus, Article 2.08 dictated LaHood's disqualification. The Court noted that while there is a strong presumption of an

individual's right to counsel of their choice, this right is not absolute. Article 2.08's protections outweigh the right to counsel of choice.

Article 2.08 does not contemplate disqualifying a former DA's entire firm. The Court cited case law that relied on Rules 1.09 and 1.10 of the Texas Rules of Disciplinary Conduct (TRDC) that might have led to the entire firm's disqualification. Specifically, whether LaHood possessed confidential information related to the case or whether he participated "personally and substantially" might have disqualified the entire firm under Rule 1.09 or 1.10. The Court, however, stated that these are "merely" disciplinary rules and the Court has declined to use them as the sole basis for relief in the past. Thus, the Court did not reach a conclusion as to whether Rule 1.09 or 1.10 should disqualify the entire firm. The Court determined that the court of appeals improperly granted mandamus relief disqualifying the entire firm due to the absence of unequivocal, well-settled law.

Commentary: The chief takeaway from *Meza* is that the Court of Criminal Appeals declined to order mandamus relief based on the TRDC. Put another way, these rules do not rise to the level of "law" for the purposes of mandamus. So, no matter how well-settled or unequivocal a rule may be, the Court appears unwilling to conclude that a trial court has a ministerial duty to follow it. This is, of course, not to say that courts should feel free to disregard the TRDC—just that mandamus, according to the Court, is not the appropriate tool to remedy TRDC violations.

Where an agreement to dismiss and not re-file a felony charge was made in exchange for the defendant's guilty plea to misdemeanor charges that were also eventually dismissed, the trial court's grant of the defendant's motion for specific performance provided the approval necessary to render the grant of immunity enforceable.

State v. Hatter, 634 S.W.3d 456 (Tex. App.—Houston [14th Dist.] 2021, no pet.)

Sanitha Hatter was charged with a felony and a misdemeanor. While these charges were pending, she accrued a second misdemeanor. At trial, the State filed a motion to dismiss the felony charge based on the understanding that Hatter would plead guilty to both misdemeanor charges. However, the misdemeanor charges were dismissed shortly thereafter for unrelated reasons. Following the misdemeanor dismissals, the State re-filed the felony charge. In response, Hatter filed a "Motion for Specific Performance" asking the trial court to enforce the prosecutor's "promise of a dismissal" with respect to the felony charge. The trial court granted the motion for specific performance and declared on the record that the case was dismissed. On its signed order granting the motion, the trial court wrote, "State is ordered to dismiss."

On appeal, the State put forward two main arguments as to why the trial court lacked authority to either dismiss the felony charge or order the State to dismiss it. First, the State argued that a "prosecutor's offer of immunity from future prosecution is binding only if the trial court approves of the offer when it is made," (emphasis in original). The 14th Court of Appeals determined that approval did not need to be concurrent with the offer. Rather the trial court could approve the results of an immunity agreement without having to chime in when the agreement was struck. Second, the State argued that the prosecutor's promise to dismiss was enforceable only if the defendant performed their end of the bargain. Because Hatter ultimately did not perform by pleading guilty to her misdemeanors, the promise to dismiss was unenforceable. The court of appeals disagreed, holding that a trial court's approval of an immunity agreement was not contingent upon performance. Citing *Smith v. State*, 70 S.W.3d 848, 855 (Tex. Crim. App. 2002), the court determined that the responsibility of supervising performance of an immunity agreement lies with the prosecutor, not with the

court. Furthermore, the court's only role in the context of immunity agreements is to approve or veto them. Here, the trial court approved the immunity agreement. Based on the trial court's approval of the agreement, the appellate court affirmed the order dismissing Hatter's felony charge.

Commentary: It is very interesting to see a trial court's "order of dismissal" upheld on appeal. Conventionally, only the State has the authority to move to dismiss a prosecution. While the trial court may approve or veto the dismissal, it cannot sua sponte trigger a dismissal. It appears that the appellate court here perceived the trial court's "order to dismiss" merely as its approval of the immunity agreement; the two actions were treated as functionally interchangeable and rendered a similar result. However, there seems to be a large gap between "approving an immunity agreement" and "ordering the State to dismiss a felony charge." As a practical matter, the court here has generated a dismissal outside the motion of a prosecutor.

C. Appeals

By timely filing and presenting a motion for a new trial requesting a hearing, a defendant preserved for appeal the issue of whether the trial court erred in failing to hold the hearing.

Montelongo v. State, 623 S.W.3d 819 (Tex. Crim. App. 2021)

Alberto Montelongo was convicted of multiple felonies. He timely filed a motion for a new trial and requested a hearing. The hearing was scheduled but cancelled sua sponte by the trial court. No ruling was made on the motion. Soon after, his motion for a new trial was overruled by operation of law. On appeal, Montelongo argued that the trial court abused its discretion in failing to hold the hearing. The court of appeals acknowledged the motion for a new trial, but noted that no attempt was made by Montelongo to reschedule it before the deadline or object to the lack of a ruling on the motion. The court of appeals thus ruled that the issue was not preserved for appeal.

In an 8-1 decision authored by Judge Walker, the Court of Criminal Appeals overruled the court of appeals. In this case, the defendant was not required to object in order to preserve the issue for appeal. Objections, by their nature, can only occur when the trial judge is in a position to "do something about it." Here, it would have been improper to object to the trial court not ruling on the motion because at the moment the court's deadline to rule on the motion was reached, the trial court had lost jurisdiction of the case and a ruling would be unauthorized. It would also have been improper to object to the trial court not ruling on a motion when they still had time to rule. In other words, there was no time for the defendant to properly object to the trial court's lack of a ruling. Thus, "by timely filing and presenting a motion for a new trial requesting a hearing… [the defendant] preserved the issue of whether the trial court erred in failing to hold the hearing for appeal."

Commentary: While this case may mainly be of interest to practitioners handling appeals, it provides useful information about what is required for preservation.

F. Expunction

An arrest involving multiple misdemeanor offenses is divisible for purposes of expunging arrest records.

*Ex Parte R.P.G.P., 6*23 S.W.3d 313 (Tex. 2021)

R.P.G.P. was arrested for DWI with a blood alcohol level of at least 0.15. After his arrest, an inventory search of his vehicle resulted in the discovery of a small amount of marijuana. R.P.G.P. was subsequently charged with two offenses: misdemeanor DWI and misdemeanor possession of marijuana. The DWI charge was later dismissed after R.P.G.P. successfully completed a pretrial intervention program. The marijuana charge was dismissed as part of a deferred adjudication plea agreement. After both charges were dismissed, R.P.G.P. filed a petition to expunge the DWI arrest records pursuant to Article 55.01(a)(2)(A) of the Code of Criminal Procedure. Because R.P.G.P. had served the equivalent of court-ordered community supervision for the marijuana charge, the State argued that no part of the arrest records could be expunged. The State opposed the partial expunction request on the basis that arrest records cannot be expunged as to any single offense unless all charges stemming from the arrest are eligible for expunction under Article 55.01. The trial court denied the petition for expunction and the court of appeals affirmed.

In a 6-3 decision, the Supreme Court of Texas reversed the court of appeals' judgment concluding that the court of appeals erred in holding that R.P.G.P.'s DWI arrest records were ineligible for expunction under Article 55.01(a)(2) of the Code of Criminal Procedure. The case was remanded to the trial court which was directed to grant R.P.G.P.'s petition and render an expunction order with regard to the DWI arrest records.

Justice Guzman, writing for the majority, opined that Subarticles (a)(2) and (a)(2)(A) of Article 55.01 of the Code of Criminal Procedure (Right to Expunction), are offense-based provisions with respect to misdemeanors but arrest-based with respect to felonies. Accordingly, expunction under Article 55.01(a)(2) is not available if any felony offense stems from the same arrest. In contrast, however, misdemeanor offenses are eligible for expunction from arrest records on an individual basis.

Justice Bland, joined by Justice Blacklock and Justice Huddle, dissented because Article 55.01 does not permit the expunction of an arrest record where one misdemeanor is dismissed but another charged offense, based on the same arrest, resulted in a no-contest plea bargain with community supervision.

Commentary: The opening sentence of this decision says it "presents a straightforward, but confounding, statutory-construction issue." The problem is that Article 55.01 is hardly straightforward. It has been amended so many times that construing it is like decorating a wall that suffers from too many layers of wallpaper.

It has been four years since the Legislature expanded the expunction process outlined in Article 55.02 and gave municipal courts of record and justice courts concurrent jurisdiction with the district courts to expunge fine-only offenses where either the petitioner was arrested, or the offense was alleged to have occurred under Article 55.01(a)(1)(A) or (a)(1)(B)(ii). Article 55.01, like Chapter 55, could benefit from a total overhaul.

This is the third time in less than three years that an expunction decision from the Supreme Court of Texas has garnished a lot of attention in criminal law circles. Expunction procedures, while located in the Code of Criminal Procedure, are civil matters. Because they are a statutory privilege and not a constitutional or common law right, courts must enforce the statutory requirements as written and may not impose equitable or practical exceptions that the Legislature did not enact. *Ex Parte E.H.*, 602 S.W.3d 486 (Tex. 2020). Texas case law regarding expunction routinely reminds us that whether arrest records are eligible for expunction is a multivariable proposition. In *State v. T.S.N.*, 547 S.W.3d 617 (Tex. 2018), the Supreme Court of Texas waded into the murky waters of "offense based" vs. "arrest based" expunctions in a case in which a single arrest involved multiple wholly unrelated offenses. However, the Court declined to consider whether an arrest-based construction would comport with the language in Article 55.01(a)(2). Most courts of appeals have used an

"arrest-based" construction of Article 55.01 where an expunction is allowed only if all the offenses for which the person is arrested are eligible for expunction, not an "offense-based" approach that considers if offenses are individually eligible for expunction.

This decision is significant because the Supreme Court of Texas rejected the arrest-based approach and held that sub-articles of Article 55.01 (a)(2) and (a)(2)(A) are offense-based provisions with respect to misdemeanors but arrest-based with respect to felonies. It makes a bright line distinction between misdemeanors and felonies that is likely to be welcomed by criminal defense practitioners. The question is, what implications will it have on expunctions in municipal courts of record?

VII. Trial

Because they are not part of the formal voir dire process, juror questionnaires cannot alone be the basis for challenges for cause under Article 35.16 of the Code of Criminal Procedure.

Spielbauer v. State, 622 S.W.3d 314 (Tex. Crim. App. 2021)

Prior to questioning during jury selection in a murder trial, potential jurors were given a questionnaire that, following a brief factual summary, asked "Do you think you have heard about this case?" and "If you have heard about this case, based upon what you have heard, have you formed an opinion as to the guilt or innocence [of the defendant] as would influence you in finding a verdict[?]" Six venire members answered both questions affirmatively. The defense argued that these six should be automatically discharged under Article 35.16(a)(10) of the Code of Criminal Procedure without further questioning. The trial court disagreed and questioned the six individually, which led to four being dismissed. The other two renounced the affirmative answers they gave in the questionnaire and remained in the jury pool. The court of appeals reversed the trial court's judgment, concluding that all six venire members should have been automatically disqualified.

Before the Court of Criminal Appeals, the State argued that questionnaires are not part of voir dire and consequently cannot be the basis for challenges for cause. In a unanimous decision authored by Judge Keel, the Court sided with the State. The Court agreed that questionnaires are not part of the formal voir dire process, but rather "other" or "extrinsic" evidence to be considered along with the voir dire examination. Thus, answers given in a questionnaire cannot alone be the basis for a challenge for cause under Article 35.16—even if the questions closely or identically track Article 35.16's language. The Court also noted that questionnaires are vulnerable to misinterpretation. The Court wrote, "They may be a useful tool, but questionnaires are no substitute for the human interaction inherent to voir dire and essential to the trial court's evaluation of a juror's suitability for juror service." Thus, the trial court's decision not to immediately disqualify the potential jurors that answered the questions affirmatively was proper.

Statements made by a defendant during a butt-dial phone call were admissible as both a declaration against interest and as an admission by a party-opponent.

Templeton v. State, 629 S.W.3d 616 (Tex. App.—Eastland 2021, no pet.)

On November 5, 2017, Michael Templeton beat his girlfriend W.S., putting his knee on her neck and holding her to the floor. W.S. fled the attack to the home of her parents, Eddy and Joyce. They noticed that W.S. was crying, sweating profusely, and was out of breath, as if she had been running. W.S. also had several noticeable bruises and lacerations on her face; her eyes were swollen; and she was holding her neck. A few months after the incident, Eddy received a phone call from W.S. The call appeared to be a "butt-dial" because, although Eddy could hear W.S. and Templeton speaking, neither of them appeared to be aware that Eddy was on the line and listening to their conversation. At trial for the third-degree felony offense of assault family violence by strangulation, Eddy testified that he overheard Templeton tell W.S. during this call that, if Templeton wanted to physically abuse W.S., it was a matter for them to resolve and was not anyone else's business, including her parents or the police. Templeton objected to this testimony as hearsay but the trial court determined that it was admissible. However, it wasn't clear whether the trial court found the statement admissible under a hearsay exception or determined it was not hearsay at all. The court of appeals addressed both possibilities.

First, the Court examined the butt dial's admissibility under the statement-against-interest exception to hearsay under Rule 803(24) of the Texas Rules of Evidence. Rule 803(24) requires a two-step foundation analysis before hearsay statements against a person's penal interest may be admitted. First, the court must determine whether the statement—considering all of the circumstances—subjects the declarant to criminal liability and whether the declarant realized this risk when he made the statement. Second, the court must determine whether there are sufficient corroborating circumstances that clearly indicate that the statement is trustworthy. *Dewberry v. State*, 4 S.W.3d 735, 751 (Tex. Crim. App. 1999).

The Court of Appeals found that Templeton's statements on the butt dial call were self-inculpating because he admitted to physically abusing W.S., which would clearly subject him to criminal liability. Furthermore, he stated that his assaultive conduct was between him and W.S., not her parents or the police. This suggested that Templeton was cognizant of the statement's inculpating nature. The record also established sufficient corroborating circumstances establishing the statement's trustworthiness: W.S. bore physical signs of abuse and told her parents that Templeton had beaten her. With these facts, the Court held that the trial court would not have abused its discretion if it admitted the butt-dial testimony as a statement-against-interest hearsay exception.

Despite succeeding under this standard, the Court went on to state that Templeton's butt-dial statements were more akin to the requirements of the admission of a party-opponent under Rule 801(e)(2)(A) of the Texas Rules of Evidence. This rule provides that a statement is not hearsay if it is offered against a party to the proceeding and is that party's own statement. Here, it was undisputed that Templeton uttered these statements during the butt-dial phone call and that these statements were offered and used against Templeton by his opposing party, the State. Therefore, these statements were not hearsay by definition and were admissible.

Commentary: While statements against interest are admissible due to their reliability, admissions by party-opponents are admissible precisely because they are being admitted against the party alleged to have made those statements. Thus, that party cannot complain of an inability to cross-examine themselves. And since they are the author, they are estopped from complaining about untrustworthiness. In this way, declarations against interest in which the defendant is the declarant are virtually always additionally admissible as admissions by a party-opponent. The court applied this well-established rule to the unique scenario of a butt-dial phone call.

A trial judge's statements while ruling on a relevance objection during cross-examination were improper because they commented on the weight of the evidence, were material and harmful, and were not adequately cured.

Moore v. State, 624 S.W.3d 676 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd)

In a family violence assault jury trial, a husband and wife had disparate testimony as to what occurred. During cross-examination, there was a line of questioning about a cell phone light that could be seen on a video taken by a security camera in the couple's home. Defense counsel sought to establish that the light's movements in the video were inconsistent with the complainant's account of what occurred. Specifically, that because the light was not moving during the alleged attack, it could not have been held by the complainant. The State objected based on relevance. Before ruling on the objection, the judge expressed skepticism about this line of questioning by the defense. The judge stated, "[the phone] could be on a table or something over there." When defense counsel responded that the light moved at other times in the video, the judge replied, "Maybe shook the room or the table or something." Defense counsel objected to the judge's statements saying that they commented on the weight of the evidence. The judge agreed to strike the statements from the record and asked that the jury "disregard [his] statement."

Article 38.05 of the Code of Criminal Procedure prohibits judges from discussing or commenting upon the weight of evidence while ruling on its admissibility. The court of appeals concluded that the trial judge's comments were improper under Article 38.05 and indicated a strong disbelief in the defense's position. The judge, in effect, became an advocate for the State. The court also found the improper comments to be material: they "invaded the province of the jury, and did so during the testimony of the State's key witness on whose credibility the State's case rested." Next, the court found the comments to be harmful because this case hinged on whether the jury believed the husband or wife. During voir dire, the venire was asked questions such as whether they would be inclined to believe a man or a woman in a "he said/she said" case. The court of appeals concluded that the comments were "reasonably calculated to benefit the State and to prejudice [the defendant's] rights to a fair trial before an impartial court." Finally, the court of appeals determined that the judge's instruction to the jury to disregard the comments was not sufficient to cure the harm. First, it was terse and did not remind the jury of their province to judge the credibility of witnesses. Second, the judge instructed the jury to disregard his "statement" when multiple different statements were made, making his instruction unclear as to which statement they were to disregard.

Commentary: While some trial defects, errors, or mistakes can be cured by a judge instructing the jury to disregard what they have seen or heard, such instructions are not a panacea. Appeals courts will go through this sort of multi-layered, case-by-case analysis in determining whether the error was material and harmful and whether any harm was cured. Above all else, though, this case reminds judges of the importance of adhering to Article 38.05 and remaining neutral while presiding over jury trails.

VIII. COVID-19

A court can extend a deadline pursuant to an emergency order of the Supreme Court of Texas while exercising its plenary power, but it cannot use an emergency order to create jurisdiction where none exists.

Quariab v. Majdi Mohd El Khalili, 2021 Tex. App. LEXIS 1960 (Tex. App.—Dallas Mar. 15, 2021, no pet.)

The underlying case began as a business dispute filed in February 2020. After the parties settled, it was

dismissed on June 19, 2020. Neither party filed a post-judgment motion. However, in November 2020, one party moved to reinstate the case after an alleged breach of the settlement agreement. At the time, the Supreme Court of Texas's 26th Emergency Order Regarding the COVID-19 State of Disaster was in effect. Paragraph 2.a. of the order allowed a court to "modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order." Citing the order, the trial court extended its deadline for considering post-judgment motions and reinstated the case.

On appeal, the 5th Court of Appeals questioned whether it had jurisdiction to hear the case at all. Appellees argued that the emergency order language permitting modification of "any and all deadlines and procedures" included deadlines imposed by the expiration of a trial court's plenary power. Unconvinced, the court held that language in the emergency orders giving a court the power to modify or suspend deadlines presupposed a pre-existing power or authority over the case or the proceedings. Put another way, a trial court could not create jurisdiction for itself where the jurisdiction would otherwise be absent, emergency order or no. The court borrowed this proposition from *In re State ex rel. Ogg*, 618 S.W.3d 361 (Tex. Crim. App. 2021).

The appellate court determined that the trial court's plenary power ended July 20, 2020 (one month after dismissal) since both parties failed to file post-judgment motions that would've extended the trial court's plenary power. The motion to reinstate was entered long after this deadline. As such, the trial court lacked jurisdiction and could not avail itself of the emergency order to reinstate the case. Accordingly, the appellate court vacated the trial court's orders rendered since July 20, 2020 and dismissed the appeal.

Commentary: The Supreme Court of Texas has since curtailed this expansive language in its subsequent emergency orders. The 43rd Emergency Order lists the type of deadlines that may be extended with exactitude. The order states that, "subject only to constitutional limitations, justice courts and municipal courts may in any case, civil or criminal, without a participant's consent, modify or suspend…trial-related deadlines and procedures and deadlines and procedures for pretrial hearings."

Alleged government mishandling of the COVID-19 pandemic cannot by itself support an inference that the Government is responsible for delay in a speedy-trial claim.

U.S. v. Taylor, 2020 U.S. Dist. LEXIS 232741 (D.D.C. 2020)

Defendants James Taylor, Darin Moore, Gabriel Brown, and John Sweeney were detained pending trial for first-degree murder and kidnapping. Their trial was originally set for April 2020. However, the COVID-19 Pandemic prompted the judicial district to postpone all jury trials indefinitely. Protesting this delay, Taylor moved to dismiss the indictment citing violations of his rights under both the federal Speedy Trial Act and the Sixth Amendment.

The Speedy Trial Act provides that the trial of a defendant who enters a plea of not guilty shall commence within 70 days of indictment or initial appearance, whichever occurs later, and entitles the defendant to dismissal of the charges if the deadline is not met. Certain periods of time may be excluded from that 70-day clock. Pertinent here, a court may exclude time if it finds that "the ends of justice served by [a continuance] outweigh the best interest of the public and the defendant in a speedy trial." The court identified that the ongoing public-health threat posed by COVID-19 was a compelling justice interest, and that the delay served the ends of justice.

Next the court tackled Taylor's Sixth Amendment speedy-trial claims. It noted that, instead of imposing a specific timeline governing all trials, the U.S. Supreme Court has applied a balancing test that weighs four

factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

Under the first factor, the court found the delay "presumptively prejudicial" because over two-and-a-half years had elapsed between Taylor's arrest and the current anticipated trial date. However, the remaining three factors weighed against the defendants. As to the second factor, Taylor argued that—since the federal government "deliberately abdicated its public health responsibilities" when confronted with the pandemic and "made conscious decisions not to take the actions necessary to control"—those deliberate choices amounted to negligence. He posited that the Government could not rely on its own negligence to justify the delay in this case. While the court found this argument "creative" it held that, even assuming the Government could have done more to curb the pandemic's worst effects, Taylor failed to establish that trials in the district would not still have been suspended. And because Taylor failed to demonstrate that the Government was to blame for the delay, the second factor could not weigh against it.

Taylor's assertions under the third factor also failed to convince the court. Because he only began objecting to pandemic-related delays after his second continuance during the pandemic, Taylor's invocation of his speedy trial right carried less weight. Finally, the court also declined to find the delay prejudiced Taylor, since he only complained of generalized prejudice arising from the length of his pretrial incarceration. The Court found that pretrial detention, coupled with delay exceeding one year, did not permit an automatic inference of prejudice without proof of sub-standard conditions or other oppressive factors beyond those that necessarily attend imprisonment. *See United States v. Rice*, 746 F.3d 1074, 1082 (D.C. Cir. 2014).

Commentary: Will the U.S. Supreme Court address the inevitable questions regarding speedy trial in the age of COVID-19? Regardless, all speedy-trial claims are fact intensive, and that truism holds here. While this case is tied to the particular facts of the United States District Court for the District of Columbia, it is analogous to the situation of trial courts across the country. It could be a template of things to come. Many courts are facing backlogs as cases continue to be reset in the face of pandemic-related delays. While this is a federal case, the opinion provides a blueprint for handling speedy trial claims that may arise as this backlog is resolved. Particularly when establishing the reason and necessity of delay. First, the court here was acting in accordance with CDC guidance and emergency standing orders when it issued continuances for the defendants' trial. The existence of these proclamations helped demonstrate the existence of an ongoing public health emergency that necessitated the suspension of trials. Furthermore, the court identified that this trial was precisely the type in which delay for COVID-precautions was warranted. It involved four co-defendants, six defense attorneys, multiple out-of-state witnesses, and the Government's case-in-chief was expected to last roughly four to six weeks. All these circumstances demonstrated that a trial could not proceed safely, notwithstanding every effort to hold it. While pretrial incarceration is odious, it must be balanced against a compelling justice interest in preserving the health and safety of the court participants.

Face covering prohibitions, promulgated in the Governor's emergency order, are valid unless proven invalid in a court of law. But Texans have immunity to be free from local enforcement of face covering requirements.

Tex. Att'y Gen. Op. No. KP-0386 (2021)

A Williamson County Attorney requested an opinion from the Attorney General whether GA-38 created a right, privilege, power, or immunity with regard to Texans' ability to not wear a face covering. GA-38 was one of the Governor's emergency orders issued in response to the COVID-19 state of disaster. In his opinion, the Attorney General made two conclusions. First, "Executive Order GA-38 prohibits a governmental entity,

including a county, city, school district, or public health authority, from requiring any person to wear a face covering or to mandate that another person wear a face covering." The Attorney General began his analysis by stating that Section 418.012 of the Government Code authorized the Governor, upon a disaster declaration, to issue such orders. Such orders "have the force and effect of law." GA-38 provided that local government entities or officials that imposed a mask requirement would be subject to a fine up to $1,000. When KP-0386 was written, multiple lawsuits were pending on the validity of GA-38. Because it was the Attorney General's policy to refrain from issuing opinions on subjects currently being litigated, he "assume[d] without deciding the validity and enforceability of…GA-38…" In other words, the Attorney General's opinion was that GA-38's prohibitions on mask mandates were valid until proven invalid in a court of law. Second, he concluded that "Executive Order GA-38 creates immunity for Texans to be free from enforcement of local governmental mandates that require face coverings in most settings." The question was posed through the lens of Section 39.03 of the Penal Code, which makes it an offense for a public servant to deny individuals of any "right, privilege, power, or immunity." The Attorney General cites *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264 (1974) as precedent from the U.S. Supreme Court that executive orders can create rights and immunities. Thus, the Attorney General states that a court is likely to conclude that GA-38 creates immunity for Texans to be free from local enforcement of face covering requirements and any public servant denying such immunity could be punished under Section 39.03.

IX. Court Costs

An appeal suspends the obligation to pay court costs and thus suspends the running of the clock for the time payment fee.

Dulin v. State, 620 S.W.3d 129 (Tex. Crim. App. 2021)

Bryant Dulin was convicted of 12 offenses. His judgments were entered on June 19, 2018 and the clerk's bills of costs were signed and filed on the same day. Each included a $25 time payment fee (TPF). Dulin submitted a timely appeal for his convictions, contending that the TPFs assessed against him must be reduced because a portion was unconstitutional. Relying on *Salinas v. State*, the court of appeals found part of the TPF to be an unconstitutional tax and deleted the portion of the fee not allocated to legitimate criminal justice purposes.

The State filed a petition for discretionary review claiming, among other things, that the assessment of the time payment fees was premature because it was assessed at the time of judgment. Under Article 102.030 of the Code of Criminal Procedure, the TPF is assessed "on or after the 31st day after the date on which a judgment is entered." The state argued that the bills of costs were issued before the 31 days could have possibly elapsed.

In a 5-4 decision, the Court of Criminal Appeals vacated and remanded the judgment of the court of appeals. Presiding Judge Keller, in the majority opinion, noted the absence of a statute requiring monetary sanctions be paid while an appeal is pending. To fill the gap, the Court drew analogies to situations involving the tolling or suspension of a defendant's obligation to pay. It cited cases related to the voluntary payment of fines (*Fouke v. State*) and appeals involving deceased defendants (*Vargas v. State*). Additionally, the Court examined practical reasons for not imposing the TPF during appeal. For one, courts would need to issue reimbursements if the case were ultimately reversed and dismissed on appeal. Second, imposing the TPF at the time a defendant enters an appeal creates a monetary penalty for filing that could discourage defendants from exercising their rights. Ultimately, the Court concluded that an appeal suspends the obligation to pay fines, court costs, and restitution. As such, the trial court's imposition of the TPF at the time the defendant filed an appeal was premature and the fee should be removed from the bills of cost in full.

A dissenting opinion by Judge Yeary, joined by Judges Keel, Slaughter, and McClure, chides the majority for deciding the case on the prematurity issue instead of tackling the ultimate constitutionality of the TPF and revisiting the Court's decisions in *Salinas* and *Peraza*. The dissent argues these cases were wrongly decided and maintains that, "when the total court costs authorized by statute and appropriately imposed in a given case is not so extravagant as to plainly exceed the actual cost to the State of Texas of litigating that case to a final conviction and executing the judgment, there is no usurpation of a power properly attached to a different department of government, regardless of how the recovered funds are statutorily apportioned."

Commentary: This case represents the newest chapter in the long saga of court cost opinions. The Court eschews an opportunity to examine the constitutionality of the TPF and revisit these touchstone cases. *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015) and *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017), at least for now, remain the Court's touchstones for the constitutionality of court costs. Both examine how a fee is allocated across various funds to determine whether it possesses a legitimate criminal justice purpose and thus does not violate separation of powers.

Municipal Court Week

From November 1-5, 2021, Texas celebrated Municipal Court Week! This is a time to show appreciation for the dedicated judges, clerks, and other court personnel who comprise the Texas municipal judiciary. The below courts reported participation in Municipal Court Week this year.

For more information, please visit https://www.tmcec.com/mtsi/municipal-court-week/.

Andrews Municipal Court
Arlington Municipal Court
Azle Municipal Court
Bay City Municipal Court
Beaumont Municipal Court
Bedford Municipal Court
Cedar Hill Municipal Court
Conroe Municipal Court
Coppell Municipal Court
Danbury Municipal Court
Denton Municipal Court
El Paso Municipal Court
Fate Municipal Court
Floresville Municipal Court
Forney Municipal Court
Fort Worth Municipal Court
Georgetown Municipal Court
Haltom City Municipal Court
Harker Heights Municipal Court
Harlingen Municipal Court
Helotes Municipal Court
Hempstead Municipal Court
Houston Municipal Court
Jarrell Municipal Court

Missouri City Municipal Court Week 2021

La Porte Municipal Court
Lakeway Municipal Court
Manor Municipal Court
McAllen Municipal Court
McKinney Municipal Court
Mesquite Municipal Court
Midland Municipal Court
Missouri City Municipal Court
Nassau Bay Municipal Court
Navasota Municipal Court
Nixon Municipal Court
Pearland Municipal Court
Pleasanton Municipal Court
Princeton Municipal Court
Richardson Municipal Court
Rosenberg Municipal Court
Rowlett Municipal Court
San Antonio Municipal Court
Schertz Municipal Court
Victoria Municipal Court
Watauga Municipal Court
Windcrest Municipal Court
Wylie Municipal Court

BAIL REFORM: 87TH TEXAS LEGISLATURE (2021) SECOND SPECIAL SESSION

S.B. 6 BILL SUMMARY

TEXAS MUNICIPAL COURTS EDUCATION CENTER

S.B. 6 (the Damon Allen Act) addresses release practices surrounding habitual and violent offenders to better protect the safety of their victims, law enforcement officers, and communities. The bill allows defendants to receive individual assessments and increases data reporting to create a more transparent, accountable system. Below is a section-by-section summary of S.B. 6.

The bill has the following effective dates: January 1, 2022, except Sections 4, 6, 17, 18, 19, 20, and 21 and Articles 17.021, 17.024, 17.15(a), and 17.15(c), Code of Criminal Procedure, as added or amended by this Act, take effect December 2, 2021; Section 7 and Article 17.15(b), Code of Criminal Procedure, as added by this Act, have no effect. The duties imposed under 17.15(a)(6) apply starting April 1, 2022.

Section 2: Right to Bail

S.B. 6 amends Article 1.07 of the Code of Criminal Procedure to require any person to be eligible for bail unless denial of bail is expressly permitted by the Texas Constitution or by other law. It prohibits this provision from being construed to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law. This section of the bill deletes existing text requiring all prisoners to be bailable unless for capital offenses when the proof is evident.

Section 3: Magistration

The bill amends Article 15.17(a) of the Code of Criminal Procedure requiring the magistrate, if applicable, to inform the arrested person that the person is authorized to file the affidavit described by Article 17.028(f), which relates to ability to pay (See Section 5: Bail Decision). This section also requires the magistrate to determine whether the bail decision is subject to Article 17.027 (See Section 5: Release on Bail of Defendant Charged with Felony Offense Committed While on Bail) before admitting the arrestee to bail.

Section 4: Definition of Bail Bond

This section makes a minor change to the definition of bail bond in Article 17.02 of the Code of Criminal Procedure. It adds the phrase if applicable to the provision allowing an administrative fee under Section 117.055 of the Local Government Code to be subtracted from the amount of bail refunded to a defendant that complies with his or her bond conditions.

Section 5: Public Safety Report System, Authority to Release on Bail Certain Defendants, Release on Bail of Defendant Charged with Felony Offense Committed While on Bail, Training on Duties Regarding Bail, and Bail Decision

Public Safety Report System

S.B. 6 adds Article 17.021 of the Code of Criminal Procedure (Public Safety Report System) requiring the Office of Court Administration (OCA) to develop and maintain a public safety report system that is available for use for purposes of Article 17.15 (Rules for Setting Amount of Bail).

Under added Article 17.021(b), the public safety report system must:

(1) state the requirements for setting bail under Article 17.15 and list each factor provided by Article 17.15(a);

(2) provide the defendant's name and date of birth or, if impracticable, other identifying information, the cause number of the case, if available, and the offense for which the defendant was arrested;

(3) provide information on the eligibility of the defendant for a personal bond;

(4) provide information regarding the applicability of any required or discretionary bond conditions;

(5) provide, in summary form, the criminal history of the defendant, including information regarding any:

(A) previous misdemeanor or felony convictions;

(B) pending charges;

(C) previous sentences imposing a term of confinement;

(D) previous convictions or pending charges for offenses that are offenses involving violence as defined by Article 17.03 (Personal Bond), or offenses involving violence directed against a peace officer; and

(E) previous failures of the defendant to appear in court following release on bail; and

(6) be designed to collect and maintain the information provided on a bail form submitted under Section 72.038 of the Government Code.

This section requires OCA to provide access to the public safety report system to the appropriate officials in each county and each municipality at no cost. The bill prohibits this subsection from being construed to require OCA to provide an official or magistrate with any equipment or support related to accessing or using the public safety report system.

Under added Article 17.021(d), the public safety report system may not:

(1) be the only item relied on by a judge or magistrate in making a bail decision;

(2) include a score, rating, or assessment of a defendant's risk or make any recommendation regarding the appropriate bail for the defendant; or

(3) include any information other than the information listed in 17.021(b).

Added Article 17.021(e) requires OCA to use the information maintained under 17.021(b)(6) to collect data from the preceding state fiscal year regarding the number of defendants for whom bail was set after arrest, including the number for each category of offense, the number of personal bonds, and the number of monetary bonds.

Under 17.021(f), OCA shall, not later than December 1 of each year, submit a report containing the data described by 17.021(e) to the governor, lieutenant governor, speaker of the Texas House of Representatives (house), and presiding officers of the standing committees of each house of the legislature with primary jurisdiction over the judiciary.

Article 17.021(g) requires the Department of Public Safety (DPS) to assist OCA in implementing the public safety report system established under this article and to provide criminal history record information to OCA in the electronic form necessary for OCA to implement this article.

Added Article 17.021(h) provides that any contract for goods or services between OCA and a vendor that may be necessary or appropriate to develop the public safety report system is exempt from the requirements of Subtitle D (State Purchasing and General Services), Title 10 (General Government) of the Government Code. This subsection expires September 1, 2022.

Public Safety Report

S.B. 6 adds Article 17.022 of the Code of Criminal Procedure (Public Safety Report), which requires a magistrate considering the release on bail of a defendant charged with an offense punishable as a Class B misdemeanor or any higher category of offense to order that:

(1) the personal bond office established under Article 17.42 (Personal Bond Office) for the county in which the defendant is being detained, if a personal bond office has been established for that county, or other suitably trained person including judicial personnel or sheriff's department personnel, use the public safety report system developed under Article 17.021 to prepare a public safety report with respect to the defendant; and

(2) the public safety report prepared under Subdivision (1) be provided to the magistrate as soon as practicable but not later than 48 hours after the defendant's arrest.

This section prohibits a magistrate from, without the consent of the sheriff, ordering a sheriff or sheriff's department personnel to prepare a public safety report under this article.

Notwithstanding 17.022(a), a magistrate may personally prepare a public safety report, before or while making a bail decision, using the public safety report system developed under Article 17.021.

This provision requires the magistrate to:

(1) consider the public safety report before setting bail; and

(2) promptly but not later than 72 hours after the time bail is set, submit the bail form described by Section 72.038 of the Government Code, in accordance with that section.

In the manner described by Article 17.022, a magistrate is authorized, but is not required, to order, prepare, or consider a public safety report in setting bail for a defendant charge only with a misdemeanor punishable by fine only or a defendant who receives a citation under Article 14.06(c) (relating to authorizing a peace officer who is charging a person with committing an offense that is a Class A or B misdemeanor, if the person resides in the county where the offense occurred, instead of taking the person before a magistrate, to issue a citation to the person that contains written notice of the time and place the person is required to appear before a magistrate of this state, the name and address of the person charged, and the offense charged). The report, if ordered, shall be prepared for the time and place for an appearance as indicated in the citation.

A magistrate may set bail for a defendant charged only with an offense punishable as a misdemeanor without ordering, preparing, or considering a public safety report if the public safety report system is unavailable for longer than 12 hours due to a technical failure at OCA.

Authority to Release on Bail in Certain Cases

S.B. 6 adds Article 17.023 of the Code of Criminal Procedure (Authority to Release on Bail in Certain Cases), which only applies to a defendant charged with an offense that is punishable as a felony or a misdemeanor punishable by confinement. Under this article, an applicable defendant, notwithstanding any other law, may be released on bail only by a magistrate who is:

(1) any of the following:

(A) a resident of this state;

(B) a justice of the peace serving under Section 27.054 (Exchange of Benches) or 27.055 (Special and Temporary Justices), Government Code; or

(C) a judge or justice serving under Chapter 74 (Court Administration Act), Government Code; and

(2) in compliance with the training requirements of Article 17.024 (discussed infra).

Under Article 17.023(c), a magistrate is not eligible to release on bail a defendant described by 17.023(a) if the magistrate:

(1) has been removed from office by impeachment, by the Supreme Court of Texas, by the governor on address to the legislature, by a tribunal reviewing a recommendation of the State Commission on Judicial Conduct (SCJC), or by the legislature's abolition of the magistrate's court; or

(2) has resigned from office after having received notice that formal proceedings by SCJC have been instituted as provided by Section 33.022 (Investigations and Formal Proceedings) of the Government Code, and before final disposition of the proceedings.

Training on Duties Regarding Setting Bail

S.B. 6 adds Article 17.024 of the Code of Criminal Procedure, requiring OCA, in consultation with the Court of Criminal Appeals, to develop or approve training courses regarding a magistrate's duties, including duties with respect to setting bail in criminal cases. The courses developed must include:

(1) an eight-hour initial training course that includes the content of the applicable training course described by Article 17.0501; and

(2) a two-hour continuing education course.

OCA shall provide for a method of certifying that a magistrate has successfully completed a training course required under this article and has demonstrated competency of the course content in a manner acceptable to OCA.

A magistrate is in compliance with the training requirements of this article if:

(1) not later than the 90th day after the date the magistrate takes office, the magistrate successfully completes the course described by Subsection (a)(1);

(2) the magistrate successfully completes the course described by Subsection (a)(2) in each subsequent state fiscal biennium in which the magistrate serves; and

(3) the magistrate demonstrates competency as provided by 17.024(b).

Notwithstanding 17.024(c), a magistrate who is serving on April 1, 2022, is considered to be in compliance if the magistrate successfully completes the training course not later than December 1, 2022. This part of the bill expires May 1, 2023.

Any course developed or approved by OCA under this article may be administered by the Texas Justice Court Training Center, the Texas Municipal Courts Education Center, the Texas Association of Counties, the Texas Center for the Judiciary, or a similar entity.

Release on Bail of Defendant Charged with Felony Offense Committed While on Bail

New Article 17.027 of the Code of Criminal Procedure (Release on Bail of Defendant Charged with Felony Offense Committed While on Bail) provides that, notwithstanding any other law:

(1) if a defendant is charged with committing an offense punishable as a felony while released on bail in a pending case for another offense punishable as a felony and the subsequent offense was committed in the same county as the previous offense, the defendant is authorized to be released on bail only by:

(A) the court before whom the case for the previous offense is pending; or

(B) another court designated in writing by the court before whom the case for the previous offense is pending; and

(2) if a defendant is charged with committing an offense punishable as a felony while released on bail for another pending offense punishable as a felony and the subsequent offense was committed in a different county than the previous offense, electronic notice of the charge is required to be promptly given to the appropriate court specified above for purposes of reevaluating the bail decision, determining whether any bail conditions were violated, or taking any other applicable action.

This article does not extend any deadline provided by Article 15.17 (Duties of Arresting Officer and Magistrate).

Bail Decision

S.B. 6 adds Article 17.028 of the Code of Criminal Procedure (Bail Decision), requiring a magistrate, without unnecessary delay but not later than 48 hours after a defendant is arrested, to order, after individualized consideration of all circumstances and of the factors required by Article 17.15(a), that the defendant be granted personal bond with or without conditions, be granted surety or cash bond with or without conditions, or be denied bail in accordance with the Texas Constitution and other law.

Article 17.028 requires the magistrate, in setting bail under this article, to impose the least restrictive conditions, if any, and the personal bond or cash or surety bond necessary to reasonably ensure the defendant's appearance in court as required and the safety of the community, law enforcement, and the victim of the alleged offense.

In each criminal case, unless specifically provided by other law, there is a rebuttable presumption that bail, conditions of release, or both bail and conditions of release are sufficient to reasonably ensure the defendant's appearance in court as required and the safety of the community, law enforcement, and the victim of the alleged offense.

However, the court is not required to hold an evidentiary hearing that is not required by other law.

Article 17.028 prohibits a judge from adopting a bail schedule or entering a standing order related to bail that is inconsistent with this article or that authorizes a magistrate to make a bail decision for a defendant without considering each of the factors in Article 17.15(a).

Under this article, a defendant who is denied bail or who is unable to give bail in the amount required by any bail schedule or standing order related to bail must be provided with the warnings described by Article 15.17.

In addition, a defendant who is charged with an offense punishable as a Class B misdemeanor or any higher category of offense and who is unable to give bail in the amount required by a schedule or order described by 17.028(e), other than a defendant who is denied bail, must be provided with the opportunity to file with the applicable magistrate a sworn affidavit in a certain form. Added 17.028 sets forth the required language of the affidavit.

A defendant filing an affidavit under 17.028(f) must complete a form to allow a magistrate to assess information relevant to the defendant's financial situation. The form must be the form used to request appointment of counsel under Article 26.04 (Procedures for Appointing Counsel) or a form promulgated by OCA that collects, at a minimum and to the best of the defendant's knowledge, the information a court is authorized to consider under Article 26.04(m).

Article 17.028 requires the magistrate making the bail decision under Subsection (a), if applicable, to inform the defendant of the defendant's right to file an affidavit under Subsection (f) and to ensure that the defendant receives reasonable assistance in completing the affidavit described by Subsection (f) and the form described by Subsection (g).

Under 17.028(h), a defendant described by Subsection 17.028(f) may file an affidavit under Subsection (f) at any time before or during the bail proceeding under Subsection (a). A defendant who files an affidavit under Subsection (f) is entitled to a prompt review by the magistrate on the bail amount. The review may be conducted by the magistrate making the bail decision under Subsection (a) or occur as a separate pretrial proceeding. The magistrate shall consider the facts presented and the factors established by Article 17.15(a) to set the defendant's bail. If the magistrate does not set the defendant's bail in an amount below the amount required by the schedule or order described by 17.028(e), the magistrate must issue written findings of fact supporting the bail decision.

Article 17.028(i) requires the judges of the courts trying criminal cases and other magistrates in a county to report to OCA each defendant for whom a review under 17.028(h) was not held within 48 hours of the defendant's arrest. If a delay occurs that will cause the review under 17.028(h) to be held later than 48 hours after the defendant's arrest, the magistrate or an employee of the court or of the county in which the defendant is confined, shall provide notice of the delay to the defendant's counsel or to the defendant, if the defendant does not have counsel.

The magistrate may enter an order or take other action authorized by Article 16.22 (Early Identification of Defendant Suspected of Having Mental Illness or Intellectual Disability) with respect to a defendant who does not appear capable of executing an affidavit under 17.028(f).

The filing of an affidavit is not required before a magistrate considers the defendant's ability to make bail under Article 17.15.

Article 17.028 authorizes a written or oral statement obtained under this article or evidence derived from the statement to be used only to determine whether the defendant is indigent, to impeach the direct testimony of the defendant, or to prosecute the defendant for an offense under Chapter 37 (Perjury and Other Falsification), Penal Code.

A magistrate may, notwithstanding 17.028(a), make a bail decision regarding a defendant who is charged only with a misdemeanor punishable by fine only or a defendant who receives a citation under Article 14.06(c) without considering the factor required by Article 17.15(a)(6), related to the defendant's criminal history.

Section 6: Release on Personal Bond (effective December 2, 2021) (Note: Section 7, an identical provision as Section 6, would have made this section take effect immediately but did not receive the requisite vote and thus, has no effect.)

S.B. 6 amends Article 17.03(b) of the Code of Criminal Procedure (Personal Bond) and adds Subsections (b-2) and (b-3). It deletes existing text authorizing only the court before whom the case is pending to release on personal bond a defendant who is charged with an offense under Section 19.03 (Capital Murder), Section 20.04 (Aggravated Kidnapping), Section 22.021 (Aggravated Sexual Assault), Section 22.03 (Deadly Assault on Law Enforcement or Corrections Officer, Member or Employee of Board of Pardons and Paroles, or Court Participant), Section 22.04 (Injury to a Child, Elderly Individual, or Disabled Individual), Section 29.03

(Aggravated Robbery), Section 21.02 (Continuous Sexual Abuse of Young Child or Disabled Individual), or Section 20A.03 (Continuous Trafficking of Persons).

Added (b-2) prohibits a defendant, except as provided by Articles 15.21 (Release on Personal Bond If Not Timely Demanded), 17.033 (Release on Bond of Certain Persons Arrested Without a Warrant), and 17.151 (Release Because of Delay), from being released on personal bond if the defendant:

(1) is charged with an offense involving violence; or

(2) while released on bail or community supervision for an offense involving violence, is charged with committing:

(A) any offense punishable as a felony; or

(B) an offense under the following provisions of the Penal Code:

(i) Section 22.01(a)(1) (relating to providing that a person commits an offense if the person intentionally, knowingly, or recklessly causes bodily injury to another);

(ii) Section 22.05 (Deadly Conduct);

(iii) Section 22.07 (Terroristic Threat); or

(iv) Section 42.01(a)(7) (relating to providing that a person commits an offense if the person intentionally or knowingly discharges a firearm in a public place other than a public road or a sport shooting range) or (8) (relating to providing that a person commits an offense if the person intentionally or knowingly displays a firearm or other deadly weapon in a public place in a manner calculated to alarm).

Added (b-3) defines "controlled substance" and "offense involving violence" for purposes of Article 17.03.

Section 8: DPS Training Related to the Use of the Statewide Telecommunications System

S.B. 6 adds Article 17.0501, which requires DPS to develop training courses that relate to the use of the statewide telecommunications system maintained by DPS and that are directed to each magistrate, judge, sheriff, peace officer, or jailer required to obtain criminal history record information under Chapter 17 (Bail), as necessary to enable the person to fulfill those requirements.

Section 9: Charitable Bail Organizations

S.B. 6 adds Article 17.071 to the Code of Criminal Procedure (Charitable Bail Organizations). A charitable bail organization means a "person who accepts and uses donations from the public to deposit money with a court in the amount of a defendant's bail bond." The term does not include:

(1) a person accepting donations with respect to a defendant who is a member of the person's family, as determined under Section 71.003 (Family), Family Code; or

(2) a nonprofit corporation organized for a religious purpose.

Article 17.071 does not apply to a charitable bail organization that pays a bail bond for not more than three defendants in any 180-day period.

A person may not act as a charitable bail organization for the purpose of paying a defendant's bail bond in a county unless the person:

(1) is a nonprofit organization exempt from federal income taxation under Section 501(a), Internal Revenue Code of 1986, as an organization described by Section 501(c)(3) of that code; and

(2) has been issued a certificate under Subsection (d) with respect to that county.

A county clerk shall issue to a charitable bail organization a certificate authorizing the organization to pay bail bonds in the county if the clerk determines the organization is a nonprofit organization described by 17.071(c)(1) and is current on all filings required by the Internal Revenue Code.

This section requires a charitable bail organization to file in the office of the county clerk of each county where the organization intends to pay bail bonds an affidavit designating the individuals authorized to pay bonds on behalf of the organization.

It also requires a charitable bail organization, not later than the 10th day of each month, to submit to the sheriff of each county in which the organization files an affidavit under 17.071(e), a report that includes certain information for each defendant for whom the organization paid a bail bond in the preceding calendar month.

A sheriff who receives a report under 17.071(f) must provide a copy of the report to OCA.

Article 17.071 prohibits a charitable bail organization from paying a bail bond for a defendant at any time the organization is considered to be out of compliance with the reporting requirements of this article.

It authorizes the sheriff of a county to suspend a charitable bail organization from paying bail bonds in the county for a period not to exceed one year if the sheriff determines the organization has paid one or more bonds in violation of this article and the organization has received a warning from the sheriff in the preceding 12-month period for another payment of bond made in violation of this article. The sheriff must report the suspension to OCA.

Chapter 22 (Forfeiture of Bail) applies to a bail bond paid by a charitable bail organization.

This article prohibits a charitable bail organization from accepting a premium or compensation for paying a bail bond for a defendant.

OCA, not later than December 1 of each year, must prepare and submit, to the governor, lieutenant governor, speaker of the house, and presiding officers of the standing committees of each house of the legislature with primary jurisdiction over the judiciary, a report regarding the information submitted to OCA under (f-1) and (h) for the preceding state fiscal year.

Section 10: Rules for Setting Amount of Bail

S.B. 6 changed the heading of Article 17.15 of the Code of Criminal Procedure to Rules for Setting Bail (instead of fixing bail). The bill amends 17.15 by creating Subsection (a) in part from existing text. That subsection provides that the amount of bail and any conditions of bail to be required in any case in which the defendant has been arrested are to be regulated by the court, judge, magistrate, or officer taking the bail in accordance with Articles 17.20 (Bail in Misdemeanor), 17.21 (Bail in Felony), and 17.22 (May Take Bail in Felony) and are governed by the Constitution and seven rules provided in this subsection. The bill amends the rules as follows:

(1) Bail and any conditions of bail (rather than the bail) shall be sufficient to give reasonable assurance that the undertaking will be complied with.

(2) The bill made nonsubstantive changes to this rule.

(3) Provides that the nature of the offense and the circumstances under which the offense was committed are to be considered, including whether the offense is an offense involving violence as defined by Article 17.03 or involves violence directed against a peace officer.

(4) Requires that the ability to make bail be considered and authorizes proof to be taken on this point. The bill made other nonsubstantive changes.

(5) Requires that the future safety of a victim of the alleged offense, law enforcement, and the community be considered.

(6) The bill adds this rule, which requires that the criminal history record information for the defendant, including information obtained through the statewide telecommunications system maintained by DPS and through the public safety report system developed under Article 17.021, be considered, including any acts of family violence, other pending criminal charges, and any instances in which the defendant failed to appear in court following release on bail.

The bill adds (a-1), which provides that notwithstanding any other law, the duties imposed by Subsection (a)(6) with respect to obtaining and considering information through the public safety report system do not apply until April 1, 2022. This subsection expires June 1, 2022.

(7) This is also a new rule that requires that the citizenship status of the defendant be considered.

New Subsection (c) defines "family violence" for Article 17.15.

Section 11: Bail in Misdemeanor

S.B. 6 amends Article 17.20 of the Code of Criminal Procedure (Bail in Misdemeanor) by adding Subsections (b), (c), and (d). Added Subsection (b) requires the sheriff, peace officer, or jailer, before taking bail under this article, to obtain the defendant's criminal history record information through the statewide telecommunications system maintained by DPS and through the public safety report system developed under Article 17.021.

Subsection (c) authorizes a sheriff, peace officer, or jailer, notwithstanding Subsection (b), to make a bail decision regarding a defendant who is charged only with a misdemeanor punishable by fine only or a defendant who receives a citation under Article 14.06(c) without considering the factor required by Article 17.15(a)(6).

Subsection (d) provides that if the defendant is charged with or has previously been convicted of an offense involving violence as defined by Article 17.03, the sheriff, officer, or jailer are prohibited from setting the amount of the defendant's bail but are authorized to take the defendant's bail in the amount set by the court.

Section 12: Bail in Felony

S.B. 6 amends Article 17.22 (May Take Bail in Felony) by creating Subsection (a), which authorizes the sheriff or other peace officer, or a jailer licensed under Chapter of the Occupations Code1701 (Law Enforcement Officers), who has the defendant in custody, in a felony case, if the court before which the case is pending is not in session in the county where the defendant is in custody, to take the defendant's bail in the amount set by the court or magistrate, or if no amount has been set, then in any amount that the officer considers reasonable and that is in compliance with Article 17.15. It deletes existing text authorizing the sheriff or other peace officer, or a jailer licensed under Chapter 1701 of the Occupations Code, who has the defendant in custody, in a felony case, if the court before which the same is pending is not in session in the county where the defendant is in custody, to take the defendant's bail bond in such amount as may have been fixed by the court or magistrate, or if no amount has been fixed, then in such amount as such officer may consider reasonable.

Added Subsection (b) requires the sheriff, peace officer, or jailer, before taking bail under this article, to obtain the defendant's criminal history record information through the statewide telecommunications system maintained by DPS and through the public safety report system developed under Article 17.021.

New Subsection (c) prohibits the sheriff, officer, or jailer, if the defendant is charged with or has previously been convicted of an offense involving violence as defined by Article 17.03, from setting the amount of the defendant's bail but authorizes those individuals to take the defendant's bail in the amount set by the court.

Section 13: Conditions of Release and Procedures and Forms Related to Monetary Bond

Amends Chapter 17, Code of Criminal Procedure, by adding Articles 17.51, 17.52, and 17.53.

Article 17.51 (Notice of Conditions) requires the clerk of the court, as soon as practicable but not later than the next business day after the date a magistrate issues an order imposing a condition of release on bond for a defendant or modifying or removing a condition previously imposed, to send a copy of the order to the appropriate attorney representing the state and to the sheriff of the county where the defendant resides. It also authorizes a clerk of the court to delay sending a copy of the order under 17.51(a) only if the clerk lacks information necessary to ensure service and enforcement.

Article 17.51 requires the clerk of the court, if an order described by 17.51(a) prohibits a defendant from going to or near a childcare facility or school, to send a copy of the order to the child care facility or school. It authorizes the copy of the order and any related information to be sent electronically or in another manner that can be accessed by the recipient.

This article requires the magistrate or the magistrate's designee to provide written notice to the defendant of the conditions of release on bond and of the penalties for violating a condition of release.

It also requires the magistrate to make a separate record of the notice provided to the defendant under 17.51(e).

Finally, Article 17.51 requires OCA to promulgate a form for use by a magistrate or a magistrate's designee in providing notice to the defendant under 17.51(e). The form must include the relevant statutory language from the provisions of this chapter under which a condition of release on bond is authorized to be imposed on a defendant.

Article 17.52 (Reporting of Conditions) requires a chief of police or sheriff who receives a copy of an order described by Article 17.51(a), or the chief's or sheriff's designee, to, as soon as practicable but not later than the 10th day after the date the copy is received, enter information relating to the condition of release into the appropriate database of the statewide law enforcement information system maintained by DPS or modify or remove information, as appropriate.

New Article 17.53 (Procedures and Forms Related to Monetary Bond) requires OCA to develop statewide procedures and prescribe forms to be used by a court to facilitate:

(1) the refund of any cash funds paid toward a monetary bond, with an emphasis on refunding those funds to the person in whose name the receipt described by Article 17.02 was issued; and

(2) the application of those cash funds to the defendant's outstanding court costs, fines, and fees.

Section 14: Criminal History System Information

S.B. 6 amends Article 66.102(c) of the Code of Criminal Procedure by adding Subsection (7), which requires that information in the computerized criminal history system relating to an arrest include, for an offender released on bail, whether a warrant was issued for any subsequent failure of the offender to appear in court.

Section 15: Removal of a Justice of a Peace

The bill amends Section 27.005(a) of the Government Code and adds Subsection (c). Amended Subsection (a) provides that, for purposes of removal under Chapter 87 of the Local Government Code (Removal of County Officers from Office; Filling of Vacancies), "incompetency" in the case of a justice of the peace includes the failure of the justice to successfully complete (in addition to the existing requirements):

(1) within one year after the date the justice is first elected the course described by Article 17.024(a)(1) of the Code of Criminal Procedure; and

(2) each following state fiscal biennium, the course described by Article 17.024(a)(2), Code of Criminal Procedure.

Added Subsection (c) authorizes a course described by Subsection (a)(1)(A) to include a course described by Subsection (a)(1)(B).

Section 16: Bail and Pretrial Release Information

S.B. 6 adds Section 71.0351 of the Government Code (Bail and Pretrial Release Information) requiring the clerk of each court setting bail in criminal cases, as a component of the official monthly report submitted to OCA under Section 71.035, to report:

(1) the number of defendants for whom bail was set after arrest, including the number for each category of offense, the number of personal bonds, and the number of surety or cash bonds;

(2) the number of defendants released on bail who subsequently failed to appear;

(3) the number of defendants released on bail who subsequently violated a condition of release; and

(4) the number of defendants who committed an offense while released on bail or community supervision.

New Section 71.0351 requires OCA to post the information in a publicly accessible place on OCA's website without disclosing any personal information of any defendant, judge, or magistrate.

It also requires OCA, not later than December 1 of each year, to submit a report containing the data collected under this section during the previous state fiscal year to the governor, lieutenant governor, speaker of the house, and presiding officers of the standing committees of each house of the legislature with primary jurisdiction over the judiciary.

Section 17: Bail Form

S.B. 6 adds Section 72.038 of the Government Code (Bail Form) requiring OCA to promulgate a form to be completed by a magistrate, judge, sheriff, peace officer, or jailer who sets bail under Chapter 17, Code of Criminal Procedure, for a defendant charged with an offense punishable as a Class B misdemeanor or any higher category of offense. OCA must incorporate the completed forms into the public safety report system developed under Article 17.021 of the Code of Criminal Procedure.

The form must:

(1) state the cause number of the case, if available, the defendant's name and date of birth, and the offense for which the defendant was arrested;

(2) state the name and the office or position of the person setting bail;

(3) require the person setting bail to:

(A) identify the bail type, the amount of the bail, and any conditions of bail;

(B) certify that the person considered each factor provided by Article 17.15(a), Code of Criminal Procedure; and

(C) certify that the person considered the information provided by the public safety report system; and

(4) be electronically signed by the person setting the bail.

Subsection 71.038(c) requires the person setting bail, an employee of the court that set the defendant's bail, or an employee of the county in which the defendant's bail was set, on completion of the form required under this section, to promptly but not later than 72 hours after the time the defendant's bail is set provide the form electronically to OCA through the public safety report system.

Subsection (d) requires OCA to publish the information from each form submitted under this section in a database that is publicly accessible on OCA's website. Any identifying information or sensitive data, as defined by Rule 21c of the Texas Rules of Civil Procedure, regarding the victim of an offense and any person's address or contact information is required to be redacted and is prohibited from being published under this subsection.

Section 18: Dissemination of Criminal History Record Information (effective December 2, 2022)

S.B. 6 amends Section 411.083 authorizing DPS to disseminate criminal history record information under Subsection (b)(8) (relating to requiring DPS to grant access to criminal history record information to OCA) only to the extent necessary for OCA to perform a duty imposed by law, including the development and maintenance of the public safety report system as required by Article 17.021 of the Code of Criminal Procedure, or to compile court statistics or prepare reports. It authorizes OCA to disclose criminal history record information obtained from DPS under Subsection (b)(8) in a public safety report prepared under Article 17.022 of the Code of Criminal Procedure.

Section 19: County Expenses Paid from Fees

The bill amends Subsection 117.055(a) of the Local Government Code and adds Subsections (a-1) and (a-2). Amended Subsection (a) requires the clerk, except as provided by Subsection (a-1), to compensate the county for the accounting and administrative expenses incurred in handling the registry funds that have not earned interest, including funds in a special or separate account, to at the time of withdrawal, deduct from the amount of the withdrawal a fee in an amount equal to five percent of the withdrawal but prohibits the amount from exceeding $50.

New Subsection (a-1) prohibits a clerk from deducting a fee under Subsection (a) from a withdrawal of funds generated by the collection of a cash bond or cash bail bond if in the case for which the bond was taken:

(1) the defendant was found not guilty after a trial or appeal; or

(2) the complaint, information, or indictment was dismissed without a plea of guilty or nolo contendere being entered.

Added Subsection (a-2) requires the clerk, on the request of a person to whom withdrawn funds generated by the collection of a cash bond or cash bail bond were disbursed, to refund to the person the amount of the fee deducted under Subsection (a) if:

(1) subsequent to the deduction, a court makes or enters an order or ruling in the case for which the bond was taken; and

(2) had the court made or entered the order or ruling before the withdrawal of funds occurred, the deduction under Subsection (a) would have been prohibited under Subsection (a-1).

Section 20: Repeal of Article 17.03(f)

S.B. 6 repeals the former definition of "controlled substance" in Subsection (f), which was replaced by Section 6 of the bill.

Section 21: Development of the Public Safety Report System by OCA

This section requires OCA, as soon as practicable but not later than April 1, 2022, to create the public safety report system developed under Article 17.021, Code of Criminal Procedure, as added by this Act, and any related forms and materials and to provide to the appropriate officials in each county access to the system, forms, and materials at no cost. Requires OCA, if those items are made available before April 1, 2022, to notify each court clerk, judge or other magistrate, and office of an attorney representing the state.

Section 22: Development of Forms and Training by OCA

This section requires OCA, as soon as practicable but not later than April 1, 2022, to:

(1) promulgate the forms required by Articles 17.028(g) and 17.51(g) of the Code of Criminal Procedure, as added by this Act, and by Section 72.038 of the Government Code, as added by this Act; and

(2) develop or approve and make available the training courses and certification method as described by Article 17.024 of the Code of Criminal Procedure, as added by this Act, and develop the procedures and prescribe the forms required by Article 17.53 of the Code of Criminal Procedure, as added by this Act.

If the items described by Subsection (a) of this section are made available before April 1, 2022, OCA must notify each court clerk, judge or other magistrate, and office of an attorney representing the state.

Teen Court Workshop

TMCEC, in conjunction with the Georgetown Municipal Court, Teen Court Association of Texas, and TxDOT, is proud to offer the Teen Court Workshop on **April 18-19, 2022**. This unique event gives municipal courts the knowledge and tools to launch or enhance a teen court program with a focus on improving traffic safety. **There is no fee to register.** For attornees who attend, TMCEC will report CLE credit to the State Bar of Texas with no additional fee (CLE hours TBD).

Eligible attendees will receive one night of lodging at no cost. Travel reimbursement is available! Municipal judges, clerks, prosecutors, and juvenile case managers are invited to attend. For more information, please visit https://www.tmcec.com/mtsi/teen-court/.

FACULTY APPRECIATION

TMCEC would like to sincerely thank the following faculty members for their expertise and dedication in Academic Year 2021:

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Zindia Thomas
Tiffany Totah
Bonnie Townsend
Dr. James Tucker
Ryan Kellus Turner
Nikki Vicknair
Stephen Vigorito
Scott T. Walters
Matthew Wright
Robert Wunderlich

Remaining AY 22 TMCEC Academic Schedule

Seminar	Date(s)	City	Venue
North Texas Regional Judges Seminar	March 8-10, 2022	Dallas	Hilton Dallas Lincoln Centre
North Texas Regional Clerks Seminar	March 8-10, 2022	Dallas	Hilton Dallas Lincoln Centre
Virtual Livestream - North Texas Regional Judges Seminar	March 8-10, 2022	Virtual	Online
Virtual Livestream - North Texas Regional Clerks Seminar	March 8-10, 2022	Virtual	Online
Municipal Traffic Safety Initiatives Conference	March 28-30, 2022	Dallas	Hilton Dallas Lincoln Centre
Panhandle Regional Judges Seminar	April 11-13, 2022	Lubbock	Overton Hotel + Conference Center
Panhandle Regional Clerks Seminar	April 11-13, 2022	Lubbock	Overton Hotel + Conference Center
Teen Court Workshop	April 18-19, 2022	Georgetown	Sheraton Austin Georgetown Hotel + Conference Center
South Texas Regional Clerks Seminar	May 2-4, 2022	South Padre Island	Isla Grand Beach Resort
South Texas Regional Judges Seminar	May 4-6, 2022	South Padre Island	Isla Grand Beach Resort
Court Security Conference	May 17-18, 2022	Austin	Austin Southpark Hotel
Fundamentals: Constitutional Criminal Procedure & Legislative Changes (Judges & Clerks)	May 26-27, 2022	Big Spring	Hotel Settles
Juvenile Case Managers Conference	June 6-8, 2022	Austin	Austin Southpark Hotel
Court Administrators Conference	June 20-22, 2022	Houston	Omni Houston Hotel (Galleria)
Prosecutors Conference	June 20-22, 2022	Houston	Omni Houston Hotel (Galleria)
West Texas Regional Judges Seminar	June 27-29, 2022	Odessa	Odessa Marriott Hotel + Conference Center
West Texas Regional Clerks Seminar	June 27-29, 2022	Odessa	Odessa Marriott Hotel + Conference Center
Courts, Cities, & Councils Ordinances Seminar	July 7-8, 2022	Georgetown	Sheraton Austin Georgetown Hotel + Conference Center
New Judges Seminar	July 25-29, 2022	Austin	Austin Southpark Hotel
New Clerks Seminar	July 25-29, 2022	Austin	Austin Southpark Hotel
Impaired Driving Symposium	August 15-16, 2022	Bee Cave	Sonesta Bee Cave
Mental Health Conference	August 18-19, 2022	Corpus Christi	Omni Corpus Christi Hotel

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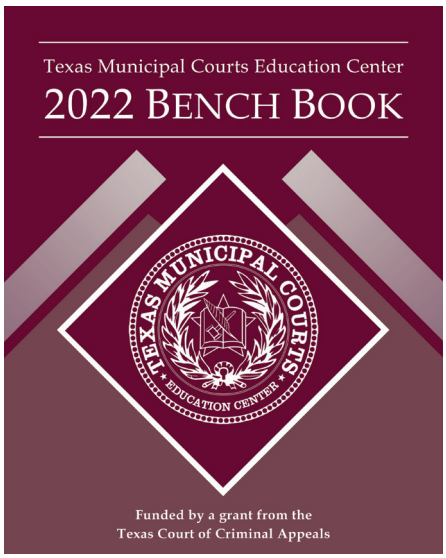
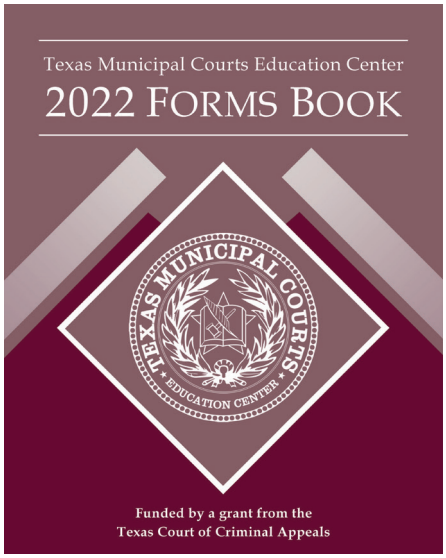
MISSION STATEMENT

TMCEC

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.





NOW ONLINE

The 2022 editions of the Bench Book and Forms Book are now available online with updates from the 87th Legislative Session.

Also Updated: The Online Texas Truancy Court Resource Manual

Check out the TMCEC website for more updated publications as they become available. For physical copies of available books, go to the TMCEC online store (https://texas-municipal-courts-education-center.myshopify.com/).

www.tmcec.com/resources/books