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AROUND THE STATE

Numerous municipal courts across Texas celebrated National Night Out (October 4) and Municipal Court Week (November 7-11) in 2022!

For information on how TMCEC can assist your city in celebrating these events in the future and to view the various ways cities celebrate, visit https://www.tmcec.com/mtsi/national-night-out/ and https://www.tmcec.com/mtsi/municipal-court-week/. If your court celebrated either event in 2022 but is not included on the list below, please email ned@tmcec.com to be added.

National Night Out Participants

Angus
Arlington
Austin
Azle
Balch Springs
Bay City
Beaumont
Brookside Village
Bulverde
Cedal Hill
Celina
College Station
Colleyville
Collinsville
Conroe
Corpus Christi
Denison
Denton
Double Oak
Edinburg
Elsa
Everman
Fort Worth
George West
Harlingen
Helotes
Ingleside
Keller
Kingsville
La Marque
La Porte
Lake Worth
Lampasas
Manor
Midland
Nixon
Richland
Saint Hedwig
San Antonio
Sansom Park
Shady Shores
Shepherd
Somerset
The Colony
Victoria
Vidor
White Settlement
Wilmer
Woodsboro
Wortham

Municipal Court Week Participants

Alvin
Amarillo
Andrews
Angus
Arlington
Austin
Azle
Balcones Heights
Bay City
Beaumont
Bells
Bridgeport
Brookside Village
Cedar Hill
College Station
Colleyville
Columbus
Conroe
Coppell
Crowley
Dallas
Danbury
Denison
Denton
Edinburg
El Paso
Fate
Forney
Fort Worth
Friona
Frisco
Georgetown
Gun Barrel City
Harker Heights
Harlingen
Helotes
Hempstead
Houston
Ingleside
Jonestown
Keller
Killeen
LaPorte
Lago Vista
Lake Worth
Lexington
Liberty Hill
Lometa
Lorenzo
Lubbock
Malakoff
Mesquite
Midland
Missouri City
Pearland
Pflugerville
Princeton
Prosper
Richardson
Roanoke
Saginaw
Saint Hedwig
San Angelo
San Elizario
Schertz
Seabrook
Somerset
Sugar Lane
Universal City
Van Horn
Victoria
Watauga
White Settlement
Wilmer

CASE LAW AND ATTORNEY GENERAL OPINION UPDATE

Benjamin Gibbs | TMCEC Program Attorney & Deputy Counsel
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Except where noted, the following decisions and opinions were issued between the dates of October 1, 2021 and September 30, 2022.

Acknowledgments: Thanks to Judge David Newell and Elaine Riot.

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I. Constitutional Law

A. First Amendment

A city's refusal to allow petitioners to raise their Christian flag at City Hall, as part of the city's flag-raising program, based on its religious viewpoint amounted to impermissible viewpoint discrimination and violated the Free Speech Clause of the First Amendment.

Shurtleff v. City of Bos., 142 S. Ct. 1583 (2022)

On three flagpoles outside the entrance to Boston City Hall, the city flies the American flag from the first pole, the flag of the Commonwealth of Massachusetts from the second, and usually the city's own flag from the third pole. For years, Boston allowed private groups to request use of the third flagpole to raise flags of their choosing. As part of this program, Boston approved hundreds of requests to raise dozens of different flags. The city did not deny a single request to raise a flag until, in 2017, Harold Shurtleff, the director of a group called Camp Constitution, asked to fly a Christian flag. Boston refused, believing that flying a religious flag at City Hall would violate the Establishment Clause. At that time, Boston had no written policy limiting use of the flagpole based on the content of a flag. Shurtleff and Camp Constitution sued, claiming that Boston's refusal to let them raise their flag violated, among other things, the First Amendment's Free Speech Clause. The district court found in favor of Boston. The First Circuit Court of Appeals affirmed. The U.S. Supreme Court granted certiorari.

Justice Breyer wrote the majority opinion, joined by Chief Justice Roberts, Justice Sotomayor, Justice Kagan, Justice Kavanaugh, and Justice Barrett. The first issue for the Court was whether the flag-raising program constituted government speech or a forum for private expression. If it was government speech, the city could refuse flags based on viewpoint. This is because the First Amendment does not prevent the government from declining to express a view. However, the line between a forum for private expression and the government's own speech is not always clear, especially when the government invites the public to participate in a program. To resolve the issue, the Court, according to precedent, conducted "a holistic inquiry" designed to determine whether the government intends to speak for itself or to regulate private expression. The majority noted that past cases looked to several types of evidence to guide the analysis, including the history of the expression at issue, the public's likely perception as to who (the government or a private person) is speaking, and the extent to which the government has actively shaped or controlled the expression. The Court concluded that while the historical practice of flag flying at government buildings favored Boston, the city's lack of meaningful involvement in the selection of flags or the crafting of their messages led the majority to classify the flag raisings as private, not government, speech. In light of that holding, the Court found that the city's refusal discriminated based on religious viewpoint and violated the Free Speech Clause.

Justice Kavanaugh concurred, noting that this dispute resulted from the city's misunderstanding of the Establishment Clause. The city thought allowing the religious flag would violate the Establishment Clause. However, a government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular ones. On the contrary, a government violates the Constitution when (as here) it excludes religious persons, organizations, or speech because of religion from public programs, benefits, facilities, and the like.

Justice Alito, joined by Justice Thomas and Justice Gorsuch concurred in the judgment, but disagreed with the Court's analysis, which relied on cases that did not set forth a test that always and everywhere applies when the government claims that its actions are immune to First Amendment challenge under the government-speech doctrine. Treating those factors as a test obscures the real question in government-speech cases: whether the government is speaking instead of regulating private expression. Justice Alito would have resolved the issue using a different method: "government speech occurs if—but only if—a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private

speech." Analyzed under this alternative framework, the flag displays were plainly private speech within a forum created by the city, not government speech.

Justice Gorsuch, joined by Justice Thomas, wrote a concurring opinion to highlight the "real problem" in this case. According to Justice Gorsuch, it is not Boston's mistake about the scope of the government speech doctrine or its error in applying the Court's public forum precedents. Instead, it traces back, at least in part, to *Lemon v. Kurtzman*, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). Though the Court subsequently abandoned *Lemon*, cities like Boston, for various reasons, continue to rely on it. According to Justice Gorsuch, "Boston's travails supply a cautionary tale for other localities and lower courts."

The City of Austin's outdoor advertising ordinance, which distinguished between on-premises and off-premises signs and specially regulated the latter, is facially content-neutral and not subject to strict scrutiny under the First Amendment, absent a content-based purpose or justification.

City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464 (2022)

Like many other jurisdictions throughout the United States, the City of Austin regulates signs that advertise things that are not located on the same premises as the sign, as well as signs that direct people to offsite locations (i.e., off-premises signs). At the time of this dispute, the City of Austin prohibited construction of new off-premises signs. Grandfathered off-premises signs could remain in their existing locations as "nonconforming signs," but could not be altered in ways that increased their nonconformity. No such restrictions, however, existed for on-premises signs.

Reagan National Advertising of Austin (Reagan) and Lamar Advantage Outdoor Company (Lamar) own billboards in Austin. When Reagan sought permits to digitize some of its billboards, the City of Austin denied its applications. Reagan filed suit in state court, alleging that the City's prohibition against digitizing off-premises signs, but not on-premises signs, violated the Free Speech Clause of the First Amendment. After the City petitioned to remove the case to federal court, Lamar intervened. The trial court held that the challenged sign ordinance provisions were content neutral under *Reed v. Town of Gilbert*, 576 U. S. 155 (2015), reviewed the City's on-/off-premises distinction under intermediate scrutiny, and found that the distinction satisfied that standard. Reagan and Lamar appealed.

The Fifth Circuit Court of Appeals reversed and remanded. It found the on-/off-premises distinction to be facially content based because a government official had to read a sign's message to determine whether the sign was off-premises. Unlike the trial court, the Court of Appeals reviewed the on-/off-premises distinction under strict scrutiny. It held that the ordinance failed to satisfy this more onerous standard. The City of Austin petitioned the U.S. Supreme Court for review.

In a 6-3 decision that reversed and remanded, Justice Sotomayor, writing for the majority, held that the ordinance's on-/off-premises distinction for signs was facially content neutral. In *Reed v. Town of Gilbert*, the Court held that a speech regulation is facially content based if it targets speech based on its communicative content (i.e., it applies to speech because of the topic discussed or the idea or message expressed.) In holding that a regulation is content based merely because it requires "reading the sign at issue," the Court of Appeals interpreted *Reed* too broadly. The concern in *Reed* was the possibility of singling out specific content for differential treatment, not distinguishing speech based on location. In cases prior to *Reed*, the Court recognized that some restrictions—such as regulation of solicitation—may require evaluation of the content of speech yet remain content neutral. Previously, the Court had described on-/off-premises distinctions as content neutral. While *Reed* said that some content-based distinctions defined regulated speech by its function or purpose, the principle articulated in *Reed* was simply that a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject matter distinction for a "function or purpose" proxy that achieves the same result. Although in this case the ordinance's distinction was facially content neutral, it could still violate the First Amendment if it had been adopted to pursue an impermissible purpose or if it failed intermediate scrutiny. Because the Court of Appeals did not address these issues, the Court left them for remand and expressed no view on the matters.

Justice Breyer in a concurring opinion explained that while *Reed* is binding precedent, he believes that the Court's reasoning in *Reed* is wrong.

Justice Alito concurred in the judgment in part and dissented in part. The Court of Appeals reasoned that the ordinance-imposed content-based restrictions could not satisfy strict scrutiny but did not apply the tests required before a law is declared facially unconstitutional.

Justice Thomas, joined by Justice Gorsuch and Justice Barrett, dissented. In *Reed v. Town of Gilbert*, the Court held that a speech regulation is content based and presumptively invalid if it draws distinctions based on the message a speaker conveys. In this case, the City of Austin's ordinance imposed special restrictions on off-premises signs (specifically, signs that advertise a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that direct persons to any location not on that site). Under *Reed*, Austin's off-premises restriction is content based. It discriminates against certain signs based on the message they convey—e.g., whether they promote an on-/off-site event, activity, or service. The majority concedes that "the message on the sign matters." This alone should end the inquiry under *Reed*. The majority goes on to find the ordinance to be content neutral by recasting facially content-based restrictions as only those that target sufficiently specific categories of communicative content and not as those that depend on communicative content. The majority implicitly rewrites the bright-line rule for content-based restrictions under *Reed*. The upshot of the majority's reasoning appears to be that a regulation based on a sufficiently general or broad category of communicative content is not actually content based. Prior to this case *Reed* provided a clear and neutral rule that protected the freedom of speech from governmental caprice and viewpoint discrimination.

Commentary: *Reed* marked a departure from what was previously understood to be content discrimination. Prior to *Reed*, courts focused on whether a law had an impermissible government justification or purpose as the primary basis for finding content discrimination. However, under *Reed*, impermissible motive is no longer required to find content discrimination. A law can be content based on its face regardless of motive, content-neutral justification, or lack of hostility of the ideas contained in the regulated speech. *Reed* marked the first time that the Court articulated this broader definition of content discrimination. As a practical outcome, the *Reed* majority acknowledged that "laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'" Depending on your perspective, this case either counterbalances or hobbles the Court's holding in *Reed*. Undoubtedly, from the perspective of governments tasked with creating constitutional sign regulations, it is a big win.

B. Fourth Amendment

The particularity requirement of the Fourth Amendment is satisfied if an affidavit that is incorporated into the warrant includes a specific description of the place searched.

Patterson v. State, No. PD-0322-21, 2022 Tex. Crim. App. LEXIS 187 (Tex. Crim. App. Mar. 30, 2022)

Police and medics responded to multiple emergency calls regarding a drug overdose at a fraternity house. After discovering a deceased fraternity brother, police made three warrantless protective sweeps of the fraternity house to make sure members were out of their rooms and in common areas and to determine if anyone else needed medical attention. During each sweep, police saw narcotics and paraphernalia in plain view inside certain rooms and common areas. On the third sweep, Investigator Garrett saw contraband in Samuel Patterson's (Appellant's) room. Instead of seizing it, Garrett drafted a search warrant, which identified the "suspected place" to be searched by giving a detailed description of the appearance of the fraternity house. An affidavit was incorporated by and made part of the warrant for all purposes. The affidavit described the "suspected place" exactly as the warrant did, but in a separate place also described what he personally observed in Appellant's room. A magistrate found probable cause and issued the search warrant, which was executed. The contraband seized from the room led to two charges of unlawful possession of a controlled substance. The trial court denied Appellant's motion to suppress. After conviction, Appellant appealed the trial court's denial of his suppression motion.

The court of appeals held that the warrant's description of the place to be searched violated the particularity requirement of the Fourth Amendment. Focusing on the fact that the affidavit's description of Appellant's room did not appear under "suspected place" to be searched, the court of appeals determined that neither the search warrant nor the affidavit identified Appellant's room within the fraternity house as a place to be searched; rather, they both described the entire fraternity house and thus constituted a general warrant. The Court of Criminal Appeals reversed and remanded.

Judge Keller delivered the opinion of a unanimous Court. According to the Court, although the search warrant and the affidavit both described the entire fraternity house in the section titled "suspected place," the incorporated affidavit proceeded to identify the Appellant and listed the contraband that officers saw in Appellant's particular room. This portion of the incorporated affidavit established probable cause and satisfied the particularity requirement because it was sufficiently specific to inform the officers of where they were to search and what they should expect to find. To invalidate this search by focusing solely on the section of the warrant and incorporated affidavit titled "suspected place" would constitute reading the warrant in a "hyper-technical" manner, rather than the common-sense approach that the law requires.

An investigator calling a confidential informant (CI) an "anonymous tipster" and misstating who made initial contact between a sergeant and the Drug Enforcement Agency (DEA) in a warrant affidavit did not make material misrepresentations and thus the warrant was valid.

Diaz v. State, 632 S.W.3d 889 (Tex. Crim. App. 2021)

An investigator got a warrant to search three cell phones owned by the defendant. The affidavit in support of the warrant provided that a Harris County sergeant got an anonymous tip tying the defendant to the phones. The person that gave the tip turned out to be a CI for the DEA. The affidavit, however, called him an "anonymous tipster" and not a CI. There were also two alleged inaccuracies in the affidavit: that the sergeant initially reached out to the DEA (instead of they to him) and that the sergeant asked the DEA to check the phone numbers (when they did so without his asking). The trial court denied suppression and the court of appeals affirmed. The Court of Criminal Appeals granted review to analyze the materiality of the misrepresentations under *Franks v. Delaware*, 438 U.S. 154 (1978).

The Court unanimously affirmed. The court noted that while there are some differences between a CI and an anonymous tipster, anonymous tipsters are not treated "less skeptically" than CIs: "The credibility of CIs and anonymous sources and the reliability of the information they provide are evaluated the same way—according to facts in the affidavit demonstrating their credibility or the reliability of their information." *See State v. Duarte*, 389 S.W.3d 349 (2012). The other potential misrepresentation did not have any bearing on probable cause—they only related to which agency made initial contact and what the sergeant expressly asked for during the events that tied the defendant to the phones. The Court concluded that these issues were not material under *Franks*.

There was reasonable suspicion for a Driving While Intoxicated (DWI) traffic stop when a peace officer saw a vehicle's wheels twice hit the curb even though the peace officer's dashcam footage did not contain clear evidence of the wheel's contact with the curb.

Martinez v. State, 649 S.W.3d 782 (Tex. App.—Houston [1st Dist.] 2022, pet. denied)

A peace officer trailing a vehicle at night testified that he observed the vehicle veer from its lane and strike the curb twice in a short amount of time. There were no other vehicles in the vicinity and the officer identified no acceptable reason (such as avoiding a pothole) to justify this driving behavior. The officer initiated a stop based on his suspicion of DWI. After the stop, the officer also testified that he observed scrape marks on the wheel that he saw strike the curb. At trial, the officer's dashcam footage was of a relatively poor quality due to it being nighttime and the glare from oncoming traffic. As a result, it did not clearly show that the vehicle hit the curb at all. The trial court nonetheless denied the defendant's motion to suppress under the Fourth Amendment.

The court of appeals upheld the traffic stop and denial of the suppression of evidence. While the video did not clearly show that the vehicle struck the curb at all, it did not clearly show that it did not strike the curb. Thus, it was not viewed as the type of "indisputable" evidence that would have allowed the appellate court to disregard the officer's testimony. The court acknowledged that striking a curb is not necessarily a standalone crime but noted that it certainly may be "sound indicia" of DWI. *See Leming v. State*, 493 S.W.3d 552, 564 (Tex. Crim. App. 2016). Giving deference to the trial court's findings, the court of appeals found that the traffic stop was justified. The court also concluded that the trial court's consideration of the tire scrape marks in favor of reasonable suspicion was improper because this was not known to the officer prior to the stop, but this error was harmless because the other evidence was sufficient to justify the stop.

An officer did not have probable cause to make a Driving While Intoxicated (DWI) arrest when an apparently intoxicated woman was discovered in a parked car with the engine on because there was no direct evidence of intoxication and no witnesses testified to seeing the woman drive the car.

State v. Espinosa, 650 S.W.3d 849 (Tex. App.—Houston [14th Dist.] 2022, pet. granted)

Around 3:15 p.m., a woman was in the driver's seat of the fifth car in line for after-school pickup at a Houston elementary school. Cars typically start lining up around 3:00 p.m. The vehicle was in park with the engine running. Passersby noticed that her neck appeared to be at an odd angle and she seemed to be sleeping. The passersby were able to awaken the woman, who stated that she was "going to a nearby middle school" possibly to pick up her son. Authorities were called. Police discovered empty wine bottles and observed slurred speech, which led to a DWI arrest. The woman, however, refused to take a standard field sobriety test, no breath or blood tests were administered, and she never admitted to drinking. The trial court granted the motion to suppress because no witnesses observed the woman operating the vehicle or testified as to when she arrived in the pickup line.

The court of appeals agreed with the trial court, concluding that there was insufficient evidence to establish a temporal link between the defendant's alleged intoxication and the operation of her vehicle. Not only did no one testify that they saw the defendant drive her car, but there was also no concrete evidence of the intoxication (such as a blood draw). Because intoxication and operation are crucial elements of DWI, there was no probable cause to make the DWI arrest.

Judge Jewell dissented, expressing concern that the majority improperly conflated a probable cause inquiry with a legal sufficiency analysis. Judge Jewell would have remanded the case for further proceedings because, in his view, the information available to the officer was sufficient to warrant a prudent person's belief that the defendant committed DWI. Proving up the elements of a crime is not a requirement to establish probable cause. Furthermore, many Texas courts have found probable cause to arrest for DWI under the totality of the circumstances despite the fact that no one observed the defendant operate the vehicle. *See, e.g., Abraham v. State*, 330 S.W.3d 326, 330-31 (Tex. App.—Dallas 2009, pet. dism'd); *Chilman v. State*, 22 S.W.3d 50, 56 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd); *State v. Parson*, 988 S.W.2d 264, 267-68 (Tex. App.—San Antonio 1998, no pet.); *Elliott v. State*, 908 S.W.2d 590, 591-92 (Tex. App.—Austin 1995, pet. ref'd).

Commentary: Stay tuned. The Court of Criminal Appeals granted a petition for discretionary review for this case on August 24, 2022.

A defendant had no expectation of privacy—and thus could not challenge the search and seizure of his car's black box data recorder—after he declined to collect his vehicle from a wrecking yard following a crash.

Vitela v. State, 649 S.W.3d 649 (Tex. App.—San Antonio 2022, pet. filed)

Vitela lost control of his vehicle in Boerne while driving around a curve and hit a tree. One of the vehicle's occupants died as a result. During the investigation, police officers obtained a warrant to recover the black box event data

recorder from the car to ascertain the speed the car was travelling leading up to and during the crash. The black box revealed that the car was travelling 115 miles per hour in the seconds prior to the crash. Vitela was convicted of criminally negligent homicide. Vitela appealed, arguing that evidence obtained from the black box should have been suppressed because the black box was not found in the place that police expected to find it. The State responded that because Vitela abandoned his vehicle, he had no standing to challenge the seizure. To that, Vitela responded that the facts supporting abandonment were not developed until trial and were not known at the time of the pre-trial suppression hearing. Thus, they should not be considered during appellate review.

The court of appeals upheld the black box seizure. First, Vitela indeed abandoned his vehicle and relinquished any expectation of privacy he had. Following the crash, Vitela's car was taken to a wrecking yard. Vitela was given the option to collect his car from the yard but declined. His insurer subsequently sent it to an auto auction. While on the auction lot, the search warrant was executed. With no expectation of privacy, Vitela had no standing to challenge the search and seizure. The court also declined to limit their review—or the trial court's review—to the facts known during the pre-trial suppression hearing. In other words, the trial court did not err by including facts in their ruling that were learned during trial that precluded suppression even though the suppression hearing occurred before trial.

Commentary: A petition for discretionary review was filed on August 25, 2022.

A search of a pickup truck and a locked toolbox attached to its bed was proper because the registered owner gave consent even though the owner's brother had been using the truck for several months prior to the search.

Robertson v. State, 636 S.W.3d 740 (Tex. App.—Eastland 2021, no pet.)

As part of a theft investigation, law enforcement sought to search a pickup truck that had been driven by the defendant for the previous few months but was owned by and registered to the defendant's brother. The defendant refused to consent to the search. He was arrested on suspicion of theft and the truck was taken to an impound lot. The defendant's brother repeatedly called the impound lot trying to get his truck back. Five days after it was impounded, the defendant's brother signed a consent form allowing police to search the truck. Methamphetamine was found in a locked toolbox attached to the bed of the pickup truck. The box was owned and installed by the defendant, but law enforcement testified that they did not know this at the time of the search. The defendant was ultimately convicted of possession of a controlled substance in a drug-free zone. On appeal, the defendant challenged, among other things, the denial of his motion to suppress the evidence found in the locked box.

The court of appeals affirmed the suppression denial, concluding that "[as] the registered owner of the impounded vehicle, [the defendant's brother] had at least the right to equal control of the vehicle as did [the defendant] and a greater right of possession under the impound statutes." Furthermore, it was reasonable for the officer to believe that the defendant's brother, as the registered owner of the vehicle, had at least apparent authority to give consent to the search of the truck and toolbox even though the defendant refused consent earlier. Lastly, the fact that the defendant's brother called the impound lot daily trying to get "his" truck back shows that he did not transfer ownership of the truck to the defendant.

C. Fifth Amendment

No manifest necessity existed to declare a mistrial where the State, after announcing ready for trial and after the jury was empaneled and sworn, learned its key witness, a trooper, had been deployed to the Texas border.

Ex parte Herrington, 643 S.W.3d 255 (Tex. App.—Tyler 2022, no pet.)

In a DWI trial, both Appellant and the State announced they were ready for trial and conducted voir dire. The jury was empaneled and sworn. Subsequently, the State learned that its key witness, a DPS trooper, was deployed to

the Texas border (the State had previously notified the trooper of the trial and believed he would be present and available). After the State notified Appellant's counsel and the trial court that the witness was unavailable, the trial court declared a mistrial. Appellant filed a pretrial application for habeas corpus arguing that a second trial was barred by double jeopardy. The trial court denied the application. Appellant appealed the denial, arguing that he did not consent to the mistrial and that no manifest necessity existed for the trial court to sua sponte declare a mistrial. Accordingly, Appellant argued, further prosecution of the pending charge is barred by the Fifth Amendment's Double Jeopardy Clause.

The 14th Court of Appeals agreed and reversed and remanded the trial court's order denying Appellant's application for a writ of habeas corpus. To specifically answer the question whether an unavailable witness constitutes manifest necessity to grant a mistrial, the court relied on *Downum v. U.S.*, 372 U.S. 734, 737-38 (1963), which held that when a prosecutor agrees to the empaneling of a jury, gambling that his missing witness will appear in time to testify, the prosecutor subjects his case to a defendant's later plea of double jeopardy. The court also noted that other appellate courts have determined the absence of a material witness did not create a manifest necessity. Here, the State did not secure its witness or ensure he was present and available before announcing ready and empaneling the jury. Once the court swore the jury, the State's predicament shifted from the need for a continuance to a failure of proof.

D. Sixth Amendment

Without hearing evidence and making case-specific findings, a defendant's constitutional right to face-to-face confrontation was violated when the court allowed the witness accuser to wear a mask while testifying, denying the opportunity for the jury to read the accuser's face and fully judge their credibility.

Finley v. State, 2022 Tex. App. LEXIS 8154 (Tex. App.—Fort Worth Nov. 3, 2022, no pet.)

At Finley's jury trial in late 2021, masks were voluntary for anyone in the courtroom, including witnesses. When the sole complainant and eyewitness (T.G.) took the stand wearing a surgical mask covering her nose and mouth, Finley requested that the court require T.G. to remove her mask during testimony as to not interfere with the jury's ability to evaluate the witness's facial expressions and demeanor. The State claimed the request was merely an attempt to harass and annoy the victim and referenced the pandemic as the basis for allowing the mask. Citing the emergency orders from the Supreme Court of Texas, the State said the guidance was clear that courts should do as much as possible to protect people during in-person proceedings. The court agreed with the State and allowed T.G. to wear a mask.

Finley appealed his conviction, claiming that the trial court denied him his Sixth Amendment Right to Confrontation by allowing T.G. to testify at trial while wearing a mask without sufficient findings.

On its own motion, the 2nd Court of Appeals abated the appeal and ordered the trial court to supply "case-specific, evidence-based findings pertaining to whether it was necessary for T.G. particularly to wear a mask while she testified." At first, the trial court did not supply any particularized findings but submitted three documents without explanation: (1) a Tarrant County judiciary operating plan, (2) an order of assignment showing Finley's case had been assigned to a retired judge, and (3) a docketing sheet.

Subsequently, the trial court supplemented the record with a transcript of a non-evidentiary abatement hearing including thirty-six findings of fact orally pronounced by the trial court. The court of appeals found the findings unconvincing. According to the court, "T.G. should not have been permitted to testify while wearing a mask unless the trial court could articulate, from the evidence before it, a justifiable reason why she specifically, in this particular trial, needed to wear a mask in a courtroom where masks were not otherwise required." Holding that the trial court erred and that the error was not harmless, the court of appeals reversed and remanded for a new trial.

E. Fourteenth Amendment

Abortion is not a protected right under the Fourteenth Amendment. *Roe v. Wade* and *Planned Parenthood v. Casey* are overruled.

Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)

In a 6-3 decision written by Justice Alito, the Court held that the U.S. Constitution does not guarantee a right to abortion. The Court agreed with both the petitioner and respondent that resolution of the case hinged on two prior decisions. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court held that the Fourteenth Amendment provided a fundamental right to privacy that, although not absolute, protected a woman's right to abort her fetus. In Planned *Parenthood v. Casey*, 505 U.S. 833 (1992), a plurality opinion, the Court affirmed the central holding in *Roe* that: (1) women had the right to have an abortion prior to viability and to do so without undue interference from the State; (2) the State could restrict the abortion procedure post-viability, so long as the law contained exceptions for pregnancies which endangered the woman's life or health; and (3) the State had legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

The Court overruled both *Roe v. Wade* and *Planned Parenthood v. Casey*, reasoning that the Constitution does not reference abortion and the right to an abortion was neither implicitly protected by a constitutional provision, deeply rooted in history and tradition, implicit in an ordered liberty concept, nor justified as a component of a broader entrenched right. The argument that abortion regulations violate the Equal Protection Clause is foreclosed by the Court's prior rulings. State regulation of abortion is not a sex-based classification and is not subject to heightened scrutiny. Therefore, if the right to abortion is protected by the Constitution, it must be rooted in the "liberty" protected by the Due Process Clause. In determining whether that Clause protects a particular liberty interest, the Court determined whether the interest is deeply rooted in the Nation's history and tradition. Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. Abortion had long been a crime in every state until shortly before *Roe*. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful. By 1868, three-quarters of the states had made abortion a crime at any stage of pregnancy, and the remaining states would soon follow. Because *Roe* either ignored or misstated this history, the Court set forth the common-law and statutory history, coming to the "inescapable conclusion" that a right to abortion is not deeply rooted in the nation's "history and traditions." Accordingly, neither Roe nor Casey is supported by precedent. *Casey*, by means of substantive due process, invoked *Loving v. Virginia*, 388 U.S. 1 (1967) (inter-racial marriage), *Griswold v. Connecticut*, 381 U.S. 438 (1965) (contraception), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (education of one's children). Other parties asserting substantive due process as the basis for having a right to an abortion have cited *Lawrence v. Texas*, 539 U.S. 558 (2003) (private, consensual sexual acts), and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex marriage). The Court explained that none of these cases involved the right to destroy "potential life," and thus "do not support the right to obtain an abortion." While both sides made "important policy arguments," the Court lacks authority to weigh those arguments. The power to weigh such argument is returned to the people and their elected representatives.

The majority opinion went on to explain that stare decisis does not compel continued acceptance of precedent because *Roe* usurped power to address a profound, important moral and social question that unequivocally belongs to the people and their elected representatives. The quality of reasoning in *Roe* was exceptionally weak, drawing precise lines as to permissible restrictions under *Casey* proved impossible, and courts should not substitute their social and economic beliefs for the judgments of legislative bodies. The constitutional challenge to the Mississippi law at issue in this case failed given the State's legitimate interest in protecting the life of the unborn. Because there is no fundamental constitutional right to an abortion, abortion regulations enacted by state legislatures should be subject to rational-basis review and concluded that Mississippi's ban on abortion after 15 weeks was justified by legitimate interests, including the "preservation of prenatal life at all stages of development."

In a concurring opinion, Justice Thomas agreed with the Court's holding but wrote separately to argue that the Court should go further in future cases, reconsidering other past Supreme Court cases that granted rights based on substantive due process, such as *Griswold v. Connecticut* (the right to contraception), *Obergefell v. Hodges* (the right to same-sex marriage), and *Lawrence v. Texas* (banned laws against private sexual acts). He wrote, "Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents."

In a separate concurring opinion, Justice Kavanaugh wrote that abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting fetal life. The interests on both sides of the abortion issue are "extraordinarily weighty." The issue before this Court is not the policy or morality of abortion. Like numerous other difficult questions of American social and economic policy, the Constitution does not address abortion. Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral. The nine unelected Members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States. The Constitution is neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process. To be clear, the Court's decision *does not outlaw* abortion throughout the United States (emphasis in the opinion). Overruling *Roe* does *not* mean the overruling of precedents involving issues such as contraception and marriage and does *not* threaten or cast doubt on those precedents (emphasis in the opinion). In his opinion, it would be unconstitutional to prohibit a woman from going to another state to seek an abortion under the right to travel, and that it would be unconstitutional to retroactively punish abortions performed before *Dobbs* when they had been protected by *Roe* and *Casey*.

Chief Justice Roberts concurred in the judgment. According to the Chief Justice, the Court granted review to answer a single question: "Whether all pre-viability prohibitions on elective abortion are unconstitutional." In urging review, Mississippi argued that it was possible to answer the question without overturning *Roe* or *Casey*. While agreeing with the Court that the viability line established by *Roe* and *Casey* should be discarded under a stare decisis analysis, the case before the Court did not require overturning either *Roe* or *Casey*. Mississippi's law allows a woman three months to obtain an abortion. Accordingly, he would have the Court take a more measured course: the right to an abortion should extend far enough to ensure a reasonable opportunity to choose but need not extend any further (and certainly not all the way to viability). Out of adherence to a simple yet fundamental principle of judicial restraint, no more needed to be stated by the Court. "If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more." Chief Justice Roberts explained that while the Court's opinion is thoughtful and thorough, those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary for the Court to issue a decision.

Justice Kagan wrote a dissenting opinion, joined by Justice Breyer and Justice Sotomayor, stating that for half a century, *Roe* and *Casey* have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child and that in the first stages of pregnancy, the government could not make that choice for women. According to the dissent, the government could not control a woman's body or the course of a woman's life: it could not determine what the woman's future would be. "Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions." The dissent stated that *Roe* and *Casey* struck a balance between a woman's right to autonomy in early stages of pregnancy and allowing states to bar abortion only after viability. According to the dissent, the majority "discards that balance" by permitting a state to force a female to bring a pregnancy to term regardless of the cost to her or her family.

The dissent disagreed with allowing states to ban abortion from conception onward, attributing that to the majority's belief that it does not think forced childbirth at all implicates a woman's rights to equality and freedom. The majority

"does not think there is anything of constitutional significance attached to a woman's control of her body and the path of her life."

The dissent went on to say that to justify the imbalance, the majority focuses on whether the reproductive rights recognized in *Roe* and *Casey* existed in 1868 despite previously stating that historical evidence may not illuminate the scope of a right. The dissent countered that early law provides some support for abortion rights. The dissent explained that common-law authorities did not treat abortion as a crime before "quickening"—the point when the fetus moved in the womb. This is why the majority conveniently focused on state laws after 1868 and up to the time of *Roe*. At the time of the Fourteenth Amendment's ratification, the "people" were exclusively men and not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. "When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship."

The dissent considered the Court's precedents about bodily autonomy, sexual and familial relations, and procreation to be all interwoven—"all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination." The dissent disagreed that the right recognized in *Roe* and *Casey* is singular or isolated. For decades, according to the dissent, the Court has linked it to other settled freedoms involving bodily integrity, familial relationships, and procreation. The right to terminate a pregnancy stemmed the right to purchase and use contraception. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. "Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other." Addressing the majority's argument that a right must be "deeply rooted in the Nation's history," the dissenting opinion reflected on what that approach means for interracial marriage. The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed interracial marriage as unprotected as abortion. Nevertheless, in in *Loving v. Virginia*, 388 U. S. 1 (1967), the Court recognized the Fourteenth Amendment as ensuring such as right. While the Court attempts to assuage concern as to the broader implications of this decision on other constitutional rights, according to the dissent, Justice Thomas "makes clear that he is not with the program." The dissent found his concurring opinion to telegraph his future intentions "to use the ticket of today's decision again and again" to rationalize a "duty" to overrule other "demonstrable erroneous decisions."

The dissent disagreed with the majority's formula for overriding stare decisis—that the Court merely must believe *Roe* and *Casey* are egregiously wrong. The dissent stated that accepting this standard could spell the end of any precedent with which a bare majority of the present Court disagrees. According to the dissent, it makes radical change too easy and too fast, based on nothing more than the new views of new judges. "The majority has overruled *Roe* and *Casey* for one and only one reason—it has always despised them, and now it has the votes to discard them. In doing so, the majority substitutes a rule by judges for the rule of law."

The dissent concluded, "With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent."

Commentary: *Dobbs* is not a criminal case; however, the word "crime" appears 26 times throughout the *Dobbs* decision. *Roe v. Wade* was not a criminal case. However, it began in Dallas County and involved the constitutionality of a criminal abortion statute in the Penal Code. That was more than 50 years ago. The overruling of *Roe* changes the legal landscape related to abortion and criminal law in Texas. In the past, TMCEC has summarized criminal-law-related legislative changes. In 2021, the 87th Legislature passed H.B. 1280, creating Chapter 170A (Performance of Abortion) in the Health & Safety Code. It contains a variety of criminal, civil, and regulatory enforcement measures, including a new felony for performing an abortion. The bill contained a trigger law provision meaning that the new criminal offense became effective 30 days after the Supreme Court's reversal of *Roe* became final (i.e., August 25,

2022). Because of its potential implications on magistrate duties, in a future edition of *The Recorder*, TMCEC will provide more detailed information about abortion-related crimes after *Dobbs*.

The Second Amendment protects an individual's right to carry a handgun for self-defense outside the home. New York's "proper-cause" requirement violated the Fourteenth Amendment in that it prevented law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.

N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022)

In the State of New York, the Sullivan Act of 1911 made the possession of a handgun without a permit a crime and made issuance of concealed carry permits subject to the discretion of local law enforcement. Under the Sullivan Act, to obtain a permit, the applicant must "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." The applicant had to have a non-speculative need for self-defense to establish a proper cause to grant a permit.

In a 6-3 decision written by Justice Thomas, the Court held that the state law was unconstitutional as it infringed on the right to keep and bear arms, reversing the Second Circuit's decision and remanding the case for further review. The majority opinion effectively rendered public carry a constitutional right under the Second Amendment. "The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights' guarantees. We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need."

Because it is a constitutional right, the Court ruled out use of the two-part test to evaluate state gun laws, which generally involved application of intermediate scrutiny, and instead evaluated the Sullivan Act under a more-stringent test of whether the proper-cause requirement is consistent with the Nation's historical tradition of firearm regulation. Gun control laws that identify restricted "sensitive places", such as courthouses and polling places, likely pass constitutional scrutiny. However, urban areas do not qualify as such sensitive places.

When the Second Amendment's plain text covers an individual's conduct (i.e., the right to bear arms), the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the scope of the Second Amendment.

Justice Alito issued a concurring opinion responding to dissenting members of the Court. Dismissing Justice Breyer's concern on a new legal framework for Second Amendment cases, he wrote, "Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun." He questioned whether a person bent on committing an atrocity such as a mass shooting would be deterred because it would be illegal for them to carry a firearm outside of their home. He also pointed out that the recent shooting rampage in Buffalo occurred in New York, and New York's law had done nothing to stop the perpetrator.

Justice Kavanaugh issued a concurring opinion, joined by Chief Justice Roberts, affirming the authority of states to have licensing requirements (e.g., background checks) before issuing public carry permits. Such requirements are distinct from the Sullivan Act which granted open-ended discretion to licensing officials and authorized licenses only for those applicants who showed a special need distinct from self-defense. Citing precedent, he emphasized that nothing in the Court's opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Justice Barrett issued a concurring opinion that briefly delved into the methodological points that the Court does not resolve in terms of determining the manner and circumstances in which "post ratification" practice may bear on the original meaning of the Constitution.

Justice Breyer dissented, joined by Justice Sotomayor and Justice Kagan. The crux of the dissent was data. In 2017, there were an estimated 393.3 million civilian-held firearms in the United States, or about 120 firearms per 100 people. That is more guns per capita than any other country in the world. (Yemen came in second place). The United States suffers a disproportionately high rate of firearm-related deaths and injuries. By 2020, the number of firearm-related deaths in the U.S. had risen to 45,222. Gun violence is now the leading cause of death in children and adolescents, surpassing car crashes, which had previously been the leading cause of death for children and adolescents for more than 60 years. Since the start of 2022, there have been 277 reported mass shootings—an average of more than one per day. In response to Justice Alito, the point of all of these statistics is not that "guns are bad." Guns are used for legitimate purposes, such as sport (e.g., hunting or target shooting), certain types of employment (e.g., as a private security guard), or self-defense. The point is that balancing these lawful uses against the dangers of firearms is primarily the responsibility of elected bodies, such as legislatures, and that the Court's new framework for courts to use in Second Amendments cases will harm states' abilities to regulate guns.

Commentary: Since 2021, most Texans have been able to legally carry a handgun without a license or training. Accordingly, for people in Texas, it may be hard to fathom having a law like the Sullivan Act. State gun laws can vary substantially, which is why Bruen is a landmark decision in Second Amendment jurisprudence. It should be considered part of the Court's Second Amendment trilogy of caselaw. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court affirmed that U.S. citizens have an individual right, unconnected to a "well-regulated militia," to possess guns within their own homes. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court found that the right of an individual to "keep and bear arms," as protected under the Second Amendment, is incorporated by the Due Process Clause of the Fourteenth Amendment and is thereby enforceable against the states. In *Bruen*, the Court ruled that the ability to carry a pistol in public is a constitutional right under the Second Amendment. However, what tends to be overlooked in each of these three major decisions, is that while each involved a jurisdiction with an overly restrictive gun-related law, each also reiterated the rights of states to enact laws: (1) prohibiting possession of firearms by felons and the mentally ill, (2) forbidding the carrying of firearms in "sensitive places" such as schools and government buildings, and (3) imposing conditions and qualifications on the commercial sale of arms.

F. Section 1983 Lawsuits

A *Miranda* violation does not form the basis for a claim under Section 1983 because such a violation is not necessarily a violation of the Fifth Amendment and there is no justification for expanding *Miranda* to confer a right to sue under Section 1983.

Vega v. Tekoh, 142 S. Ct. 2095 (2022)

Deputy Vega questioned Tekoh at his place of employment without a *Miranda* warning. He was prosecuted, and his confession was admitted into evidence, but the jury returned a verdict of not guilty. Tekoh then sued Vega under Section 1983. The Ninth Circuit Court of Appeals held that the use of Tekoh's un-*Mirandized* statement provided a valid basis for a Section 1983 claim against Vega. The U.S. Supreme Court granted certiorari.

Justice Alito delivered the opinion of the Court, joined by Chief Justice Roberts, Justice Thomas, Justice Gorsuch, and Justice Kavanaugh.

Section 1983 provides a cause of action against any person acting under color of state law who "subjects" a person or "causes [a person] to be subjected . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The majority began by refuting the Ninth Circuit's holding that a violation of *Miranda* constitutes a violation of the Fifth Amendment. *Miranda* itself and the Court's subsequent cases make clear that *Miranda* imposed a set of prophylactic rules. Additionally, contrary to the Ninth Circuit's holding and Tekoh's argument, *Dickerson v. U.S.* did not upend the Court's understanding of the *Miranda* rules as prophylactic, which was confirmed by subsequent cases. A violation of *Miranda* does not necessarily constitute a violation of the

Constitution, and therefore such a violation does not constitute the deprivation of a right secured by the Constitution under Section 1983.

Though a Section 1983 claim may also be based on "the deprivation of any rights, privileges, or immunities secured by the . . . laws," assuming *Miranda* constitutes federal "law," a judicially crafted prophylactic rule should apply only where its benefits outweigh its costs. The prophylactic purpose of *Miranda* is served by the suppression at trial of statements obtained in violation of *Miranda* and by the application of that decision in other recognized contexts. Allowing the victim of a *Miranda* violation to sue a police officer for damages under Section 1983 would have little additional deterrent value and permitting such claims would cause many problems. Specifically, re-adjudication of a factual question already decided by a state court is not only wasteful, but also undercuts the strong judicial policy against the creation of two conflicting resolutions based on the same set of facts. It could also produce unnecessary friction between the federal and state court systems. The majority also listed procedural issues. Therefore, the Court refused to extend *Miranda*.

Justice Kagan, joined by Justice Breyer and Justice Sotomayor, dissented, finding that *Miranda*'s protections are a right secured by the Constitution within the meaning of Section 1983. According to the dissent, under Section 1983, a right is anything that creates specific "obligations binding on [a] governmental unit" that an individual may ask the judiciary to enforce. The Court's decision in *Dickerson* repeatedly labels *Miranda* a rule stemming from the Constitution. *Miranda*'s constitutional rule gives suspects a correlative right. The dissent was not persuaded by the majority's description of *Miranda* as prophylactic. Comparing the majority's holding with a prior decision involving the Commerce Clause, the dissent asks, if a right implied from Congress's constitutional authority over interstate commerce is enforceable under Section 1983, how could it be that *Miranda*—which the Court has found necessary to safeguard the personal protections of the Fifth Amendment—is not also enforceable?

A plaintiff can assert a Fourth Amendment claim under Section 1983 for malicious prosecution if, among other requirements, the plaintiff has "obtained a favorable termination of the underlying criminal prosecution," which does not require an affirmative indication of innocence, but only that the prosecution ended without a conviction.

Thompson v. Clark, 142 S. Ct. 1332 (2022)

Larry Thompson was living with his fiancée and their newborn baby when his sister-in-law, who apparently lives with mental illness, called 911 and claimed that Thompson was abusing the baby. EMTs arrived at the apartment but left after Thompson denied that anyone had called 911. When the EMTs returned with four police officers, Thompson told them they could not enter without a warrant. The officers entered and handcuffed Thompson. The EMTs, after finding red marks on the baby's body, took the baby to the hospital for evaluation. Medical professionals found the marks to be diaper rash with no signs of abuse.

Meanwhile, the police took Thompson to jail and charged him with obstructing governmental administration and resisting arrest. He remained in custody for two days and was released by a judge on his own recognizance. Before trial, the prosecution moved to dismiss the charges, which was granted by the judge. Neither provided an explanation for the motion or the dismissal.

Thompson sued the police officers under 40 U.S.C. Section 1983 alleging, among other violations, a 4th Amendment claim for malicious prosecution. However, to prevail on that claim under Second Circuit precedent, he had to show that his criminal prosecution ended not merely without a conviction, but also with some affirmative indication of his innocence. Because he could not provide an explanation for the dismissal of his charges, the district court dismissed his Fourth Amendment claim. On appeal, the Second Circuit adhered to its precedent and affirmed.

The U.S. Supreme Court granted certiorari to resolve a split in the courts of appeals over how to apply the favorable termination requirement of a Fourth Amendment claim under Section 1983 for malicious prosecution. Contrasted

to the Second Circuit and others, the Eleventh Circuit has held that a favorable termination occurs if the criminal prosecution ends without a conviction.

When defining the contours of a Section 1983 claim, the Court looks to "common law principles that were settled at the time of its enactment." Justice Kavanaugh, writing for the majority (6-3), first concluded that the Court's precedents recognize a Fourth Amendment claim under Section 1983 for malicious prosecution. According to the majority opinion, under the construct of Section 1983, malicious prosecution is the most analogous tort as of 1871 when Section 1983 was enacted. Based on American malicious prosecution tort law in 1871, the Court held that a Fourth Amendment claim under Section 1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence. A plaintiff need only show that the criminal prosecution ended without a conviction.

Justice Alito, joined by Justice Thomas and Justice Gorsuch, dissented, finding that the majority opinion created a "chimera of a constitutional tort by stitching together elements taken from two very different claims: a Fourth Amendment unreasonable seizure claim and a common-law malicious-prosecution claim." Comparing the elements of the two claims, the dissent concluded that the Fourth Amendment and malicious prosecution have almost nothing in common (contrasted by the dissent to more analogous common-law torts like false arrest and false imprisonment). According to the dissent, the Court has never held that the Fourth Amendment houses a malicious-prosecution claim. Further, the courts of appeals have done so by misunderstanding *Albright v. Oliver*, 510 U.S. 266 (1994), a plurality opinion. Instead of accepting the misunderstanding, the dissenters would have instead explained Albright, which "did not even hint that such a claim could be brought under the Fourth Amendment." According to the dissent, instead of clarifying the law, the majority decision will "sow more confusion." The dissenting justices would have held that a malicious prosecution claim may not be brought under the Fourth Amendment.

Commentary: This case is novel because the Court establishes a Fourth Amendment claim for malicious prosecution and resolves a split in the courts of appeals regarding the elements of that claim (prior to Thompson, there was no freestanding right under the Constitution to be free from malicious prosecution under the precedent of the Fifth Circuit. *See Anokwuru v. City of Houston*, 990 F.3d 956, 963-64 (5th Cir. 2021)). However, the Court does not express a view on the merits of the underlying case, such as whether Thompson was ever seized as a result of the alleged malicious prosecution, whether he was charged without probable cause, and whether the officers are entitled to qualified immunity, leaving that to the court of appeals on remand. While some see this case as making it easier to sue the police for malicious prosecution, the questions left unanswered by the Court were also left intact as barriers to such lawsuits. For example, the existence of probable cause underlying a warrant can result in the dismissal of a Fourth Amendment claim for malicious prosecution. *See Payton v. Town of Maringouin*, 2022 U.S. App. LEXIS 21506 (5th Cir. Aug. 3, 2022).

II. Procedural Law

A. Warrants

The language of Article 18.01(b) of the Code of Criminal Procedure permits anticipatory search warrants.

Parker v. State, No. PD-0388-21, 2022 Tex. Crim. App. LEXIS 470 (Tex. Crim. App. July 27, 2022)

On June 1, 2017, United Parcel Service (UPS) in Eugene, Oregon received two packages for delivery addressed to Silas Parker c/o Scott Cove, 2070 Lime Kiln Road, San Marcos, Texas. The shipping labels and paperwork listed Silas Parker as both the shipper and tWhe recipient. The sender told the UPS employee the packages contained chanterelle mushrooms. Once the sender left the store, the UPS employee, believing the packages smelled like marijuana, contacted a security supervisor who opened one of the packages. Both packages contained suspected psilocybin (illegal "magic mushroom"). The police were notified. Oregon State Police Detective Jered McLain observed that each package contained 21-pound bags of mushrooms, which tested positive for psilocybin.

Detective McClain contacted the San Marcos Police Department, the local law enforcement with jurisdiction over the shipping address, and told Detective Lee Harris that he would return the boxes to UPS with some, but not all, of the psilocybin, replacing the removed bags with rocks. Detective McClain gave Detective Harris the UPS tracking numbers with a delivery date of June 9. Harris determined that the delivery address for the packages of psilocybin, 2070 Lime Kiln Road, matched the address on Silas Parker's driver's license. Further, Parker was listed as the manager of a business named Thigh High Gardens, located at the same address.

Detective Harris requested a search warrant from a magistrate to seize the packages and search 2070 Lime Kiln Road when the packages were delivered. In the affidavit, Harris set forth the facts stated above and that there was at the specified location, a quantity of psilocybin. Additionally, the affidavit stated that there was evidence of a crime at the location, including writings, photos, currency, weapons, and more. Harris sought permission to search the premises "on or around the expected delivery date of June 9, 2017," after Harris was able to confirm parcel delivery to the suspected place and premises.

On June 7, the magistrate issued the search warrant. On June 9, Harris and other officers watched the UPS delivery truck drive through the property's front gate. After Harris confirmed on the UPS website that the driver had marked the packages as "delivered," officers searched the home and seized the packages containing the bags of psilocybin mushrooms and other items. After the search, Harris applied for a search warrant of Parker's cell phone data to prove that Parker was in Oregon on the date the packages were shipped. That affidavit set forth the facts above about the investigation and the execution of the first warrant.

In the trial court, Parker filed a motion to suppress all evidence seized from the search of 2070 Lime Kiln Road, and a separate motion to suppress his electronic customer data discovered on his phone. He asserted that the search of the house was illegal because it was predicated upon a warrant obtained in anticipation of events that had not yet occurred, violating Article 18.01(b) of the Code of Criminal Procedure. The trial court denied the motion. Parker then pleaded guilty pursuant to a plea bargain with the prosecution for the reduced charge of possession between one and four grams of psilocybin and was placed on deferred-adjudication community supervision for a term of ten years.

On appeal, Parker challenged the trial court's denial of his pretrial motion to suppress. The court of appeals held the trial court properly denied Parker's motion to suppress all evidence from the search of the residence because the magistrate had probable cause to issue the warrant. Parker filed a petition for discretionary review with the Court of Criminal Appeals.

In a matter of first impression, the Court granted review to determine if Article 18.01(b) prohibits magistrates from issuing anticipatory search warrants. Judge McClure, joined by eight members of the Court, delivered the majority opinion, affirming the judgment of the court of appeals and holding that Article 18.01(b) does not prohibit anticipatory search warrants. The Court reasoned that unless Article 18.01 contains a present possession requirement, it does not prohibit anticipatory search warrants. Rather it allows for searches when a magistrate finds probable cause to believe evidence will be found upon the occurrence of some condition precedent event. The Court agreed with the court of appeals that the magistrate had a substantial basis for determining that there was a fair probability that the psilocybin would be found at Parker's residence.

Judge Yeary issue a concurring opinion questioning parts of the statutory construction of the majority opinion.

Commentary: While we are not claiming to be prescient, in 2011, in the wake of *U.S. v. Grubbs*, 547 U.S. 90 (2006), TMCEC anticipated that anticipatory warrants would be an emerging topic worthy of judicial education. It was a staple in our Regional Judges Seminar agenda. *Grubbs* upheld the constitutionality of anticipatory warrants in general. Anticipatory warrants require a magistrate to determine that it is now probable that contraband, evidence of a crime, or a fugitive will be on the described premises when the search warrant is executed by law enforcement.

The TMCEC presentation on anticipatory warrants was taught throughout the state by St. Mary's Law School Professor, Gerald Reamey (who is now also the Presiding Judge at the Shavano Park Municipal Court), and Texas Tech Law School Professor, Charles Bubany. As a result of the collaboration and conversations stemming from the TMCEC presentation, Professor Reamey wrote a subsequent Baylor Law Review article, "The Promise of Things to Come: Anticipatory Warrants in Texas" 65 Baylor L. Rev. 473 (2013).

Flash forward ten years. In the instant case, the court of appeals disagreed with Parker that the Court of Criminal Appeals in *State v. Toone*, 872 S.W.2d 750 (Tex. Crim. App. 1994) adopted his interpretation of Article 18.01(b) of the Code of Criminal Procedure (i.e., anticipatory warrants are prohibited because probable cause does not "exist" at the time of issuance). Parker doubled down. Seeking review of the matter before the Court of Criminal Appeals was a bold gambit.

Read Professor Reamey's law review article. The Court's opinion in *Parker* was easily anticipated: "It is true that in the case of anticipatory warrants, probable cause does not exist to believe contraband or evidence is present when the warrant issues. However, the nature of probable cause is probability, not certainty. In all cases, warrants issue on the prediction, based on reliable information, that evidence probably will be found when the warrant is executed. If it is this probability that 'counts,' then the anticipatory warrant is no more deficient under the [A]rticle 18.01(b) standard than any other kind of warrant. The [U.S.] Supreme Court relied on this interpretation of probable cause in Grubbs, and it seems unlikely that a Texas court would read the probable cause requirement in [A]rticle 18.01(b) more expansively." 65 Baylor L. Rev. 473, 493.

Generic, boilerplate language in a search warrant application about cell phone use among criminals is, on its own, insufficient to establish probable cause for the purposes of Article 18.0215(c)(5)(B) of the Code of Criminal Procedure—specific facts connecting the item to be searched to the alleged offense are required.

State v. Baldwin, No. PD-0027-21, 2022 Tex. Crim. App. LEXIS 321 (Tex. Crim. App. May 11, 2022)

Police obtained a search warrant under Article 18.0215(c)(5)(B) of the Code of Criminal Procedure to search a defendant's cell phone during a capital murder investigation. In applying for the warrant, the affiant used boilerplate language: "It is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications." The defendant contended that nothing in the probable cause affidavit directly tied the cell phone to the murder. The State argued that the magistrate properly made reasonable inferences based on the totality of the affidavit that the cell phone would likely contain evidence related to the case at hand.

Judge McClure authored the majority opinion holding that the generic, boilerplate language about cell phone use among criminals is insufficient to establish probable cause. Rather, "specific facts connecting the items to be searched to the alleged offense are required for the magistrate to reasonably determine probable cause." Applying this holding to the probable cause affidavit, the Court found that there were no facts within the four corners of the affidavit tying the cell phone to the offense. The probable cause affidavit mainly described witness statements about seeing the defendant in a vehicle that matched the description of a vehicle seen leaving the scene of the crime. To say that the cell phone was used before, during, or after the crime was nothing more than speculation.

Judge Keller, joined by Judges Keel, Slaughter, and Yeary, filed a dissenting opinion. Judge Keller agreed with the majority's holding that more than boilerplate language is needed but disagreed that a nexus between the cell phone and the crime was not established within the probable cause affidavit. First, the car that the defendant was driving was sufficiently linked to the crime—and the cell phone was in the car. This links the cell phone to the crime. Second, the crime was committed by two people, acting together over the course of two days, and was the type of crime that involves coordination. Cell phone use in coordinating the crime is to be expected and, in Judge Keller's opinion, the magistrate properly signed the search warrant.

Judge Yeary also filed a dissenting opinion where he expressed concern that the categorical rule established by the majority does not exhibit the great deference that is owed to magistrates under the Fourth Amendment and will inhibit perfectly constitutional warrants in the future. Judge Yeary concluded by stating that "[n]either the law nor the people will be served by this decision, but criminals and their enterprises will benefit."

B. Setting Bail

District and county judges acted as officers of the state judicial system when they made bail schedules and thus could not create liability for the county. Without evidence that the district and county judges should have predicted that magistrate judges would treat their bail schedules as binding, the plaintiff's theory of causation was too speculative to establish standing to sue the district and county judges.

Daves v. Dall. Cty., 22 F.4th 522 (5th Cir. 2022)

In January 2018, six indigent individuals arrested for misdemeanor or felony offenses in Dallas County filed a class action lawsuit under 42 U.S.C. § 1983 (Section 1983) against Dallas County; 17 Dallas County District Court and Criminal District Court Judges (district judges), who handle felony cases; 11 Dallas County Criminal Court at Law Judges (county judges), who handle misdemeanors; six of the Dallas County Magistrate Judges (magistrate judges); and the Sheriff of Dallas County. Along with the complaint, the plaintiffs filed a motion for a preliminary injunction that would prohibit Dallas County "from enforcing its wealth-based pretrial detention system" and require it "to provide the procedural safeguards and substantive findings that the Constitution requires before preventatively detaining any presumptively innocent individuals."

The defendants filed motions to dismiss due to a lack of jurisdiction, raising threshold defenses, and rejecting the case's merits. Among other points, Dallas County, the Sheriff, and the magistrate judges argued that none of the defendants is a county policymaker sufficient for municipal liability. The district judges argued that the plaintiffs lacked standing. The county judges argued for abstention under *Younger v. Harris*, 401 U.S. 37 (1971), an argument incorporated by the district judges and magistrate judges (abstention precludes a federal court from hearing cases within its jurisdiction, instead, giving state courts authority over the case). The district court made no explicit ruling on the motions.

At the heart of this case are bail schedules. The district judges promulgated one for felony arrestees, which took effect in February 2017. In April 2017, the county judges promulgated a bail schedule for misdemeanor arrestees. Those judges described the bail schedules as non-binding, operating like a menu. Whereas the district court in this case found that the magistrate judges routinely treat them as binding when determining bail.

The district court held that this case was indistinguishable from *ODonnel I* (*ODonnel v. Harris Cty.*, 892 F.3d 147 (5th. Cir. 2018)) and issued an injunction almost identical to the *ODonnel* court's injunction. The only threshold issue the court discussed was policymaking authority for municipal-liability purposes. It did not make any holdings as to whether the plaintiffs have standing, whether any defendants were entitled to sovereign immunity, or whether to abstain under *Younger*.

The plaintiffs, Dallas County, and the district judges each filed notices of appeal (the magistrate judges did not appeal). The Fifth Circuit's panel opinion made some revisions to the injunction, but bound by the *ODonnel* opinions, it affirmed in most part. The Fifth Circuit in this case considered the appeal en banc.

After oral argument in May 2021, the Texas Legislature passed S.B. 6. The court asked for briefs addressing the legislation. The plaintiffs responded that the procedures for imposing bail on indigent pretrial arrestees remain constitutionally infirm, while the defendants argued that the new law makes it even clearer that the standards and procedures for imposition of pretrial bail are state-law matters. The Court determined that the new legislation did not eliminate the need to analyze the threshold issues of municipal liability, standing, and abstention. However, the court remanded to the district court for initial resolution of the effect of S.B. 6.

The court first answered the question whether any defendants were acting on behalf of Dallas County. In cases brought under Section 1983, when deciding whether an official is acting for the State or local government, the court examines the function (the act being challenged in the litigation—here, bail schedules) of a governmental official with final policymaking authority. *See McMillian v. Monroe Cty.*, 520 U.S. 781 (1997). Looking to the Texas Constitution and the Code of Criminal Procedure, the court concluded that creating bail schedules is a judicial act that applied state law. Thus, when the district and county judges made a bail schedule, they acted as officers of the state judicial system, not on behalf of the county, and they could not create liability for the county for those actions. (The court does not address the Sheriff due to a lack of briefing.)

Next, the court addressed the issue of standing to sue the district and county judges, concluding that the plaintiffs offered no evidence or law that the district and county judges should have predicted that the magistrate judges would have treated the bail schedules as binding. Establishing standing when a causal relationship between injury and challenged action depends on the decisions of an independent third party. The plaintiff must show that third parties will likely react in predictable ways. The court did not agree that it was predictable that the discretion urged by the schedules themselves and required by state law (Article 17.15 of the Code of Criminal Procedure) would not be exercised. Because the current injunction cannot stand against the only officials subject to it, the court vacated the district court's preliminary injunction.

For the magistrate judges, the plaintiffs only sued for declaratory relief and no party offered a brief on appeal whether federal jurisdiction existed over the claims against the magistrate judges. The court suggested, based on its analysis of the district and county judges, that causation for the claimed injuries might be traced to the magistrate judges. The court noted that available relief against any defendant judge is limited by a 1996 amendment to Section 1983 "that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable," but the court left for remand how that limitation affects the analysis of abstention.

Finally, the court remanded to the district court for the limited purpose of conducting such proceedings as it considers appropriate and making detailed findings and conclusions concerning abstention under Younger and related caselaw as well as the effect of S.B. 6 on the issues in this case.

Commentary: So far, S.B. 6 appears to achieve its bail reform goals as well as serve as a reset for bail litigation. On remand, the district court, in a memorandum opinion, concluded that S.B. 6 moots this case. *Daves v. Dal. Cnty.*, No. 3:18-CV-154-N, 2022 U.S. Dist. LEXIS 118274 (N.C. Tex. July 6, 2022). The new law, passed in the wake of similar litigation challenging bail practices in Harris County, renders the plaintiffs' challenge to policies and practice in Dallas County as they existed prior to S.B. 6 nonjusticiable. The court reasoned that the Texas Legislature enacted S.B. 6 to impose uniform minimum procedural requirements on bail practices throughout the state. Specifically, S.B. 6 amended the Code of Criminal Procedure to require an individualized bail determination within 48 hours of arrest (Article 17.028(a)). Among other factors, the decisionmaker must consider an arrestee's ability to pay money bail (Articles 17.028(a), 17.15(a)(4)). Where a bail schedule or standing order remains in place, it also codified the right of an arrested individual to complete a financial affidavit—either in advance of or concurrent with the initial bail determination proceeding—and procedures to place arrested individuals on notice of this right (Articles 17.028(a), (f), (g-1) and 17.15(a)(4)). And it created a mechanism for obtaining review of an initial bail determination in light of information concerning ability to pay provided in a financial affidavit (Articles 17.028(a), (f), (g-1), (h) and 17.15(a)(4)). These features of S.B. 6 track the Fifth Circuit's now-superseded *ODonnel* panel decision holding that due process requires an individualized determination of bail within 48 hours.

The district court acknowledged the possibility that Dallas County's bail practices suffer from constitutional deficiencies today, but for the foregoing reasons, the court concluded that another case properly presenting objections to post-S.B. 6 practices would be the proper vehicle to pursue such claims. According to the court, "there is more than one way to ensure that a bail system upholds due process rights. Texas has chosen its way, and [p]laintiffs are

not entitled to have this [c]ourt immediately intervene to tinker with the rules that the Legislature has just recently enacted."

A court would likely conclude that a magistrate who issued an arrest warrant executed in another county may, until charges are filed in the appropriate court, modify a bond set by a magistrate from the arresting county pursuant to Article 17.09 of the Code of Criminal Procedure.

Tex. Att'y Gen. Op. No. KP-0417 (2022)

A request for opinion by Martin Placke, Lee County Attorney, asked whether a magistrate who issued an arrest warrant has authority to modify a bail bond set by a magistrate from another county if the accused is transported back to the warrant-issuing county.

According to the Attorney General, yes, based on the language in Article 17.09 of the Code of Criminal Procedure, which addresses subsequent bond proceedings, stating in relevant part that: "whenever, during the course of [a criminal] action, the judge or magistrate in whose court such action is pending 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 case, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested, and require the accused to give another bond in such amount as the judge or magistrate may deem proper" (emphasis in the opinion). Thus, he opined, to modify a bond, the magistrate must be the one "in whose court such action is pending."

The opinion cited case law to determine whether an action is "pending" in a court, stating that it depends on whether the court currently has jurisdiction over the matter. If a magistrate receives a complaint and issues an arrest warrant, that magistrate exercises jurisdiction over the action until formal charges are filed in the appropriate court. Ex parte Clear, 573 S.W.2d 224, 229 (Tex. Crim. App. 1978) (holding that the filing of a felony complaint in a justice court gave that court "[s]ole jurisdiction over th[e] complaint . . . to the exclusion of all other courts" until the complaint was dismissed or formal charges were filed). The Court later reiterated the principle that "to change the bonds already properly set by a magistrate," another judge "must first have jurisdiction over" the case. *Guerra v. Garza*, 987 S.W.2d 593, 593 (Tex. Crim. App. 1999).

By contrast, according to the opinion, when a person is arrested on a warrant issued in another county, the court of the magistrate who sets bail does not necessarily have jurisdiction over the case. He cites Article 15.18(a)(1) of the Code of Criminal Procedure providing that the magistrate before whom an out-of-county arrestee is taken shall "take bail, if allowed by law, and, if without jurisdiction, immediately transmit the bond taken to the court having jurisdiction of the offense" (emphasis in the opinion). Thus, the Attorney General opined that a court would likely conclude that Article 17.09 authorizes a magistrate who issued an arrest warrant executed in another county to modify a bond set by a magistrate from the arresting county until charges are filed in the appropriate court.

The opinion noted that Article 17.09 does not expressly condition the authority to modify bonds on whether the conditions sought are mandatory or discretionary. Because no precise standard exists for determining what constitutes "good and sufficient cause" under Article 17.09, each case must be reviewed on a fact-by-fact basis.

C. Jurisdiction

Civil courts have subject matter jurisdiction over challenges to city ordinances that impose criminal penalties if the challenge is related to preemption and constitutionality. Any city ordinance that imposes a fine for each day that a violation exists threatens irreparable injury to vested property rights.

Titlemax of Tex., Inc. v. City of Austin, 639 S.W.3d 240 (Tex. App.—Houston [1st Dist.] 2021, no pet.)

The City of Austin passed ordinances regulating payday lending. Payday lenders are also regulated by state law, such as in Chapter 393 of the Finance Code. Titlemax, which operates payday lenders in Austin, filed suit against

the city seeking an injunction to stop enforcement of the ordinances, alleging that the ordinances are preempted by Chapter 393, that they fail to require mens rea under Chapter 393, and that the ordinances are unconstitutionally vague and impose excessive fines. The City subsequently filed criminal charges in the Austin Municipal Court under the challenged ordinances. The district court granted the City's motion for summary judgment.

The 1st Court of Appeals overturned the summary judgment. Applying the standard established by the Supreme Court of Texas in *Tex. Propane Gas Ass'n v. City of Hous.*, 622 S.W.3d 791 (Tex. 2021), the court determined that the challenge to the ordinances in this case was essentially civil, and not criminal, under the *Heckman* "essence test." *Titlemax,* 639 S.W.3d at 248-250 (citing *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 146 (Tex. 2012)).

The weightiest factor under that test was the court's finding that a $500 per day fine threatened Titlemax's vested property rights. According to the court, a pending criminal prosecution is a factor to consider but is not outcome determinative. Finally, Titlemax's challenge to the ordinances is based on preemption and unconstitutionality. The court ruled this basis a civil matter even though the ordinances in question imposed criminal penalties.

Under these facts, the district court had subject matter jurisdiction. The court of appeals reversed the summary judgment and remanded for further proceedings.

Commentary: Under the rubric imposed by *Tex. Propane Gas Ass'n*, it is hard to imagine a situation where a challenge to the constitutionality of a statute would be inappropriate in a civil court. Previously, these questions were relegated to criminal appeals and habeas petitions. The future of criminal ordinance challenges appears to be declaratory relief under the theory that the ordinance, as long as it remains undisturbed, acts in terrorem (as a legal threat) and practically accomplishes its goal, even if no prosecution is ever initiated.

D. Pleas

A defendant's failure to understand that his plea would make him ineligible for a professional license did not render his plea involuntary because he assumed the responsibility of apprising himself of the consequence when he decided to represent himself.

Ex parte Pham, 640 S.W.3d 645 (Tex. App.—Houston [14th Dist.] 2022, pet. ref'd)

Pham waived his right to counsel and pleaded no contest. He later learned that he would be unable to reinstate his dentist license as a result of his plea. With the assistance of counsel, he applied for habeas corpus relief and sought to set aside his plea, arguing primarily that his plea had not been knowing and voluntary because he did not understand that he had effectively pleaded guilty and that his plea had rendered him ineligible to practice dentistry. After habeas was granted, the State appealed. (Interestingly, he also argued that he had received ineffective assistance of counsel though he represented himself.) The State argued that Pham failed to prove that his unawareness was anything more than a "self-created legal misunderstanding." The court of appeals agreed. Pham was warned of the dangers and disadvantages of self-representation, and by choosing to accept those risks, he assumed the responsibility of understanding the law for himself, and of applying it correctly. The State also argued that Pham's plea was voluntary, even if Pham had been unaware that he would be unable to practice his chosen profession. Again, the court agreed.

The court presumes that a plea is voluntary so long as the defendant has been admonished of his constitutional rights, if he has knowingly and voluntarily waived those rights, and if he has received his warnings under Article 26.13. The warnings under Article 26.13 cover a variety of subjects and consequences but make no mention of the possibility of becoming ineligible for professional licenses. A trial court is not required to admonish a defendant about every possible consequence of his plea. Rather, a trial court is required to admonish a defendant "only about those direct consequences that are punitive in nature or specifically enunciated in the law." *See Mitschke v. State*, 129 S.W.3d 130, 136 (Tex. Crim. App. 2004). Because the trial court was not required to admonish Pham of this non-punitive consequence, Pham assumed the responsibility of apprising himself of the consequence when he made

the free decision to elect self-representation. Pham did not become aware of the consequence by the time he entered his plea, but this unawareness did not render the plea involuntary. The habeas court, thus, abused its discretion. The court reversed the judgment of the habeas court and rendered judgment denying Pham's application for writ of habeas corpus.

E. Jury Trials

When a jury had disagreements related to witness testimony in a criminal trial, the trial court erred in providing a written transcript of the relevant testimony as opposed to an oral reading, but the error was harmless.

Stredic v. State, No. PD-1035-20, 2022 Tex. Crim. App. LEXIS 313 (Tex. Crim. App. May 11, 2022)

Vincent Stredic was convicted of murdering a prominent Houston rapper known as "Mr. 3-2." At trial during jury deliberations, the jury disagreed as to one of the witness statements and inquired whether they could see the court reporter's notes. The trial court subsequently provided the jury with a transcript of the questioned testimony. The court of appeals reversed Stredic's conviction because Article 36.28 of the Code of Criminal Procedure only authorizes the oral readback of a court reporter's notes to the jury and does not permit a written transcript to be provided. Article 36.38 provides that during criminal trials in courts of record, if the jury disagrees as to the statement of any witness, the relevant portions of the court reporter's notes may be "read to them." If there is no reporter or the notes cannot be read, the court is authorized to recall the witness.

The issue that the Court of Criminal Appeals tackled was whether Article 36.28 contains the only two ways in which earlier testimony can be given to the jury or whether it is simply two options in a non-exhaustive list. The majority, in an opinion written by Judge Keller, concluded that Article 36.28 contains the only two options and prohibits all other methods of providing earlier testimony. The word "may" in Article 36.28 does not confer discretion, but rather describes what is permitted. In other words, Article 36.28 provides an exclusive procedure which trial courts may not deviate from. In this case, the trial court erred in providing a written transcript to the jury. Furthermore, the majority reasoned that providing a transcript "draws more attention" to a finite piece of testimony, which could be tantamount to an impermissible comment on the weight of the evidence. In its harm analysis, the Court concluded that providing the transcript did not influence the jury. The Court was unable to come up with any theory as to why being able to read a transcript of the earlier testimony would have had an injurious effect on the jury's deliberations and verdict. If anything, the majority wrote, the transcript gave the jury the opportunity to review the testimony even more carefully. The Court thus concluded that the error was harmless and affirmed the trial court's judgment.

Judge Walker filed a dissenting opinion in which he disagreed with the majority's use of a harm analysis. He wrote that a "structural" error such as this one should not be evaluated for harm. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). He also pointed out potential issues with providing a written transcript and not an oral reading: How many transcripts were given? Did all jurors get equal time with it? If only one was given, did one juror read it aloud or give his or her summation of it? Judge Walker wrote: "At the heart of the problem—and the reason we cannot assess harm—is the fact that we can never know the answers to these questions…"

A defendant was permitted to withdraw his waiver of a jury trial that was made in anticipation of a negotiated plea that was never finalized.

Sanchez v. State, 630 S.W.3d 88 (Tex. Crim. App. 2021)

Sanchez executed a waiver of his right to a jury trial in anticipation of entering a negotiated guilty plea at a hearing later that day. After executing the waiver, he became hesitant about pleading guilty. At the hearing, Sanchez explained that he signed the waiver but did not know that he would lose his right to have a jury. His attorney assured the judge that he had adequately explained the waiver to Sanchez in Spanish but had not translated the waiver verbatim. The

prosecution gave Sanchez until 5:00 p.m. to accept the offered plea agreement. At the end of the plea hearing, the judge clarified that, if Sanchez declined the offer, the court would proceed to a bench trial based on the waiver. Sanchez did not accept the State's offer. Before the bench trial began, Sanchez formally requested the trial court to allow him to withdraw his waiver of jury trial. The State refused to consent, and the trial court denied Sanchez's motion. The trial court found Sanchez guilty and assessed punishment. Sanchez appealed.

In the court of appeals, Sanchez argued that (1) his jury waiver was invalid, (2) the trial court erred when it denied his request to withdraw his jury waiver, (3) the trial court erred when it denied his motion for new trial, and (4) he received ineffective assistance of counsel. The court of appeals affirmed. The Court of Criminal Appeals granted Sanchez's petition for discretionary review.

In a majority opinion, Judge Yeary, writing for the Court, explained that although the defendant made no formal request to withdraw his jury-trial waiver during his plea hearing, he had "effectively" requested a withdrawal through his actions, which the trial judge noted on the record. Finding a valid jury-trial waiver, the Court assessed the *Hobbs* factors (*Hobbs v. State*, 298 S.W.3d 193 (Tex. Crim. App. 2009)). Under *Hobbs*, to withdraw a valid jury-trial waiver, a defendant must show that granting the request will not: (1) interfere with the orderly administration of the business of the trial court; (2) result in unnecessary delay or inconvenience to witnesses; or (3) prejudice the State. When examining the *Hobbs* factors, the relevant date is the date of the withdrawal, not the date of trial. In this instance, the Court determined that his request did not interfere with court business, delay proceedings, inconvenience witnesses, or prejudice the State. The trial court abused its discretion by refusing to allow Sanchez to withdraw his jury-trial waiver.

Judge Hervey concurred in the result.

Presiding Judge Keller dissented without a written opinion.

Commentary: It cannot be overemphasized that in Texas law, the jury trial occupies a unique, high pedestal. A defendant does not have to make an express or formal request to withdraw a jury-trial waiver to a trial court, so long as the record reflects the request. TMCEC recently published an article by Judge Eric Bayne of Del Rio, which was in part inspired by the Court of Criminal Appeals' decision in *Sanchez*. Check it out. "What Now? When a Defendant Withdraws a Jury Waiver" *The Recorder* (June 2022) at 6.

F. Evidence

The doctrine of chances did not justify the admission of past drug-related misconduct in a drug-possession-with-intent-to-deliver case.

Valadez v. State, No. PD-0574-19, 2022 Tex. Crim. App. LEXIS 217 (Tex. Crim. App. Mar. 30, 2022)

Police stopped a vehicle for a window-tint violation and found 18 pounds of marijuana and a "giant lump" of cocaine, which led to a passenger's conviction for drug possession with intent to deliver. At trial, the State introduced evidence of the defendant's past "connections" with drugs, such as a conviction for possession of 2-4 ounces of marijuana. The trial court admitted the evidence and the court of appeals held that the admission was not an error. The Court of Criminal Appeals granted review to decide whether this evidence was admissible under the doctrine of chances or Texas Rules of Evidence.

The Court concluded that the extraneous drug evidence was inadmissible. Character evidence in criminal cases is generally inadmissible because it may cause the jury to prejudge the defendant and deny him an opportunity to defend against the instant charge. *See Michelson v. United States*, 335 U.S. 469 (1948). Rule 404(b)(1) of the Texas Rules of Evidence prohibits the admission of evidence related to the defendant's past crimes or other misconduct to prove a person's character to show that they acted in accordance with this character in the case being tried. For extraneous misconduct to be admissible, it must "tend to enhance or diminish the probable existence of a fact

of consequence in the case." *Segundo v. State*, 270 S.W.3d 79 (Tex. Crim. App. 2008). Similarly, the doctrine of chances will sometimes permit the admission of extraneous evidence if there is a showing of "highly unusual [events] that are unlikely to repeat themselves inadvertently or by happenstance." *De La Paz v. State*, 279 S.W.3d 336 (Tex. Crim. App. 2009).

The Court concluded that the doctrine of chances did not justify the admission of past misconduct in this case. The defendant's past connections to drugs were generally of the low-level personal possession variety. In this case, distributable amounts of drugs were found in a vehicle with three occupants. None of these past or present situations was unusual. The present case was not a repeat scenario of the defendant's past drug involvement. Thus, any probative value from these past cases was substantially outweighed by the danger of misleading or prejudicing the jury.

Judge Yeary, joined by Judge Slaughter, filed a dissenting opinion finding that the majority should have given more deference to the trial court's assessment under Rule 403 of the Texas Rules of Evidence, which states that a court may exclude relevant evidence if its probative value is substantially outweighed by its risk of unfair prejudice. In the dissenting judges' view, the trial court determined that the extraneous misconduct had probative value to the current case that was not substantially outweighed by its risk of unfair prejudice. It was not the Court's place to substitute their own Rule 403 assessment for the trial court's.

A trial court may admit a computer animation exhibit as a demonstrative exhibit to illustrate otherwise admitted testimony or evidence if the exhibit's proponent shows that it (1) is authenticated, (2) is relevant, and (3) has probative value that is not substantially outweighed by the danger of unfair prejudice.

Pugh v. State, 639 S.W.3d 72 (Tex. Crim. App. 2022)

A dogwalker found the deceased body of William Delorme in a parking lot between two bars. An investigation by officers, an expert in accident reconstruction, and a medical examiner concluded that Delorme died from multiple blunt-force injuries from being hit by a motor vehicle and run over. Further investigation led officers to suspect Allen Pugh and obtain a warrant to seize his truck. Forensic analysis affirmatively tied the truck to Delorme. Allen Pugh was charged with murder.

At trial, the State sought to illustrate the testimony of an accident reconstruction expert along with testimony regarding other forensic evidence with a series of computer animations. The computer animations at issue each show a moving, 3-D diagram of Pugh's truck from three different angles colliding with a human figure, consistent with the testimony of the State's sponsoring accident reconstruction expert.

In his motion to suppress, Pugh not only argued that the exhibits at issue were more prejudicial than probative, but that any staged recreation involving human beings is impossible to duplicate in every minute detail and is therefore inherently more prejudicial than probative.

At the suppression hearing, the State called two certified accident reconstructionists to testify regarding the underlying creation of the exhibits. Pugh offered no challenge to the experts' qualifications, their opinions, or the underlying process used to create the exhibits. At the end of the hearing, the trial court overruled the defense's objections and admitted three computer-animation exhibits (a first-person animation viewing from inside the vehicle was excluded as subjective). The trial court explained that it would give a limiting instruction to the jury regarding the exhibits.

The jury found Pugh guilty of murder. Pugh appealed. The court of appeals held that the trial court did not abuse its discretion in admitting the exhibits because the animations depicted the scene from a distance, showed nothing gruesome, and did not attempt to portray Delorme's actions prior to the truck strike. Further, the court of appeals noted widespread support for the use of computer animation to recreate the scene of an accident "as long as the animation is based on objective data" as the animations were in this case.

On discretionary review, Pugh argued that the court of appeals erred in holding that the trial court was within its discretion when it allowed the State to introduce three animations to the jury which depicted the decedent Delorme as unarmed and stationary, contrary to the evidence. Underlying this, he argued that any staged re-enacted criminal acts or defensive issues involving human beings are too highly prejudicial to ensure a fair trial. Pugh recommended certain conditions to the admission of computer animations featuring human behavior. However, the Court concluded that the traditional rules of evidence provide an adequate foundation for trial courts to evaluate the admissibility of computer-generated evidence.

Judge Newell delivered the opinion for a unanimous court. The Court rejected Pugh's argument that the Court established a per se bar to recreations of human behavior. While the Court had not previously addressed the specific admissibility of computer animations as demonstrative evidence, the Court did not find such animations to be fundamentally different from any other form of demonstrative evidence. They should be admitted given the proper evidentiary predicate for demonstrative exhibits (must be authenticated, relevant, and have probative value that is not substantially outweighed by unfair prejudice).

In analyzing the exhibit's authenticity, the trial court should consider whether the exhibit is a fair and accurate portrayal of what its proponent claims it to be. In determining relevance, the trial court should consider the helpfulness of the exhibit in illustrating testimony. Finally, in analyzing the exhibit's probative value versus danger of unfair prejudice, the trial court should weigh its probative value (i.e., its helpfulness to the jury) with its potential for unfair prejudice, misleading the jury, or confusing the issues.

In this case, the State demonstrated that the exhibits were authenticated, were relevant, and had probative value that was not outweighed by unfair prejudice. The trial court did not abuse its discretion to admit them. The Court affirmed the judgment of the court of appeals.

To challenge the qualifications of a sponsor of business records under Texas Rule of Evidence 803(6)(D), the objecting party need not specifically object that a witness is neither a proper custodian of the business records nor another qualified witness.

Bahena v. State, 634 S.W.3d 923 (Tex. Crim. App. 2021)

Daring Bahena's trial for aggravated robbery the prosecution sought to admit a disc containing recordings of phone calls from jail into evidence. A sergeant with the Harris County Sheriff's Office was called to testify. The sergeant testified that he was a supervisor responsible for gathering and disseminating phone call information from the jail, but he did not personally compile the jail calls at issue in this case. Rather, a deputy under the sergeant's supervision had stored and transferred the calls to a disk. Bahena objected that the Sergeant was not the custodian of records for the phone calls. The trial court overruled the objection. The jury found Bahena guilty. Bahena appealed, arguing that the trial court abused its discretion in overruling his objection that the Sergeant was not the custodian of records for the calls. The court of appeals affirmed. The Court of Criminal Appeals granted Bahena's petition for discretionary review.

In a unanimous decision, Judge McClure explained that a defendant is not required to specifically object to both prongs of Texas Rule of Evidence 803(6)(D) to obtain a merits review of his hearsay objection. To hold otherwise would, improperly place the burden on the objecting party to establish the inadmissibility of the challenged evidence. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement. Texas Rule of Evidence 801(d). Hearsay is inadmissible unless made admissible by statute or rule. Texas Rule of Evidence. 802. Under what is commonly referred to as the business records rule, a record of an act, event, condition, opinion, or diagnosis is admissible hearsay if: (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge; (B) the record was kept in the course of a regularly conducted business activity; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony, affidavit,

or unsworn declaration of the custodian or another qualified witness; and (E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. Texas Rule of Evidence 803(6).

According to the Court, after an objection is made, the proponent of the evidence has the burden to establish its admissibility. Consequently, Bahena did not forfeited his point of error by solely objecting that the sergeant was not a custodian of records. However, the Court held that overruling Bahena's objection was not an abuse of discretion by the trial court. The sergeant was either a custodian of records or another qualified witness who could sponsor the records. Additionally, the sergeant's testimony established the predicate for the business-records exception to the hearsay rule found in Texas Rule of Evidence 803(6). Although Bahena asserted that the recordings lacked trustworthiness, he made no such objection in the trial court and failed to preserve error. Furthermore, there was no showing that the information contained in the records or the circumstances of their preparation indicated a lack of trustworthiness.

Commentary: Stripped to its core, this decision is noteworthy to both the bench and bar. When introducing business records, a proponent does not necessarily have to have a sponsoring witness who is the custodian of the record if the witness is qualified. This requires the proponent to lay a predicate establishing the witness's qualifications and the elements of the business records rule.

The Texas Family Code allows a magistrate to demand the ability to review a juvenile's statement to determine whether it was given voluntarily—but if the magistrate does so, the statement is inadmissible as evidence if the magistrate does not affirmatively find that the statement was voluntary.

State v. Torres, 639 S.W.3d 791 (Tex. App.—Corpus Christi 2021, pet. granted)

Starr County Sheriff's deputies arrested Torres on August 11, 2017 as part of an investigation into the disappearance of a 17-year-old. Jesus Barrera, Jr., a justice of the peace, gave Torres statutory *Miranda* warnings at the sheriff's office at 8:13 p.m., but Torres refused to make a statement. After being taken to the Starr County Juvenile Center, officers brought Torres back to the sheriff's office, and Barrera again administered statutory warnings to Torres at 12:23 a.m. the next day. Torres signed his name acknowledging the warning, indicated that he understood his rights, waived his rights, and agreed to be interviewed by law enforcement officers. Barrera signed warning forms both times he administered them, and both forms contained a check next to the following statement: "OPTIONAL DIRECTIVE: APPLICABLE ONLY TO RECORDED STATEMENTS: Pursuant to Section 51.095(f), Family Code, I am requesting that the officer return you and the recording of your statement to me at the conclusion of the process of questioning so that I can determine whether it was given voluntarily."

Officers then interviewed Torres at the sheriff's office and later at the suspected crime scene. The interviews were recorded on a bodycam. In the interviews, Torres revealed information related to a dead body. Barrera stayed at the sheriff's office until 4:00 a.m., but he did not meet with Torres again or review his recorded statement to determine whether the statement was given voluntarily.

Torres moved to suppress the recorded statement. The trial court granted the motion to suppress. The trial court found that Barrera requested in writing that law enforcement bring Torres back to him at the conclusion so that he could determine, pursuant to Section 1.095(f) of the Family Code, whether Torres voluntarily participated in the interview. The trial court concluded that, if the magistrate requests the child be returned after questioning and it is not done, then the child's statement is inadmissible.

In considering the State's appeal, the court found the sole question to be whether Barrera used the procedure described by Section 51.095(f) of the Family Code. If so, the recordings were properly suppressed. It was undisputed that Barrera made a spoken request on the recording and additionally checked the box on the waiver form indicating that he wished to have Torres and the recording returned to him so that he could evaluate the voluntariness of

Torres's statements. The court found that Barrera waited for several hours overnight to complete the procedure and never withdrew his decision to invoke the procedure, therefore Barrera did use the procedure. He did not make a voluntariness determination, and therefore the statements were inadmissible. The court noted that nothing in the record indicated that the statements were not voluntary, but that the statute must be strictly construed. Acknowledging that this could lead to an unjust result, the court urged the legislature to amend the statute to reflect that a statement be admissible if it is, at any point, determined to be voluntarily made, regardless of whether the magistrate invoked the procedure in Section 51.095(f).

Commentary: Stay tuned. The State's petition for discretionary review has been granted.

G. Jury Instructions

Because there were genuine factual disputes related to the circumstances surrounding a traffic stop for no license plate, the defendant was entitled to an Article 38.23 jury instruction.

Chambers v. State, No. PD-0424-19, 2022 Tex. Crim. App. LEXIS 602 (Tex. Crim. App. Sep. 14, 2022)

A Round Rock police officer stopped a driver for having no license plate, which led to a drug possession conviction. Dashcam footage from the traffic stop definitively revealed that the vehicle had a properly attached paper license plate. The defendant's motion to suppress and request for a jury instruction under Article 38.23 of the Code of Criminal Procedure (which would have instructed the jury to disregard any evidence it believed was illegally obtained) were both denied. The court of appeals affirmed. The Court of Criminal Appeals unanimously reversed the court of appeals and held that the defendant was entitled to an Article 38.23 instruction and remanded to the court of appeals for a harm analysis. *See Chambers v. State*, No. PD-0424-19, 2022 Tex. Crim. App. LEXIS 221 (Tex. Crim. App. Apr. 6, 2022). The State then filed a motion for rehearing.

The Court of Criminal Appeals denied the motion for rehearing but did address the State's argument that the defendant was not entitled to an Article 38.23 instruction because none of the factual disputes the defendant relied on were "material." The Court disagreed with the State in a majority opinion written by Judge Richardson. Specifically, there were genuine factual disputes about whether the paper license plate was illuminated with taillamps as required by Section 547.322 of the Transportation Code. But the State did not cite Section 547.322 until its petition for discretionary review. The State also argued that the license plate was obscured, but this argument was not raised until the motion for rehearing. Finally, the State argued that because the license plate was expired, that could have been the basis for the stop, but the Court pointed out that the officer himself testified that the expired plate had nothing to do with the stop. For these reasons, the Court concluded (for the second time) that the defendant was entitled to an Article 38.23 instruction at trial.

Judge Keller filed a dissenting opinion stating that she would have granted the rehearing because the defendant provided no evidence at trial affirmatively contesting the officer's testimony that he did not see an illuminated light. Therefore, there was no dispute that the officer had reasonable suspicion to initiate a traffic stop.

A Driving While Intoxicated (DWI) defendant was entitled to a necessity jury instruction when she took over for a sick driver and unsuccessfully attempted to move the vehicle off the road because even though she argued at trial that she was not "operating" the vehicle, she effectively admitted to each element of DWI.

Maciel v. State, 631 S.W.3d 720 (Tex. Crim. App. 2021)

A motorist became ill, stopped his car in the middle of the road, and began vomiting. The passenger, who had a blood alcohol content of over .15, climbed over to the driver's seat "to try to move the car out of the middle of the road to the closest parking lot." She was unable, however, to move the car, which led to this testimony: "I couldn't get the

car to move, so I wasn't driving. I don't think I was operating it." An officer with the Texas A&M University Police Department arrived on the scene and conducted field sobriety tests, which the defendant failed, leading to a DWI conviction. On appeal, the defendant argued that she was entitled to a jury instruction on the defense of necessity under Section 9.22 of the Penal Code. The intermediate court of appeals held that the defendant was not entitled to this instruction because her defense was that she was not "operating" the vehicle and thus could not have been guilty of DWI. In other words, the defendant could not argue both that she was not driving and that she was driving out of necessity.

The Court of Criminal Appeals, in a unanimous decision written by Judge McClure, reversed the court of appeals judgment and remanded the case for a harm analysis. While it is true that the "confession-and-avoidance" defense generally requires the defendant to admit to every element of an offense (*Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007)), defendants are still entitled to an instruction on any defensive issue raised at trial (*Celis v. State*, 416 S.W.3d 419, 430 (Tex. Crim. App. 2013)). In determining whether a defense is supported by the evidence, trial courts must view it in the light most favorable to the requested jury instruction. Looking at the trial record, the majority agreed that the defendant indeed argued that she was not "operating" the vehicle, but her testimony did effectively admit to all the elements of DWI as required by *Shaw*. She admitted to being behind the wheel, with the engine running, trying to move the car, which is sufficient for a DWI conviction. *See Denton v. State*, 911 S.W.2d 388 (Tex. Crim. App. 1995). She admitted to being intoxicated. This was enough for the Court to unanimously conclude that the defendant, on balance, satisfied her burden of confession-and-avoidance. Furthermore, because there is no statutory definition of "operate," the Court found it unreasonable to place so much emphasis on this statement by the defendant.

Judge Newell wrote a concurring opinion expressing that he believes the well-established standard of the Court of Criminal Appeals remanding cases for harm analyses is unnecessary. According to Judge Newell, because harm analyses can be effectively conducted independently of the argument of the parties, the Court of Criminal Appeals "should just answer the question when [they] have the chance."

H. Appeals

Regardless whether an objection to a restitution order is to its appropriateness or its amount, the objection must be raised in the trial court in order to be preserved on appeal.

Garcia v. State, No. PD-0025-21, 2022 Tex. Crim. App. LEXIS 129 (Tex. Crim. App. Mar. 2, 2022)

A jury convicted Appellant Daniel Garcia of aggravated sexual assault and ordered him to pay the Attorney General's Office $1,000 in restitution for a sexual assault exam performed on the victim. At judgment, the trial judge stated, "I'll also order that you pay $1,000 to the office of the attorney general as restitution in this case. Is there any legal reason why sentence should not be imposed?" Appellant's counsel responded, "Not at this time, Your Honor." The written judgment included the restitution order. Appellant did not challenge it in a motion for new trial but did raise it on appeal. The court of appeals modified the judgment to remove the restitution and affirm the conviction as modified.

In an 8-1 decision written by Judge Keel, the Court of Criminal Appeals reversed the appellate court and affirmed the trial court's judgment, holding that because the distinction between "factual basis" and "appropriateness" of restitution claims is unclear, the Court should not rely upon that distinction to decide whether challenges to restitution orders must be preserved in trial court. Because there is no authority to hold otherwise, the Court held that challenges to restitution orders, whether on factual basis or appropriateness, must be raised in the trial court in order to be preserved for appeal. Here, Appellant did not object to the restitution ordered though he had the opportunity to do so.

Judge Newell concurred without written opinion.

Judge Yeary dissented, arguing that the Court should instead remand to the court of appeals, which did not address error preservation in this case. Though the State may raise the issue of error preservation for the first time even on discretionary review, addressing the issue where the lower court failed to do so is problematic because the issue is not adequately briefed.

The State could appeal a trial court's order granting post-conviction habeas corpus relief and vacating the conviction in a misdemeanor case because such an order effectively granted a new trial.

State v. Garcia, 638 S.W.3d 679 (Tex. Crim. App. 2022)

In 2007, Leonardo Garcia (Appellee) pleaded guilty to a second misdemeanor theft charge (the first was in 1998) and was sentenced to 10 days in jail with three days credit for time served. In 2019, the U.S. Department of Homeland Security notified him that he was subject to deportation as a result of the two convictions. Appellee filed an application for habeas corpus relief under Article 11.09 of the Code of Criminal Procedure, alleging that his plea in 2007 was involuntary because he was not advised by counsel of the immigration consequences of his plea. After a hearing, the trial court granted the relief, vacated the 2007 conviction, and ordered that Appellee be discharged and released without delay.

The State appealed, arguing that the trial court abused its discretion in granting habeas corpus relief. The court of appeals dismissed the State's appeal for lack of jurisdiction. According to the court of appeals, the State, as the respondent in a habeas action, could not appeal an order "discharging" Appellee. The court of appeals noted that Article 44.01 of the Code of Criminal Procedure specifically authorizes the State to appeal a grant of habeas corpus relief under Article 11.072 of the Code of Criminal Procedure. However, here, Appellee had filed his writ application pursuant to Article 11.09.

On discretionary review, the State argued that Article 44.01 authorizes the State to appeal a trial court order granting a new trial. According to the State, the trial court's order granting habeas corpus relief and vacating the judgment is the functional equivalent of a new trial regardless of whether the trial court also ordered Appellee to be discharged from custody.

In an opinion delivered by Judge Newell, the Court agreed with the State. The Court has held that the State may appeal a trial court's order granting habeas corpus relief when the granting of such relief results in one of the enumerated situations giving rise to the State's ability to appeal under Article 44.01 of the Code of Criminal Procedure. Here, the trial court's order granting habeas corpus relief and vacating Appellee's misdemeanor conviction effectively granted a new trial. Under Article 44.01, the State may appeal a trial court's order granting a new trial.

The court of appeals erred by focusing solely upon the trial court's additional order "discharging" the Appellee from custody, improperly relying on an outdated and inapplicable legal theory. Further, the court erroneously relied upon Article 44.01(k) of the Code of Criminal Procedure to support its conclusion that the State's right to appeal a grant of habeas corpus relief is limited to applications brought under Article 11.072. The addition of this specific provision to Article 44.01 does nothing to otherwise limit the State's ability to appeal under other, pre-existing portions of Article 44.01, such as subsection (a). Rather, Article 44.01(k) was necessary to authorize the State to appeal in situations that are unique to Article 11.072 proceedings. Ultimately, the court of appeals' reading of Article 44.01(k) fails to consider the Court's precedent recognizing that reviewing courts must look to the effect of the trial court's order rather than its label to determine whether the State has a right to appeal.

Therefore, the court of appeals erroneously held that the State lacked the ability to appeal from the trial court's order granting habeas corpus relief. The Court reversed and remanded.

Commentary: Article 44.01 may not be the skeleton key to unlock a court of appeals' jurisdiction to hear the State's appeal. Contrast this case with *State v. Pugh*, No. 02-21-00108-CR, 2022 Tex. App. Lexis 3721 (Tex. App.—Fort

Worth June 2, 2022, no pet.), an unpublished opinion by the 2nd Court of Appeals. The State sought to appeal the county court's reversal of the municipal court's judgment and remand for a new trial. The State argued that the 2nd Court of Appeals had jurisdiction to hear the State's appeal under Article 44.01 of the Code of Criminal Procedure, which entitles the State to appeal certain orders, including orders that grant a new trial or modify a judgment. Despite the State's arguments that Section 30.00027 of the Government Code (Appeals to Court of Appeals) does not prohibit an appeal under Article 44.01, the court found that because the State falls under Section 30.00027(a) (which applies to all "appellants," whether a defendant or the State), the court had no need to look beyond it for a default provision. Thus, the court reasoned that Article 44.01 of the Code of Criminal Procedure was superfluous to the analysis. Under Section 30.00027, an appellant has the right to appeal to the court of appeals if: (1) the fine assessed against the defendant exceeds $100 and the judgment is affirmed by the appellate court; or (2) the sole issue is the constitutionality of the statute or ordinance on which a conviction is based. Here, the county court did not affirm the judgment of the municipal court. It reversed and remanded it. Therefore, the court of appeals lacked jurisdiction to hear the State's appeal.

A court of appeals has jurisdiction to hear an appeal originating from a municipal court of record affirmed by a county court that issues a written opinion or order.

Chambers v. State, No. 14-20-00754-CR, 2022 Tex. App. LEXIS 7652 (Tex. App.—Houston [14th Dist.] Oct. 18, 2022, pet. filed)

Chambers was convicted by a jury in the Houston Municipal Court of the offense of failing to wear a seat belt while operating a commercial vehicle. The judge signed a final judgment of conviction and assessed a $150 fine. The Houston Municipal Court is a court of record. Chambers perfected his appeal to the county criminal court at law. The county court at law, acting as an appellate court, affirmed the municipal court's judgment in a written opinion. Chambers appealed to the court of appeals.

A panel of the court of appeals held that although the record contained a written opinion, it contained no order or judgment; thus, there was no jurisdiction to entertain Chambers' appeal. The appeal was dismissed. Chambers made a motion for reconsideration by the court, en banc. The motion was granted. The opinions and judgment of the panel were withdrawn.

Writing for the majority, Justice Jewell began with the threshold issue of jurisdiction. In response to the dissenting opinions, the majority stated that the dissenting opinions are incorrect in concluding that the court of appeals lacks jurisdiction on the basis that the judge of the county court at law signed no "judgment or other appealable order." To the contrary, the county court at law affirmed the judgment of the municipal court of record and did so in a written opinion overruling each assignment of error. Section 30.000024 of the Government Code (Disposition on Appeal) only requires a written opinion or order, not a written opinion and an order or a written opinion and a judgment (emphasis added). The judge of the county court at law produced a written opinion. The written opinion satisfied the statute. No part of Chapter 30 of the Government Code requires more than a written opinion or an order. While the county court judge did not write the date next to her signature, the opinion from the county court judge is signed and file-stamped, which is sufficient to establish the date of signing.

Turning to the merits of the appeal, the majority conducted an in pari materia analysis, construing the commercial-vehicle, no-seat-belt provision under which Chambers was prosecuted (Federal Motor Carrier Safety Act Regulation 392.16) against Section 545.413 of the Transportation Code (the more general passenger-vehicle provision). For reasons like those in *Garrett v. State*, 424 S.W.3d 624 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd), the court rejected Chambers' argument. The county court at law correctly ruled that the municipal court of record did not err by denying Chambers' motion to quash the complaint or by instructing the jury pursuant to Regulation 392.16.

Unpersuaded by the majority's conclusion regarding jurisdiction, Justice Spain issued a dissenting opinion. "Can an undated document be appealed? I suspect most lawyers would guess 'no.' The en banc court, however, boldly goes on a determination of jurisdictional facts on appeal, adopting a purported 'common sense' approach to what is downplayed as a minor issue—we'll just use the clerk's file-stamp on the undated document and move the merchandise. And maybe it would work in this case if there were a harmless-error standard for subject-matter jurisdiction. … I know of no such authority in the context of establishing a date that determines subject-matter jurisdiction. … This appeal can accurately be described as a jurisdictional mess. I hope the court of criminal appeals cleans it up." Further, according to Justice Spain, the court of appeals regularly dismisses appeals for lack of jurisdiction. The county court could easily sign and date a proper judgment, making this majority opinion's "reasonable indication: jurisdiction test unnecessary."

Justice Hassan similarly dissented, finding that the majority does not address the language in Section 30.00027(b) of the Government Code. Without an order or judgment, a court of appeals lacks jurisdiction and that is why this appeal should be dismissed. Article 44.01(g) of the Code of Criminal Procedure states that "the right of appeal to the Court of Appeals of this state is expressly accorded the defendant for a review of any judgment or order made hereunder and said appeal shall be given preference by the appellate court." Here, there is neither a judgment nor an order.

Commentary: Is this simply a case about a judgment being missing from the appellate record? Or is this a case highlighting a lack of a shared understanding of rules governing appeals from municipal courts beyond the county court under Chapter 30 of the Government Code (Municipal Courts of Record) and their relation to certain provisions in the Texas Rules of Appellate Procedure? Justice Spain, a former Houston Municipal Court judge, opines that it is "unnecessary to reach the issue of statutory construction of the poorly drafted appellate provisions" in Chapter 30 of the Government Code but that it can and should be addressed by the Legislature.

At the heart of this case are two questions: (1) is an appeal to the court of appeals an appeal of the judgment of conviction in the municipal court of record, or of the judgment of the county court as appellate court; and (2) can a court of appeals treat an opinion in the county court as a judgment, final and appealable? The majority falls firmly in the camp that this is a second appeal of the municipal court's judgment, not an appeal of the appellate judgment. The dissenting opinions dance around the first question and answer the second question in the negative.

When a trial court acts as an appellate court, it exercises what is described as incidental appellate jurisdiction. Although the term perfectly describes county courts hearing appeals from municipal courts of record, the concept of incidental appellate jurisdiction is not yet part of Texas law vernacular. If our understanding of the law is gauged only by an abundance of case law, relatively little is understood about appeals from municipal courts of record and county courts exercising incidental appellate jurisdiction. Similarly, as evidenced in this case, the same is true regarding subsequent appeals for county courts (acting as an appellate court) and the court of appeals.

Arguably, this opinion is a byproduct of a dearth of case law. Justice Hasan aptly points out that "[t]his is a relatively undeveloped area of law: there have been fewer than a dozen cases that even address appeals from municipal courts to county courts at law and none address this particular situation." Notably, however, Justice Hasan, in the court's withdrawn opinion reached the conclusion that there was no appellate jurisdiction based on a 25-year-old unpublished decision from the 5th Court of Appeals, *Solon v. State*, No. 05-97-01122-CR, 1997 Tex. App. LEXIS 5158 (Tex. App.—Dallas Sep. 30, 1997, no pet.). In the last quarter of a century, *Solon* had only been cited twice by any appellate court in Texas. Both times it was in the now withdrawn version of *Chambers*. If the court of appeals had not granted rehearing, it was poised to be the only published case law on point in Texas. Notably, there is no longer any reference to *Solon* in either the majority or dissenting opinions.

A petition for habeas relief related to a proceeding in a municipal court of record is inappropriately filed in a court of appeals when there is a county court with jurisdiction over the appeal.

Ex parte Bowens, 572 S.W.3d 322 (Tex. App.—Austin 2019, no pet.)

Gary Bowens was charged with a violation of the City of Austin's prohibition against camping in public areas. Bowens filed a pretrial application for writ of habeas corpus which was denied by the Austin Municipal Court. Bowens appealed to the 3rd Court of Appeals.

Because a habeas proceeding is a separate "criminal action" from the underlying offense, and denial of the petition is a final judgment in that separate action, the denial may be immediately appealed, even if the underlying offense is not yet ripe for appeal. However, a defendant's right to appeal is a statutorily created right, and is therefore limited to the parameters defined in the statute.

Under Article 45.042 of the Code of Criminal Procedure, an appeal from a municipal court shall be heard by the county court except in cases where the county court has no jurisdiction, in which counties such appeals shall be heard by the proper court. Courts of appeals generally do not have jurisdiction to hear appeals from municipal courts of record, with two exceptions (under Section 30.00027 of the Government Code): (1) the fine assessed against the defendant exceeds $100 and the judgment is affirmed by the appellate court (i.e., county court); or (2) the sole issue is the constitutionality of the statute or ordinance on which a conviction is based. Here, because Bowens brought his constitutional challenge prior to trial, there was neither a conviction in the municipal court nor a municipal court judgment affirmed by the county court Therefore, Section 30.00027 did not apply, and the court of appeals lacked jurisdiction over Bowens's appeal.

I. Expunctions

When a defendant has a conviction for an offense and is subsequently accused and acquitted of the same offense, the acquittal does not qualify as the "commission" of an offense for purposes of establishing a "criminal episode" under Article 55.01(c) of the Code of Criminal Procedure.

Ex parte K.T., 645 S.W.3d 198 (Tex. 2022)

To block the expunction of arrest records, under Article 55.01(c) of the Code of Criminal Procedure, the State had to show the "commission" of at least two offenses to establish a criminal episode. The State could not count as a "commission" any "offense" for which respondents had been acquitted. Without the acquitted charges, the State had only one offense for each respondent, which was legally insufficient to form a "criminal episode." Accordingly, K.T. and C.F. were entitled to the expunctions they had sought as a matter of law.

III. Substantive Law

A. Penal Code

The evidence was sufficient to support a conviction for false report to a peace officer even when the responding officer did not believe the report after viewing a video as the statements made to the officer were found to be material by the jury.

McCreary v. State, 649 S.W.3d 902 (Tex. App.—Fort Worth 2022, pet. ref'd)

In October 2019, Joseph and Laura McCreary were going through a divorce. When Joseph showed up to see his son according to visitation orders, Laura opened his car door and began pushing him. He tried to push Laura out

and called 911. Joseph spoke with the dispatcher while Laura yelled statements contradicting Joseph's version of the disturbance. Police responded and questioned him. Joseph gave Officer Brandt a GoPro camera that recorded Joseph's and Laura's interaction. Brandt viewed the video and spoke with Laura, obtaining a written statement. Joseph's statements were consistent with the video, while Laura's statements at the time, as well as subsequent written and oral statements, were inconsistent with the events captured on video. Due to the video, police were able to determine no family violence assault had occurred.

Police issued a warrant for Laura's arrest for the offense of false report to a peace officer under Section 37.08 of the Penal Code. The jury found Laura guilty.

Laura appealed, challenging the sufficiency of the evidence to support the conviction. Under Section 37.08 of the Penal Code, "[a] person commits an offense if, with intent to deceive, he knowingly makes a false statement that is material to a criminal investigation and makes the statement to . . . a peace officer." Laura contested the sufficiency of the evidence proving the materiality of her statements. She asserted her false statements had no effect on the criminal investigation because—after viewing the video—Officer Brandt did not believe her statements, and were therefore not material. While Brandt did testify that he did not believe Joseph assaulted Laura after viewing the video, his testimony does not refute the materiality element. The court stated that the jury was not limited to considering only evidence of the investigation's outcome in reaching a materiality determination, and the jury could have applied any common definition of "material." The court declined to apply a more restrictive definition than the jurors were legally entitled to use. Viewing in the light most favorable to the verdict, the court found the evidence sufficient to support Laura's conviction.

Commentary: In 2021, the Court of Criminal Appeals clarified the definition of "material" for the purposes of the discovery statute in Chapter 39 of the Code of Criminal Procedure. *See Watkins v. State*, 619 S.W.3d 265 (Tex. Crim. App. 2021). As Texas courts make efforts to define this significant word, keep in mind that what is "material" for the purposes of one statute may not be "material" for the purposes of another.

B. Transportation Code

A person only violates Section 545.060(a) of the Transportation Code if the person fails to maintain a single lane in an unsafe manner.

State v. Hardin, No. PD-0799-19, 2022 Tex. Crim. App. LEXIS 757 (Tex. Crim. App. Nov. 2, 2022)

A traffic stop was initiated after one wheel of a vehicle traveling in the middle of three marked lanes drifted into the right lane for a "couple seconds" before returning to the middle lane. There were no other vehicles in the area and the officer did not suspect the driver of violating any other traffic laws. The driver was ultimately charged with fraudulent possession of identifying information and forgery of a government document. She filed a motion to suppress arguing that there was no reasonable suspicion for the warrantless traffic stop that led to the charges. The trial court concluded that there was no reasonable suspicion. The court of appeals agreed.

The Court of Criminal Appeals, in a majority opinion written by Judge Newell, also agreed. The Court's holding hinged on a statutory construction of Section 545.060(a): An operator on a roadway divided into two or more clearly marked lanes for traffic: (1) shall drive as nearly as practical entirely within a single lane; and (2) may not move from the lane unless that movement can be made safely.

The statutory analysis boiled down to whether it is an offense to touch or cross a lane divider if the driver does so safely. The Court held that "a person only violates [Section 545.060(a)] if the person fails to maintain a single marked lane of traffic in an unsafe manner." In reaching this conclusion, the majority analyzed the relationship between Subsections (a)(1) and (a)(2). In addressing Subsection (a)(1), the majority concluded that "[a] plain reading of the statute reveals that a motorist does not commit an offense any time a tire touches or crosses a clearly marked lane.

It is only when the failure to stay 'as nearly as practical' entirely within a single lane becomes unsafe that a motorist violates the statute. Subsection (a)(1) does not require a motorist to stay entirely within a single lane; it only requires that a motorist remain entirely within a single marked [lane] 'as nearly as practical.'" To give effect to Subsection (a)(2), the Court concluded that it builds on Subsection (a)(1) by permitting safe lane departures whether they are momentary or full lane changes. To read the two subsections as independent requirements would render the statute unconstitutionally vague and meaningless.

The majority also disagreed with the Court's plurality opinion in *Leming v. State*, 493 S.W.3d 522 (Tex. Crim. App. 2016). The *Leming* plurality concluded that Section 545.060(a) contained two separate offenses, which led to a conclusion that, under Subsection (a)(1), simply touching the lane divider—whether or not it was done so safely—was sufficient to establish reasonable suspicion and constitute a Rules of the Road offense. Still, the majority in this case would have upheld reasonable suspicion in *Leming* regardless of whether he failed to maintain a single lane because his behavior on the road (driving slowly and swerving erratically) was indicative of Driving While Intoxicated.

Finally, the majority rejected the suggestion that this case will lead to motorists being able to drive in two lanes for extended periods of time as long as it is safe because such behavior could constitute reasonable suspicion for other traffic violations.

Judge Slaughter filed a concurring opinion agreeing with the majority's statutory interpretation but noting that the State could have successfully raised a mistake of law justification to uphold the traffic stop given the unsettled nature of Section 545.060(a) following *Leming*.

Judge Keller, joined by Judge Keel and Judge Yeary, filed a dissenting opinion arguing that Section 545.060(a) creates two independent requirements that drivers must follow. In this case, the driver clearly did not drive as nearly as was practical within a single lane under (a)(1): "She could have rounded the curve while staying entirely within the lane, but she did not. Consequently, she violated the statute and there was a sufficient basis for the stop."

Judge Yeary, joined by Judge Keller and Judge Keel, filed a separate dissenting opinion in which he noted that Section 542.301(a) of the Transportation Code provides that people commit Rules of the Road offenses when they perform prohibited acts or fail to perform required acts. In Judge Yeary's view, Section 545.060(a) contains both a required act and a prohibited act. Accordingly, violating the requirement that one drive as nearly as practical within the lane or the prohibition of departing from one's lane unsafely constitute separate actionable offenses.

Commentary: *Hardin* appears to at long last bring closure to the saga that ensued after the 2016 plurality opinion in *Leming*. Following *Leming*, courts of appeals began issuing their own interpretations of Section 545.060(a), resulting in a period where what was a state Class C misdemeanor offense in one part of Texas was not necessarily one in another part of Texas. *See Munoz v. State*, 649 S.W.3d 813 (Tex. App.—Houston [1st Dist.] 2022, no pet.); *Daniel v. State*, 641 S.W.3d 486 (Tex. App.—Austin 2021, no pet.); *State v. Hardin*, No. 13-18-00244-CR, 2019 Tex. App. LEXIS 6597 (Tex. App.—Corpus Christi-Edinburg August 1, 2019) (mem. op., not designated for publication); and *State v. Bernard*, 503 S.W.3d 685 (Tex. App.—Houston [14th Dist.] 2016), vacated and remanded by *State v. Bernard*, 512 S.W.3d 351 (Tex. Crim. App. 2017), on remand at and decision reached on appeal by *State v. Bernard*, 545 S.W.3d 700 (Tex. App.—Houston [14th Dist.] 2018, no pet.); and *Dugar v. State*, 629 S.W.3d 494 (Tex. App.—Beaumont 2021, pet. ref'd). Still, there are genuine and reasonable disagreements as to the construction of Section 545.060(a).

Does the Texas Legislature agree with the *Hardin* Court or will the case inspire clarifying legislation? We shall see.

FACULTY APPRECIATION

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Tammy Weppelman
Matthew Wright

Register for the 2023 Teen Court Workshop
February 27-28, 2023
Georgetown

Is your court interested in launching or enhancing a Teen Court program? If yes, this workshop is for you! Join TMCEC, the Teen Court Association of Texas, and a faculty comprised of some of the foremost teen court experts in Texas to learn about Teen Court and observe a live Teen Court proceeding at the Georgetown Municipal Court.

Enrollment is limited. This workshop provides the tools necessary to start or enhance a teen court program in your city!

Day 1 will be at the Georgetown Municipal Court and Day 2 will be held at the Sheraton Austin Georgetown Hotel and Conference Center. Judicial education, clerk certification, and CLE will be offered. There is a $100 CLE Reporting Fee for attorneys who want TMCEC to report their CLE credit to the State Bar.

Registration is $150.

All participants attending the entire conference are eligible for one free night of lodging at the Sheraton as well as mileage and meal reimbursement courtesy of TxDOT!

For more information, visit https://www.tmcec.com/mtsi/teen-court/ or email ned@tmcec.com. Register online at https://www.tmcec.com/registration/.

AY 23 TMCEC Academic Schedule

Seminar	Date(s)	City	Venue
South Central Regional Clerks Seminar	January 4-6, 2023	San Antonio	The Menger Hotel
South Central Regional Judges Seminar	January 4-6, 2023	San Antonio	The Menger Hotel
Clerks Level III Assessment Clinic	January 17-20, 2023	Pflugerville	Courtyard by Marriott Austin Pflugerville & Pflugerville Conference Center
Motivational Interviewing	January 27, 2023	Dallas	Hilton Dallas Lincoln Centre
Gulf Coast Regional Clerks Seminar	Feb 1-3, 2023	Galveston	Moody Gardens Hotel
Gulf Coast Regional Judges Seminar	Feb 1-3, 2023	Galveston	Moody Gardens Hotel
Houston Metro Regional Clerks Seminar	Feb 15-17, 2023	Houston	Hyatt Houston West
Houston Metro Regional Judges Seminar	Feb 15-17, 2023	Houston	Hyatt Houston West
Prosecutors Seminar	Feb 22-24, 2023	San Antonio	Holiday Inn Riverwalk
Teen Court Workshop	Feb 27-28, 2023	Georgetown	Sheraton Austin Georgetown Hotel & Conference Center
North Texas Regional Clerks Seminar	March 27-29, 2023	Dallas	Doubletree by Hilton Dallas near The Galleria
North Texas Regional Judges Seminar	March 27-29, 2023	Dallas	Doubletree by Hilton Dallas near The Galleria
Virtual North Texas Regional Clerks Seminar	March 27-29, 2023	Virtual	Online
Virtual North Texas Regional Judges Seminar	March 27-29, 2023	Virtual	Online
Municipal Traffic Safety Initiatives Conference	April 3-5, 2023	Austin	Austin Southpark Hotel
Panhandle Regional Clerks Seminar	TBD	TBD	TBD
Panhandle Regional Judges Seminar	TBD	TBD	TBD
Mental Health Motivational Interviewing	TBD	Conroe	Homewood Suites
South Texas Regional Clerks Seminar	May 2-4, 2023	Corpus Christi	Omni Corpus Christi Hotel
South Texas Regional Judges Seminar	May 2-4, 2023	Corpus Christi	Omni Corpus Christi Hotel
Court Security Conference	May 17-18, 2023	Austin	Austin Marriott South
Juvenile Case Managers Conference	June 7-9, 2023	Pflugerville	Courtyard by Marriott Austin Pflugerville & Pflugerville Conference Center
Court Administrators Seminar	June 20-22, 2023	Dallas	Hilton Dallas Lincoln Centre
Prosecutors Seminar	June 20-22, 2023	Dallas	Hilton Dallas Lincoln Centre
West Texas Regional Clerks Seminar	TBD	El Paso	TBD
West Texas Regional Judges Seminar	TBD	El Paso	TBD
New Clerks Seminar	July 10-14, 2023	Austin	Austin Southpark Hotel
New Judges Seminar	July 10-14, 2023	Austin	Austin Southpark Hotel
Impaired Driving Symposium	July 31-Aug 1, 2023	Odessa	Odessa Marriot Hotel & Conference Center
Legislative Update	August 8, 2023	Lubbock	Overton Hotel
Legislative Update	TBD	DFW	TBD
Legislative Update	August 18, 2023	Houston	Omni Houston Hotel
Legislative Update	August 22, 2023	Austin	Austin Southpark Hotel

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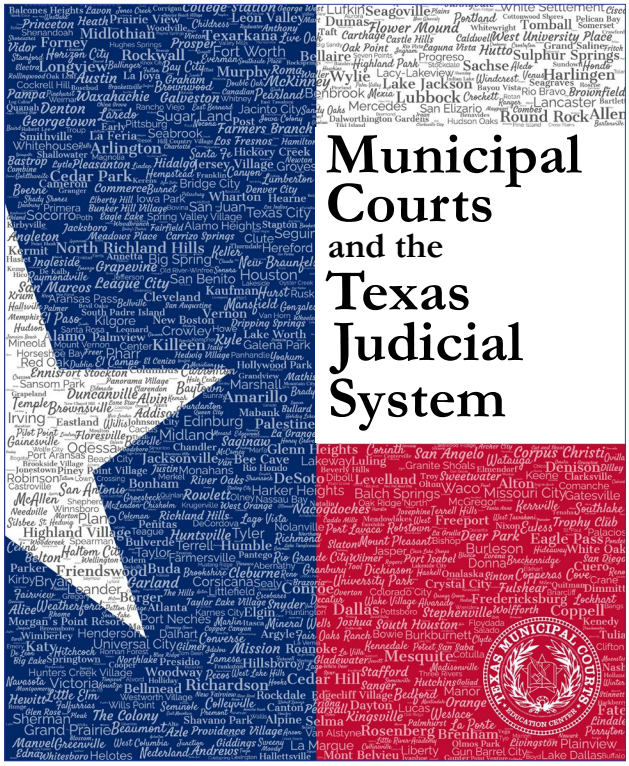
TMCEC

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.



Look for our Newest eBook Release in January 2023

Municipal Courts and the Texas Judicial System

Derived from the TMCEC Municipal Judges Book, this new book has been oriented for the broader municipal court community. The content has been thoroughly updated through the 87th Session of the Texas Legislature and features a new chapter on Trials and Appeals.

This searchable eBook will be available on multiple platforms, including Bookbaby, Amazon, and Apple Books. TMCEC will announce the launch by eblast and provide details in the TMCEC online store.