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CASE LAW AND ATTORNEY GENERAL OPINION UPDATE

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The following decisions and opinions were issued between the dates of October 1, 2019 and September 30, 2020.

Acknowledgments: Thanks to Judge David Newell, Lynda Hercules Charleson, Regan Metteauer, and Patty Thamez for their contributions to this update.

I. Constitutional Issues

A. Separation of Powers

Regardless of where funds are directed, reimbursement-based court costs do not violate Separation of Powers. Despite a lack of allocation instructions, the summoning witness/mileage fee reimburses an expense directly incurred in the prosecution of a case and thus is constitutional.

Allen v. State, No. PD-1042-18, 2019 Tex. Crim. App. LEXIS 1172 (Tex. Crim. App. Nov. 20, 2019)

Case Law *continued on pg. 8*

Inside This Issue

From the Executive Director 2
AY 21 Winter Academic Schedule.................... 3
Case Law Update Table of Contents................ 4
Traffic Safety Awards 2021 34
Clerks' Corner..35
TMCEC Online Store 36

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Special thanks to Avani Bhansali and Patty Thamez for design and layout of this edition of *The Recorder*.

FROM THE EXECUTIVE DIRECTOR

Ryan Kellus Turner

The theme of this issue is acknowledgments.

Case Law Matters

The TMCEC Case Law and Attorney General Opinion Update, featured in this issue, is an annual acknowledgment that the law does not just live in books and that interpreting the law is an endeavor which begins, but does not end, in trial courts. Our system of laws is interconnected.

The Pandemic Persists (And So Must We)

People are also interconnected. Like many of you, I have struggled with pandemic fatigue. Many of us are having to self-acknowledge that this pandemic is lasting a lot longer than we imagined. Back in April (which strangely seems more like eight years ago than eight months ago), I wrote that people will struggle between "what was," "what is," and "what shall be" and that the challenges will occur in our professional and personal lives.

COVID-19 cases are again surging in Texas at record rates. A second surge coupled with pandemic fatigue is potentially a dangerous combination. The danger is statewide but it is particularly pronounced in rural Texas where limited hospital capacity and staffing threatens rural access to emergency medical care.

Regardless of where you live in Texas, we are all in this together. Though we miss connecting with you in-person, our distance learning in AY 21 is off to a great start. Virtual Regional Judges and Clerks Seminars for East Texas kicked off in October and Central Texas in November, along with the Low Volume Seminar. Each of us can do our part to help contain and control the spread of the coronavirus. With increased awareness of pandemic fatigue and compliance with the recommendations of health officials together we can mitigate the spread of the virus in our communities. Each of us unwittingly leads by example.

Commendations for Commitment to Professional Education

Speaking of leading by example, it is my privilege to acknowledge and commend five individuals who demonstrated exceptional commitment to continuing education in AY 20. The following individuals earned the most continuing education hours from TMCEC amongst their respective professional peer groups. (Among judges, there was a tie.) Congratulations to Judge Martina Mendoza, City of Pecos; Judge Rose Zamora, City of New Braunfels; Marilee Stanley, Chief Court Clerk, City of Rowlett; Mary Sampson, Juvenile Case Manager, City of Port Arthur; and Ashley McSwain of the law firm Pace & McSwain who prosecutes in a number of cities, including Balch Springs, Ennis, Willow Park, Saint Jo, and Nocona.

Adios, Yahoo Groups

Now for a very different kind of acknowledgment: Yahoo Groups is shutting down on December 15, 2020. Nearly 1,150 TMCEC constituents use the TMCEC Listserv hosted on Yahoo Groups. Many of you have shared your concern about the loss of the listservs. (I too am a fan.) Rest assured that TMCEC is hard at work laying the foundation for a new and improved listserv. When the details are finalized, I look forward to sharing them with you (just not via Yahoo Groups).

The Recorder: A Retrospective

A final acknowledgment. AY 21 also marks the 30th anniversary of *The Recorder*. The first issue, called the *Municipal Court Reporter*, was published in January 1991. The issue you are reading now is the first of TMCEC's 30th volume. We will be commemorating the anniversary in all AY 21 issues of the journal. Avani Bhansali, TMCEC Administrative Specialist & Graphic Designer, created a special commemorative masthead for the 30th volume. If you would like to join the celebration, please send your reflections, favorite articles, comments, and stories about *The Recorder* through the last 30 years to Regan Metteauer (metteauer@tmcec.com).

REGISTRATION IS NOW OPEN (To register, go to register.tmcec.com)

DISTANCE LEARNING

(without the drive)

The AY 2021 Winter TMCEC Academic Schedule (January 1 - February 28, 2021) is now available on the TMCEC home page (tmcec.com). TMCEC will continue conducting its progrms virtually untl at least February 28, 2021. To promote certainty during uncertain times, scheduled events that cannot be held in-person because of COVID-19 will be offered as virtual seminars on the same scheduled dates. Visit our schedule of events for the most up-to-date information. **To register for events, go to register.tmcec.com.** To register for the Level III Assessment Clinic, contact Lily Pebworth (lily@tmcec.com) for details.

VIRTUAL REGIONAL SEMINARS
(featuring South-Central Texas)

CLERKS | January 4-6, 2021

JUDGES | January 4-6, 2021

VIRTUAL REGIONAL SEMINARS
(featuring Gulf Coast)

CLERKS | January 10-12, 2021

JUDGES | February 7-9, 2021

VIRTUAL REGIONAL SEMINARS
(featuring Houston Metro)

CLERKS | February 22-24, 2021

JUDGES | February 22-24, 2021

VIRTUAL LEVEL III ASSESSMENT CLINIC
CLERKS | January 25-28, 2021

VIRTUAL LOW VOLUME COURT SEMINAR
January 27-29, 2021

Last Time in AY21!

Table of Contents:

I. Constitutional Issues 1

A. Separation of Powers 1

» Regardless of where funds are directed, reimbursement-based court costs do not violate Separation of Powers. Despite a lack of allocation instructions, the summoning witness/mileage fee reimburses an expense directly incurred in the prosecution of a case and thus is constitutional. 1

• *Allen v. State*, No. PD-1042-18, 2019 Tex. Crim. App. LEXIS 1172 (Tex. Crim. App. Nov. 20, 2019) 1

» The Texas Constitution's provision for Separation of Powers does not apply to municipalities. 8

• *Tex. Att'y Gen. Op. No. KP-0334 (2020)* 8

B. First Amendment 9

» A sign ordinance regulating content-based non-commercial speech to "protect the aesthetic value of the City and to protect public safety" does not satisfy strict scrutiny. 9

• *Reagan Nat'l Advert. of Austin v. City of Austin*, 972 F.3d 696 (5th Cir. 2020) 9

» A city ordinance banning non-homestead short-term rentals may be unconstitutional if it acts as a retroactive uncompensated taking or as a restriction of the First Amendment Assembly Clause if it is not narrowly tailored to serve a compelling government interest. 10

• *Zaatari v. City of Austin*, No. 03-17-00812-CV, 2019 Tex. App. LEXIS 10290 (Tex. App.—Austin Nov. 27, 2019, pet. filed) 10

C. Fourth Amendment 12

» Blood Warrants 12

» Even though a blood warrant did not expressly authorize chemical testing of blood in a Driving While Intoxicated (DWI) case, such testing and admission of the test results as evidence did not violate the Fourth Amendment. 12

• *Crider v. State*, No. PD-1070-19, 2020 LEXIS 612 (Tex. Crim. App. Sep. 16, 2020) 12

» Consent 13

» There was valid consent to search a vehicle when a defendant moved toward the rear of his vehicle, but did not say anything verbally, after an officer asked him if he could search the vehicle, and if so, to move toward the rear of the vehicle. 13

• *Sullivan v. State*, No. 10-18-00231-CR, 2020 Tex. App. LEXIS 2266 (Tex. App.—Waco Mar. 18, 2020, pet. ref'd) 13

» Cell Phones 13

» When a defendant fled from police and left his cell phone in his vehicle, he had no standing to challenge the reasonableness of searching the cell phone's contents because he voluntarily abandoned the phone, it was not password protected, and the abandonment was not a result of police misconduct. 13

• *Wiltz v. State*, 595 S.W.3d 930 (Tex. App—Houston [14th Dist.] 2020, no pet.) 13

» A defendant had no expectation of privacy for the contents of his cell phone when it was found by an off-duty peace officer in a grocery store and illegal pornographic material was found when the officer searched its contents trying to ascertain the phone's owner. 13

• *Oseguera-Viera v. State*, 592 S.W.3d 960 (Tex. App.—Houston [1st Dist.] 2019) 13

» Reasonable Suspicion 13

» The Fourth Amendment was not violated when an officer initiated an investigative traffic stop after running a vehicle's plates and learning that the registered owner had a revoked driver's license even though the officer had no direct knowledge that the registered owner was the person operating the vehicle. 13

• *Kansas v. Glover*, 140 S. Ct. 1183 (2020) 13

» There was no reasonable suspicion for a traffic stop when a driver that had the right-of-way stopped in an intersection to let a police cruiser proceed when the police cruiser did not come to a complete stop until after passing a stop sign. 14

• *State v. Colby*, 604 S.W.3d 232 (Tex. App.—Austin 2020, no pet.) 14

» Search Incident to Arrest 15

» A warrantless search of an individual's roller bag at an airport was justified as a search incident to arrest even though he was handcuffed, had no way to access the bag, and was moved to a secure location at the airport. 15
• *Price v. State*, No. PD-0722-19, 2020 Tex. Crim. App. LEXIS 709 (Tex. Crim. App. Sep. 23, 2020). 15
» Third-Party Doctrine 15
» In light of *Carpenter*, the third-party doctrine does not extend to cell site location information (CSLI) under Article I, Section 9 of the Texas Constitution. 15
• *Holder v. State*, 595 S.W.3d 691 (Tex. Crim. App. 2020) 15
» Warrant Sufficiency 16
» An illegible signature and lack of the magistrate's printed name on a warrant does not, on its own, render the warrant facially invalid. 16
• *State v. Arellano*, 600 S.W.3d 53 (Tex. Crim. App. 2020). 16
» For the purposes of search warrants under Article 18.01 of the Code of Criminal Procedure, an affiant must swear an oath before a magistrate or other qualified officer to produce a sworn affidavit. 17
• *State v. Hodges*, 595 S.W.3d 303 (Tex. App.—Amarillo 2020, pet. ref'd) 17
D. Sixth Amendment 17
» There is no right to hybrid representation at trial under Article I, Section 10 of the Texas Constitution. 17
• *Tracy v. State*, 597 S.W.3d 502 (Tex. Crim. App. 2020) 17
» The open court doctrine was not violated when a trial court denied spectators entry into the courtroom where all the seats were taken and the largest courtroom in the facility was used. The right to a public trial is forfeited if there is no objection and subsequent ruling on the objection at trial. 18
• *Dixon v. State*, 595 S.W.3d 216 (Tex. Crim. App. 2020). 18
II. Substantive Law 19
» Evidence of the defendant's Post-Traumatic Stress Disorder (PTSD) was irrelevant to his statutory defense of duress because the statute requires the determination of compulsion be weighed under the objective "person of reasonable firmness" standard. 19
• *Moreno v. State*, No. PD-1044-19, 2020 Tex. Crim. App. LEXIS 412 (Tex. Crim. App. June 17, 2020, no pet.) 19
» When a judge revokes a defendant's bond and remands the defendant to jail but allows the defendant to turn himself into the jail later the same day, the defendant is "released from custody" and his subsequent failure to appear at the jail constitutes the Penal Code offense of Bail Jumping and Failure to Appear. 19
• *Timmins v. State*, 601 S.W.3d 345 (Tex. Crim. App. 2020) 19
» License suspensions under Section 12.01(c) of the Penal Code are civil penalties, not sentences. 21
• *Burg v. State*, 592 S.W.3d 444 (Tex. Crim. App. 2020). 21
» A violation of the quota prohibition under Section 720.002 of the Transportation Code constituted an abuse of official capacity under Section 39.02(b) of the Penal Code (Abuse of Official Capacity). 22
• *Becker-Ross v. State*, 595 S.W.3d 261 (Tex. App.—Texarkana 2020, no pet.) 22
» A defendant could only be convicted of one failure-to-appear charge for his failure to appear at a single court setting on a two-count indictment for which he had been released from confinement on two separate bonds. 23
• *Kuykendall v. State*, 592 S.W.3d 967 (Tex. App.—Houston [1st Dist.] 2019, pet. granted) 23
III. Procedural Law 24
A. Bail 24
» Judges do not have standing to challenge the Governor's Executive Order GA-13, which suspends the authority of the judiciary to release certain defendants on personal bond, in their capacity as judges. 24

- *In re Abbott*, No. 20-0291, 2020 Tex. LEXIS 351, at *4 (Tex. Apr. 23, 2020) 24

» Under Articles 23.01 (Definition of a "Capias") and 23.04 (In Misdemeanor Cases) of the Code of Criminal Procedure, the judge of a court that obtains jurisdiction of a misdemeanor case upon the filing of an information or complaint may issue a capias after commitment or bail and before trial. 25

- *Tex. Att'y Gen. Op. No. KP-0321 (2020)* 25

B. Prosecutors/Attorneys Pro Tem 25

» Attorneys pro tem and special prosecutors are two distinguishable roles comprising different authorities and responsibilities. 25

- *Tex. Att'y Gen. Op. No. KP-0273 (2019)* 25

C. Charging Instruments 26

» An information charging theft of property can survive a motion to quash when it does not list every item alleged to be stolen so long as other details (types of items, value, location, and date) are sufficient to give the defendant notice to prepare a defense. 26

- *Rodgers v. State*, No. 01-19-00181-CR, 2020 Tex. App. LEXIS 6799 (Tex. App.—Houston [1st Dist.] Aug. 25, 2020, no pet.) 26

» Sworn complaints authorizing seizure of dangerous dogs under Section 822.002 of the Health & Safety Code do not require personal knowledge; a finding that an attack is unprovoked is not a required element for dog destruction under Section 822.003; the 10-day hearing deadline under Section 822.003 does not limit courts' inherent authority to control their dockets. 26

- *Tex. Att'y Gen. Op. No. KP-0284 (2020)* 26

D. Jury Selection 27

» Prosecutors and judges do not have a duty to ***sua sponte*** disclose a familial relationship to a potential jury member during jury selection. 27

- *Hicks v. State*, No. 01-18-00603-CR, 2020 Tex. App. LEXIS 2652 (Tex. App.—Houston [1st Dist.] Mar. 31, 2020, pet. ref'd) 27

E. Jury Charge 27

» A jury charge stating that speed in excess of the posted speed limit is ***prima facie*** evidence that a defendant's speed was not reasonable and prudent does not create a presumption of guilt, shift any burden of proof to the defendant, or decrease the State's burden to prove guilt beyond a reasonable doubt. 27

- *Dahl v. State*, No. 01-19-00864-CR, Tex. App. 2020 LEXIS 5204 (Tex. App.—Houston [1st Dist.] Jul. 14, 2020, no pet.) 27

F. Jury Deliberation 28

» Article 36.28 of the Code of Criminal Procedure does not allow a written transcript of disputed testimony to be provided to the jury during deliberations. 28

- *Stredic v. State*, No. 14-18-00162-CR, 2020 Tex. App. LEXIS 6376 (Tex. App.—Houston [14th Dist.] Aug. 13, 2020, no pet.) 28

» The denial of a defendant's motion to quash the jury panel was proper where he was not provided access to the jury questionnaires until the morning of the trial, but the State received them the day before. 28

- *Sullivan v. State*, No. 10-18-00231-CR, 2020, Tex. App. LEXIS 2266 (Tex. App.—Waco Mar. 18, 2020, pet. ref'd) 28

G. Sentencing 28

» When defendants in municipal or justice courts invoke their right to a jury trial for a Class C misdemeanor, a judge or justice has no ministerial duty to deny defendants the opportunity to elect the court to determine the punishment in the event of a jury verdict of guilty. 28

- *In re Yeager*, 601 S.W.3d 356 (Tex. Crim. App. 2020) 28

» Trial courts have a ministerial duty to sign and commit oral judgments and orders to writing. 30

- *In re Pete*, No. 14-20-00456-CR, 2020 Tex. App. LEXIS 6385 (Tex. App—Houston [14th Dist.] Aug. 13, 2020, no pet.) 30

» After finding a defendant indigent, a court cannot order him to pay attorney fees absent proof of a material change in circumstances. 30

- *Junell v. State*, No. 06-19-00146-CR, 2020 Tex. App. LEXIS 4912 (Tex. App.—Texarkana Jul. 2, 2020, no pet.) 30

H. Appeals 30

» Rule 34.6(f) of the Texas Rules of Appellate Procedure offers a remedy when a record is created and later lost or destroyed, but no remedy when a record was never created in the first place. 30

- *International Fidelity Insurance Co. v. State*, 586 S.W.3d 9 (Tex. Crim. App. 2019) 30

I. Expunctions 31

» Expunction procedures, while located in the Code of Criminal Procedure, are civil matters. Because they are a statutory privilege and not a constitutional or common law right, courts must enforce the statutory requirements as written and may not impose equitable or practical exceptions that the Legislature did not enact. 31

- *Ex Parte E.H.*, 602 S.W.3d 486 (Tex. 2020) 31

IV. Court Administration 32

A. COVID-19 32

» Commissioner's courts and county judges may require face coverings in courtrooms, courthouses, and other county buildings. 32

- *Tex. Att'y Gen. Op. No. KP-0322 (2020)* 32

B. Public Information 32

» A justice of the peace can omit identifying information regarding a child sex offense victim from a probable cause affidavit. 32

- *Tex. Att'y Gen. Op. No. KP-0275 (2019)* 32

C. Court Reporters 33

- *Tex. Att'y Gen. Op. KP-0318 (2020)* 33

V. Local Government 33

A. Public Information Act 33

» Deferred prosecution agreements are excepted from required public disclosure under the Public Information Act's law-enforcement exception in Section 552.108(a)(1) & (2) of the Government Code. 33

- *Paxton v. Escamilla*, 590 S.W.3d 617 (Tex. App.—Austin 2019, pet. denied) 33

B. Firearm Regulation 33

» Municipal or county officials may not restrict the sale of firearms by deeming them a non-essential business through an emergency declaration. 33

- *Tex. Att'y Gen. Op. No. KP-0296 (2020)* 33

C. Dangerous Dog Ordinances 33

» Municipal dangerous dog ordinances that cannot be harmonized with Chapter 822 of the Health & Safety Code are likely to be deemed invalid. 33

- *Tex. Att'y Gen. Op. No. KP-0274 (2019)* 33

Important: TMCEC Listservs Moving to New Platform

On December 15, 2020, Yahoo Groups, the current platform used for TMCEC listservs, will permanently shut down. TMCEC is working to select a new platform that maintains the same functionality you are accustomed to using. For those who already subscribe to a TMCEC listserv, your subscription will automatically be transferred to the new platform. Look for an eblast from TMCEC before December 15 with more details.

Allen was convicted of aggravated robbery with a deadly weapon and ordered to pay court costs, including a $200 "summoning witness/mileage" fee under Articles 102.011(a)(3) and (b) of the Code of Criminal Procedure.

On appeal, Allen complained that the funds collected through the summoning witness/mileage fee were not statutorily directed toward a designated fund to be used for a criminal justice purpose. Instead, the proceeds were deposited into the county's general revenue fund. Allen argued that, following the Court's prior court costs decisions, this lack of allocation for a criminal justice purpose rendered the fee an unconstitutional tax collected by the judiciary. The court of appeals concluded that the summoning witness/mileage fee did not violate separation of powers principles and the Court of Criminal Appeals agreed.

Judge Slaughter, writing for the majority, reasoned that the law has long recognized reimbursement-based court costs as constitutionally permissible. The witness/mileage fee is designed to reimburse law enforcement for actual costs incurred in the prosecution of a particular case. So, although the statute did not allocate the fee directly to a "criminal justice purpose," the fee was nevertheless permissible.

Judge Yeary filed a concurring opinion indicating that the Court's precedent regarding court costs should be revisited, but *Allen* was not the case through which to do so. However, there are other cases before the Court that could "fit the bill."

Judge Keel filed a concurring and dissenting opinion. She agreed with the result but believed that the Court should have used *Allen* to address the other 17 cases pending before the Court relating to court costs by overruling *Peraza* and *Salinas* (see, commentary below).

Judge Newell concurred without a written opinion.

Commentary: Continuing the plotline featured in the April 2020 issue of *The Recorder* (see, Robby Chapman, *The Consolidation of Court Costs and Reimagining of Fines in Texas: Five Important Considerations*), the Court of Criminal Appeals, like the Texas Legislature in 2019, appears to be plotting a possible course correction when it comes to court cost challenges.

Peraza v. State, 467 S.W.3d 508 (Tex. Crim. App. 2015) and *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017), at least for now, remain the Court's touchstones for the constitutionality of court costs. Both examine how a fee is allocated across various funds to determine whether it possesses a legitimate criminal justice purpose and thus does not violate separation of powers. In *Allen*, the Court draws a stark contrast between court costs that (1) reimburse criminal justice expenses and (2) are expended to offset future criminal justice costs.

Allen examines the pre-2019 versions of Articles 102.011(a)(3) and (b). The Legislature amended these articles in the 2019 session to designate the summoning witness/mileage fee as a "reimbursement" fee. This was generally considered a non-substantive change but nevertheless reflects the importance of a fee's reimbursement qualities: that they can save a fee from a separation of powers challenge.

While the majority opinion distinguishes reimbursement costs from other costs, Judge Yeary's concurring opinion and Judge Keel's concurring and dissenting opinion are likely to garnish a lot of attention from people interested in the criminal appellate litigation of court costs. Judge Yeary is ready to revisit *Peraza* and *Salinas*. Judge Keel is ready to overrule *Peraza* and *Salinas* and put an end to "noxious court cost litigation without offending stare decisis."

The Texas Constitution's provision for Separation of Powers does not apply to municipalities.

Tex. Att'y Gen. Op. No. KP-0334 (2020)

An opinion was requested asking whether Article II, Section 1 of the Texas Constitution applies to municipal governments. Article II, Section 1 relates to separation of powers and provides that the powers of the Government of the State of Texas are to be divided into three distinct branches: Executive, Judicial, and Legislative. The request further queried whether Texas law restricts management of municipal personnel to the executive branch of a Type-A general-law municipality.

Attorney General Paxton cited *City of Fort Worth v. Zimlich*, 29 S.W.3d 62 (Tex. 2000), which stated that Article II, Section 1 only applied to *state* (not local) branches of government. Paxton also cited *City of El Paso v. Arditti*, 378 S.W. 661 (Tex. App—El Paso 2020, no pet.), which held that merging the city clerk and municipal court clerk position did not violate state separation of powers. Accordingly, Paxton opined that the Texas Constitution's provision for separation of powers does not apply to municipal governments.

As to the question related to the management of municipal personnel, a municipality's organizational structure will typically be dictated by local rules or ordinances. Because the Texas Constitution's provision for separation of powers does not apply to municipalities, it "does not control how [a city's] ordinances allocate management authority."

Commentary: The request for this opinion stems from a dispute regarding employment personnel matters. The mayor alleges the city council improperly granted itself the authority to hear appeals of disciplinary action and workplace grievances. Separation of powers vests powers and authorities to multiple branches of government. Its hallmark is "checks and balances," where each branch has an ability to "check" the other branches so that the branches remain balanced and a hierarchy is not formed. A common example is an executive branch's veto power over a legislature. As illustrated in this opinion, and the cases it cites, the structure of Texas municipal government is void of this hallmark.

There is a clear but not always obvious distinction between separation of powers and judicial independence. Judicial independence connotes the judiciary's ability to render decisions free from political pressures or personal interest. Therefore, it is possible to adhere to the principles of judicial independence in a municipality even though there is no separation of powers in that municipality.

B. First Amendment

A sign ordinance regulating content-based non-commercial speech to "protect the aesthetic value of the City and to protect public safety" does not satisfy strict scrutiny.

Reagan Nat'l Advert. of Austin v. City of Austin, 972 F.3d 696 (5th Cir. 2020)

In 2017, Reagan National Advertising of Austin (Reagan) submitted permit applications to digitize its existing off-premises sign structures. Chapter 25-10 of the Austin Code of Ordinances defined an "off-premise[s] sign" as "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." At the time, the Code did not define "on-premise" sign, but it did assign different rules for on- vs. off-premises signage. Relevant here, on-premises non-digital signs could be digitized, but off-premises non-digital signs could not. The City of Austin denied Reagan's permit applications on this basis. Reagan sued, arguing that the Code's distinction between on-premises and off-premises signs violated the First Amendment as a content-based restriction. The City claimed that this was not a regulation of a sign's content; rather, it was a time, place, or manner restriction based on the location of the signs.

The federal trial court held that the Code was content neutral and satisfied intermediate scrutiny. On appeal, the Fifth Circuit Court of Appeals identified that its First Amendment jurisprudence needed to be updated. A recent sea change had occurred in content-based signage jurisprudence. In 2015, the Supreme Court decided *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), which clarified the law surrounding content-based speech regulations. The Fifth Circuit Court of Appeals used *Reagan* as an opportunity to take inventory of its pre-*Reed* cases and

adjust accordingly.

In *Reed,* the U.S. Supreme Court explained that a law is content based when it "target[s] speech based on its communicative content," or in other words, when it "applies to particular speech because of the topic discussed or the idea or message expressed." To determine whether a law is content based, *Reed* states that a court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." A distinction "defining regulated speech by its function or purpose" may be drawn based on the message the speaker conveys and thus would be facially content based and subject to strict scrutiny.

Here, in order to determine whether a sign is on-premises or off-premises (and which Code conditions apply), one must read the sign and ask: does it advertise "a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site?" In this way, the applicable limitations depend in part on the content of the message. Put another way, a reader must ask: who is the speaker and what is the speaker saying? Under *Reed*, these are both hallmarks of a content-based inquiry. The fact that the reader must also ask where the sign is located—a content-neutral inquiry—does not save the regulation. As such, the Fifth Circuit determined that the Code provision was content based.

Because the regulation is content based, it was subject to strict scrutiny. The City relied on the stated purpose of Chapter 25-10—to "protect the aesthetic value of the City and to protect public safety"—to justify the ordinance. Following *Reed*, the Court held that these justifications did not meet strict scrutiny.

Commentary: This opinion shows the extent of the sea change produced by *Reed.* The approach in *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, sign ordinances that once satisfied intermediate scrutiny may now be in peril. The *Reed* majority itself acknowledged that "laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'"

A city ordinance banning non-homestead short-term rentals may be unconstitutional if it acts as a retroactive uncompensated taking or as a restriction of the First Amendment Assembly Clause if it is not narrowly tailored to serve a compelling government interest.

Zaatari v. City of Austin, No. 03-17-00812-CV, 2019 Tex. App. LEXIS 10290 (Tex. App.—Austin Nov. 27, 2019, pet. filed) .

In 2012, the City of Austin passed an ordinance requiring property owners to satisfy eligibility criteria and obtain a license to rent their property on a short-term basis. In 2016, a follow-up ordinance immediately suspended the licensing of any new non-homestead short-term rentals and established April 1, 2022 as the termination date for all non-homestead rentals. Additionally, the 2016 ordinance imposed several restrictions on properties operated as short-term rentals, including prohibitions on the size of groups, time of occupancy, and types of activities.

An assemblage of homeowners sued the City seeking declaratory and injunctive relief arguing that the ordinance both facially and as applied violated constitutional rights of privacy, freedom of assembly and association, due course of law, equal protection, and freedom from unwarranted searches. The State of Texas intervened in the homeowners' case, arguing that terminating non-homestead operating licenses by 2022 was unconstitutional as a retroactive law and an uncompensated taking of private property under Article 1, Sections 16 and 17 of the Texas Constitution. In response, the City filed a plea to the jurisdiction challenging the State's intervention, ripeness of the homeowners' claims, and asserted governmental immunity.

All parties sought summary judgment and were denied. On appeal, the Austin Court of Appeals addressed each

claim *de novo*. First it tackled the City's jurisdiction claims, finding that the State's standing to intervene in this matter was unambiguously conferred by the Uniform Declaratory Judgment Act. The court also found the homeowners' claims to be ripe, noting that facial challenges to ordinances are "ripe upon enactment because at that moment the 'permissible uses of the property [were] known to a reasonable degree of certainty.'" And because the plaintiffs and intervenors allege a facial abridgment of their most fundamental rights under the United States and Texas Constitutions, the City's alleged constitutional overreach itself is an injury from which the property owners and the State seek relief. Third, the court found that governmental immunity cannot shield the City from viable claims for relief from unconstitutional acts.

Next, the court turned to the State's retroactivity claim. Not all retroactive laws are unconstitutional but there is a heavy presumption against them which can only be overcome by a compelling public interest. To determine whether a retroactive law violates the Texas Constitution, courts use the three-part test developed in *Robinson v. Crown Cork & Seal Co*., 335 S.W.3d 126 (Tex. 2010). The *Robinson* test considers: (1) "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings;" (2) "the nature of the prior right impaired by the statute;" and (3) "the extent of the impairment."

The City's identified interests in passing the ordinance included public-health concerns about over-occupancy affecting the sewage system and creating fire hazards; "bad actor" tenants that dump trash in the neighborhood and urinate in public; public-safety concerns regarding strangers to neighborhoods, public intoxication, and open drug use; general-welfare concerns about noise, loud music, vulgarity, and illegal parking; and the negative impact on historic Austin neighborhoods, specifically concerns of residents that short-term rentals alter a neighborhood's quality of life and affect housing affordability. The court determined that these interests were minimal when balanced against the fundamental rights of private property ownership. Furthermore, the goals of the ordinance could be achieved by other nuisance laws and ordinances that do not infringe on property rights such as local littering or noise ordinances and Penal Code sections prohibiting disorderly conduct, public intoxication, and public urination and defecation.

Finally, the court addressed the homeowners' Assembly Clause claim. In the United States Constitution, the First Amendment Assembly Clause reads: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. The Texas Assembly Clause differs from its federal counterpart in that it includes a common good requirement. In light of scant case law, the court relied on the plain text of the Texas Assembly Clause to find it is not limited to protecting only petition-related assemblies. Here, the ordinance addressed assemblies on private property, banning "a wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity other than sleeping," whether inside or outside, after 10:00 p.m.; banning outdoor assemblies of more than six adults at any time; prohibiting more than six unrelated adults or ten related adults from using the property at any time; and giving city officials authority to "enter, examine, and survey" the short-term rentals to ensure compliance with applicable provisions of the Austin Code of Ordinances. The ordinance clearly restricted assemblies and thus prompted strict scrutiny. The court held that the ordinance infringed on short-term rental owners' and their tenants' constitutionally secured right to assembly because it limited assembly on private property without regard to the peacefulness of or reasons for the assembly. And because the infringement of the fundamental right to assemble was not narrowly tailored to serve a compelling government interest, it violated the Texas Constitution's guarantee of due course of law.

Justice Kelly's dissent notes that the majority opinion expands fundamental-rights jurisprudence to strike down policy decisions properly left to Austin's City Council under their zoning power. She takes exception to the majority's approach, which "leads to a misapplication of Retroactivity Clause precedent, creating tension with opinions of [their] sister courts of appeals; disregards Texas and U.S. history; and is an atextual expansion of the Assembly Clause."

Commentary: As we explained in the December 2018 issue of *The Recorder* after the Texas Supreme Court decision in *Tarr v, Timberwood Park Owners Association* 556 S.W. 3d 274 (Tex. 2018), short-term rentals

have emerged as a divisive issue that potentially puts property ownership rights at odds with neighbors and neighborhood associations. In the last decade, individuals have increasingly turned to short-term rentals—typically, privately owned homes or apartments that are leased for a few days or weeks at a time—for lodging while traveling. Airbnb is perhaps the most popular short-term rental marketplace, but there are numerous other app-based options. As short-term rentals have become more common, local governments have looked for ways to balance the rights of short-term rental property owners and tenants against the concerns of neighboring properties. Short-term rental ordinances will likely continue to be an issue of contention.

The majority opinion's reliance on the Assembly Clause is, if not novel, provocative. The City of Austin petitioned the Texas Supreme Court for review of this case on September 24, 2020.

C. Fourth Amendment

Blood Warrants

Even though a blood warrant did not expressly authorize chemical testing of blood in a Driving While Intoxicated (DWI) case, such testing and admission of the test results as evidence did not violate the Fourth Amendment.

Crider v. State, No. PD-1070-19, 2020 LEXIS 612 (Tex. Crim. App. Sep. 16, 2020)

Suspecting DWI, Kerrville police officers secured a warrant to *extract* Crider's blood. The warrant did not, however, expressly provide for chemical *testing* of the blood. Nevertheless, the blood was tested and revealed a blood alcohol concentration of .19. At trial, Crider argued that because the taking and testing of blood constituted two distinct invasions of privacy, and only the taking of blood was covered by the blood warrant, that the test results should be suppressed.

The Court of Criminal Appeals rejected this argument. First, the Court noted that when police seek a blood search warrant in conjunction with a DWI case, it can reasonably be assumed that they are doing so to search for evidence of intoxication, which necessitates testing the blood. In reaching its conclusion, the Court distinguished its decision in *Martinez v. State*, 570 S.W.3d 278 (2019). In *Martinez*, warrantless blood testing was deemed unconstitutional in a case where blood had been drawn by a hospital for medical purposes. The *Martinez* Court held that the defendant still had a privacy interest in blood drawn by the hospital and a warrant was required to test it for evidence of DWI. The primary distinction between *Martinez* and *Crider* is that there was a valid search warrant signed by a neutral magistrate in *Crider*. The Court rejected the argument that its scope was limited to drawing the blood. It reasoned that testing the blood is a reasonable and logical component of a blood search warrant, even if it is not specifically authorized. A secondary distinction between *Martinez* and *Crider* was that the blood was taken by a private hospital in *Martinez* and the State in *Crider*. However, the Court cautioned that its *Crider* holding does not allow for "indiscriminate rummaging" through the contents of the defendant's blood. The testing authorized by the warrant is limited to testing for evidence of DWI.

Commentary: Following *Martinez*, there were murmurings that two separate warrants would be needed to draw and test blood in impaired driving cases. While *Crider* dispelled this notion, seekers of blood search warrants are still well advised to include express language for both drawing and testing blood to prevent subsequent legal challenges. Still, Texas magistrates that sign blood search warrants should familiarize themselves with *Crider* to the extent that it permits blood testing even where words such as "test" or "analyze" are not expressly stated in a warrant. It is also important to note that *Crider* does not contemplate a scenario where a warrant's language permits the testing, but not taking, of blood.

Consent

There was valid consent to search a vehicle when a defendant moved toward the rear of his vehicle, but did not say anything verbally, after an officer asked him if he could search the vehicle, and if so, to move toward the rear of the vehicle.

Sullivan v. State, No. 10-18-00231-CR, 2020 Tex. App. LEXIS 2266 (Tex. App.—Waco Mar. 18, 2020, pet. ref'd)

Cell Phones

When a defendant fled from police and left his cell phone in his vehicle, he had no standing to challenge the reasonableness of searching the cell phone's contents because he voluntarily abandoned the phone, it was not password protected, and the abandonment was not a result of police misconduct.

Wiltz v. State, 595 S.W.3d 930 (Tex. App—Houston [14th Dist.] 2020, no pet.)

A defendant had no expectation of privacy for the contents of his cell phone when it was found by an off-duty peace officer in a grocery store and illegal pornographic material was found when the officer searched its contents trying to ascertain the phone's owner.

Oseguera-Viera v. State, 592 S.W.3d 960 (Tex. App.—Houston [1st Dist.] 2019)

Reasonable Suspicion

The Fourth Amendment was not violated when an officer initiated an investigative traffic stop after running a vehicle's plates and learning that the registered owner had a revoked driver's license even though the officer had no direct knowledge that the registered owner was the person operating the vehicle.

*Kansas v. Glover, 1*40 S. Ct. 1183 (2020)

A law enforcement officer in Kansas ran a check on a vehicle's license plates. The officer did not observe any traffic violations or attempt to identify the driver of the vehicle. The check revealed that the registered owner's license had been revoked. A traffic stop was initiated and the driver, who was indeed the registered owner of the vehicle, was charged as a habitual traffic violator under Kansas law. The Kansas Supreme Court found the stop violative of the Fourth Amendment because assuming that the registered owner was the one operating the vehicle amounted to a "hunch."

In the U.S. Supreme Court, Justice Thomas, joined by five members of the Court, reversed. Reasonable suspicion is required before a temporary investigatory stop is made. Reasonable suspicion requires articulable facts that are more than a hunch but is a less demanding standard than probable cause. The Court held that there was reasonable suspicion in this case because (1) even though it was possible that the registered owner was not driving the vehicle, it was reasonable to suspect that he was; (2) the fact that the registered owner's driver's license had been revoked did not negate the possibility that he was still driving: individuals without valid driver's licenses often still operate vehicles; and (3) no facts existed to indicate that the owner was not the one operating the vehicle. The majority reiterated that reasonable suspicion analyses are done on a case-by-case basis, which narrows the scope of this holding.

Justice Kagan wrote a concurring opinion that was joined by Justice Ginsburg. They agreed with the majority that the officer had reasonable suspicion. They wrote separately to emphasize that this is a strange case contested on an underdeveloped, stipulated record. In this case, Glover's driver's license was not *suspended* for reasons unrelated to traffic safety (e.g. failing to pay parking tickets, court fees or child support). Rather, it was *revoked*.

Under Kansas law, this nearly always stems from serious or repeated driving violations.

In her dissent, Justice Sotomayor wrote that reasonable suspicion requires knowledge that a particular person is possibly engaged in wrongdoing. In this case, the officer was able to gather more information on the identity of the driver before the stop but did not. She disagreed with the majority's position that there was reasonable suspicion if no facts existed to indicate that the owner was not the one operating the vehicle. She characterized the majority as flipping the burden of proof. Justice Sotomayor stated that the State should bear the burden of identifying articulable facts and should not be able to makes stops based on the absence of facts. Finally, she cautioned that the majority opinion has "paved the road to finding reasonable suspicion based on nothing more than a demographic profile."

Commentary: Is *Glover* a departure from settled doctrine that will dramatically alter both the quantum and nature of evidence for proving reasonable suspicion? Or is *Glover* simply the moment in our Fourth Amendment jurisprudence where we further acknowledge that combining technology (specifically, database information) with common sense judgments is an extension of precedent? Either way, this is not just about reasonable suspicion. Varying attitudes about traffic enforcement are presented in *Glover*.

There was no reasonable suspicion for a traffic stop when a driver that had the right-of-way stopped in an intersection to let a police cruiser proceed when the police cruiser did not come to a complete stop until after passing a stop sign.

State v. Colby, 604 S.W.3d 232 (Tex. App.—Austin 2020, no pet.)

A Lakeway police officer did not come to a complete stop at a stop sign, but rather proceeded partially into the intersection before coming to a complete stop. The defendant approached the intersection on a different street that did not have a stop sign at the intersection (i.e., he had the "right-of-way"). The defendant stopped in front of the police cruiser, slowly reversed, and flashed his high beams, presumably indicating his intention to let the officer proceed through the intersection. The cruiser did not move, so the defendant proceeded through the intersection. There were no other cars in the vicinity of the intersection. The officer initiated a traffic stop based on Subsection 545.302(a)(3) of the Transportation Code, which prohibits vehicles from stopping in the middle of an intersection. A Driving While Intoxicated arrest followed. The trial court concluded that, based on the facts presented, there was no reasonable suspicion justifying the initial stop and granted the defendant's motion to suppress.

On appeal, the State argued that the stop was justified because "an officer's suspicion is not unreasonable just because facts surrounding a suspected offense might ultimately excuse the conduct." Under Subsection 545.302(f) of the Transportation Code, a motorist may stop in an intersection when necessary to avoid "conflict with other traffic." The State argued that the officer had a reasonable belief that the defendant's driving behavior, even if legal, merited further investigation. The Third Court of Appeals rejected the State's arguments. The Court cited *Jaganathan v. State*, 479 S.W.3d 244 (Tex. Crim. App. 2015), which held that there is no reasonable suspicion if the facts are such that an objective officer viewing the situation would be unreasonable in failing to realize that the person's conduct was lawful. Viewing the facts in a light most favorable to the trial court's ruling, the Court did not feel that the State met its burden of showing that the defendant's driving behavior in the intersection indicated anything other than a legally permitted stop to avoid a collision. Accordingly, they affirmed the suppression of evidence.

Commentary: This case illustrates a counterweight to the oft-cited rule that an officer need not know with certainty than an offense has been committed in order to form the reasonable suspicion required to make a temporary investigatory stop. If conduct is clearly permitted by law, it will not, on its own, be enough for reasonable suspicion. Bear in mind, though, that all reasonable suspicion analyses are done case-by-case based on a totality of the circumstances.

Search Incident to Arrest

A warrantless search of an individual's roller bag at an airport was justified as a search incident to arrest even though he was handcuffed, had no way to access the bag, and was moved to a secure location at the airport.

Price v. State, No. PD-0722-19, 2020 Tex. Crim. App. LEXIS 709 (Tex. Crim. App. Sep. 23, 2020)

An individual at a San Antonio airport was detained on suspicion of drug trafficking. He was handcuffed and transferred to a secure area of the airport along with his roller bag, which was with his person at the time of arrest. After reading the defendant his rights, police searched the roller bag and found marijuana. The defendant appealed, arguing that this search violated the Fourth Amendment.

In a 5-4 decision, the Court of Criminal Appeals held that the search was reasonable and did not violate the Fourth Amendment. The reasonableness of the search turned on whether the roller bag was "immediately associated" with the defendant at the time of the arrest—a standard outlined by two U.S. Supreme Court cases: *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arizona v. Gant*, 556 U.S. 332 (2009). In analyzing the present case, the Court of Criminal Appeals pointed to its own rule outlined in *Lalande v. State*, 676 S.W.2d 115 (1984): "…where…the detainee asserts an ownership interest in the item leaving no alternative to its accompanying him into custody…once it becomes unequivocally clear that the item is to accompany the detainee, the right of inspection accrues immediately, and is not limited to inspections carried out within the station itself." The majority, in applying the *Lalande* standard, found that under the circumstances of this case it was inevitable that the roller bag would accompany the defendant to custody. Thus, no justification (i.e., a warrant) beyond a lawful arrest was required to search the bag as a search incident to arrest.

Judge Walker, joined by Presiding Judge Keller, Judge Hervey, and Judge Newell, issued a dissenting opinion that the search was unreasonable because (1) there was no way the defendant could have accessed the bag once handcuffed and thus there were no exigent circumstances justifying a warrantless search and (2) it should have been an "inventory search" under *Illinois v. Lafayette*, 462 U.S. 640 (1983), requiring established inventory procedures.

Third-Party Doctrine

In light of *Carpenter,* the third-party doctrine does not extend to cell site location information (CSLI) under Article I, Section 9 of the Texas Constitution.

Holder v. State, 595 S.W.3d 691 (Tex. Crim. App. 2020)

Holder was arrested in connection with a murder. During the investigation, he told police he was out of town when the victim was killed. Police presented a warrant to Holder's cell service provider, AT&T, that established reasonable suspicion and authorized the seizure of 23 days' worth of historic CSLI data to check the validity of his alibi. However, the State conceded at oral arguments that the petition did not set forth sufficient facts to establish probable cause. Holder was convicted and challenged the admission of the CLSI data on appeal.

The Court of Criminal Appeals addressed the question of whether, in light of *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the third-party doctrine extends to CSLI under Article I, Section 9 of the Texas Constitution. The Court began its analysis by adopting the U.S. Supreme Court's reasoning in *Carpenter* to no longer apply the third-party doctrine to CSLI records under the Texas Constitution. The Court concluded that there was no significant difference in the text of Article I, Section 9 and the Fourth Amendment nor any historically documented difference that indicated that the Framers of the 1876 Texas Constitution thought that Texas citizens should enjoy less protection from unreasonable searches and seizures under the Texas Constitution than the U.S. Constitution.

Having decided that Holder had a protected privacy interest in his CSLI that was not overcome by the third-party doctrine, the Court then addressed whether the search was nonetheless reasonable. Post-*Carpenter*, a warrant is generally needed under the Fourth Amendment to access seven or more days of CSLI information. While there is no implied warrant requirement in Article I, Section 9, the pertinent inquiry is simply whether the search was reasonable under a totality of the circumstances. Here, the State did not allege exigent circumstances or some other recognized law-enforcement need. Thus, the search had to be supported by probable cause to be reasonable. However, the State conceded that the petition did not support a probable cause finding. Because the Appellant had a reasonable expectation of privacy under Article I, Section 9 in the 23 days of his CSLI accessed by the State and the warrant did not establish probable cause, the CSLI data was erroneously admitted into evidence. The Court reversed and remanded the case for the lower court to determine whether Holder was harmed by the error.

Judge Yeary concurred to the extent that the opinion followed *Sims v. State*, 569 S.W.3d 634 (Tex. Crim. App. 2019). But he dissented to the Court's "slavish" adherence to *Carpenter*. He would have had the Court follow the reasoning in *Hankston v. State*, 517 S.W.3d 112 (Tex. Crim. App. 2017).

Commentary: In 2019, the Court of Criminal Appeals overturned its decision in *Hankston* following *Carpenter*. Formerly, under *Hankston*, a person did not have an expectation of privacy in his CSLI because of the third-party doctrine. Hankston successfully petitioned the U.S. Supreme Court to change this, which the Court did in light of *Carpenter,* holding that the Fourth Amendment third-party doctrine does not apply to CSLI. This case extends the reasoning of *Carpenter* to the Texas Constitution. The Court addressed this claim under the Texas Constitution because the defendant did not raise a claim under the federal constitution on appeal. The result is consistent with *Carpenter*, which was decided after the case was tried and affirmed on appeal.

Warrant Sufficiency

An illegible signature and lack of the magistrate's printed name on a warrant does not, on its own, render the warrant facially invalid.

State v. Arellano, 600 S.W.3d 53 (Tex. Crim. App. 2020)

A blood search warrant was signed by a magistrate in cursive. "Magistrate, Victoria County, Texas" was printed under the signature. The magistrate's name was not printed anywhere on the warrant other than in cursive on the signature line.

Following a Driving While Intoxicated conviction, the defendant argued that the warrant was facially invalid because the magistrate's signature was illegible under Article 18.04(5) of the Code of Criminal Procedure. Article 18.04 provides that search warrants are "sufficient" if, among other things, "the magistrate's name appear[s] in clearly legible handwriting or typewritten form with the magistrate's signature." Article 38.23 of the Code of Criminal Procedure, the Texas statutory exclusionary rule, provides that evidence procured unconstitutionally or in violation of Texas law may not be used against a defendant in a criminal case unless it was obtained by law enforcement with an objective good faith reliance upon a warrant issued by a neutral magistrate. This "good faith exception" only applies to facially valid warrants.

The Court of Criminal Appeals held that while the warrant in this case was defective (i.e., not sufficient under Article 18.04), it was still a facially valid warrant for the purposes of Article 38.23. Thus, the good faith exception was not precluded. A facially valid warrant means one that is issued by a neutral magistrate and is supported by probable cause—its sufficiency under Article 18.04(5) is a separate inquiry. Accordingly, the Court remanded the case for a determination of whether the good faith exception was met.

Commentary: Prior to 2015, Article 18.04 of the Code of Criminal Procedure only required a magistrate's signature. As reported in the August 2015 issue of *The Recorder*, H.B. 644 added the requirement that the

warrant contain the magistrate's name in typewritten form or clearly legible handwriting because there were reports of local law enforcement agencies illegally seizing money, drugs, jewelry, and other valuable items through search warrants with illegible signatures. It also made it a third degree felony to tamper with a warrant issued by a magistrate. We will continue to monitor this decision on remand to the Corpus Christi Court of Appeals.

For the purposes of search warrants under Article 18.01 of the Code of Criminal Procedure, an affiant must swear an oath before a magistrate or other qualified officer to produce a sworn affidavit.

State v. Hodges, 595 S.W.3d 303 (Tex. App.—Amarillo 2020, pet. ref'd)

Two law enforcement officers filled out a probable cause affidavit to secure a blood warrant. It was signed by one office at the direction of the second officer, who then signed the jurat. Neither officer swore an oath prior to preparing or signing the document. Nor did the magistrate to whom they presented the affidavit and warrant application administer any oath to assess the truthfulness of the attesting officer's statements. When the affidavit was challenged at a suppression hearing, the trial court declared the affidavit invalid due to the lack of an oath. The State appealed seeking clarity on whether an affidavit exists when no one administers an oath to the affiant who signed it.

Article 18.01(b) of the Code of Criminal Procedure states: "no search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance." Additionally, the section requires "a sworn affidavit setting forth substantial facts establishing probable cause" in every instance in which a search warrant is requested. In *Clay v. State*, 391 S.W.3d 94 (Tex. Crim. App. 2013), the Court of Criminal Appeals held that "before a written statement in support of a search warrant will constitute a 'sworn affidavit,' the necessary oath must be administered 'before' a magistrate or other qualified officer." Facts presented at trial showed that Officer 1 did not orally swear to the truth of the writing before the magistrate who issued the warrant. Nor was he formally sworn by Officer 2 under Subsection 602.002(17) of the Government Code (authorizing an oath to be administered and certificate of fact given by a peace officer if the oath is administered when an officer is engaged in the performance of the officer's duties and the administration of oaths relates to the officer's duties). Under these facts, the court of appeals concluded that the trial court had a reasonable evidentiary basis to conclude that the search warrant permitting a blood draw was void because it was founded on an unsworn affidavit.

Commentary: While some Texas intermediate appellate courts have attempted to dispense with the need for an administered oath, the Amarillo Court of Appeals followed Article 18.01 of the Code of Criminal Procedure to the letter and stated it was bound to follow *Clay*.

Texas will run into more issues like this as the criminal justice system continues to grow and accelerate. Prosecutors cannot assume that just because someone has a notary stamp or is legally authorized to administer an oath that he knows how to administer an oath in accordance with the law. In *Hodges*, the Court holds that oath-like language in the affidavit does not suffice without some form of oath administered to the affiant. Because this issue is percolating in other intermediate appellate courts, the Court of Criminal Appeals may soon intervene.

D. Sixth Amendment

There is no right to hybrid representation at trial under Article I, Section 10 of the Texas Constitution.

Tracy v. State, 597 S.W.3d 502 (Tex. Crim. App. 2020)

Tracy made numerous *pro se* pretrial motions leading up to his trial for capital murder. At a pretrial hearing, the trial court refused to rule on any of the *pro se* motions that Tracy's appointed counsel had not reviewed. The

trial court ruled that Tracy was not entitled to "hybrid" representation where he would be represented both by his appointed counsel as well as himself (*pro se*). On appeal to the Court of Criminal Appeals, Tracy asserted a constitutional right to hybrid representation under Article I, Section 10 of the Texas Constitution, which grants an accused "the right of being heard by himself or counsel, or both."

The Court began its analysis by identifying the historical underpinnings of Section 10. It determined that "the constitutional right of a defendant to be heard by himself was instituted to assure that defendants have the right to testify. And the right to be heard by counsel was intended to do away with the rules that denied representation, in whole or in part, by counsel in criminal prosecutions." Section 10 was not intended to encompass the right to self-representation. As such, there is no constitutional right to hybrid representation, in death cases or otherwise, so the trial court did not err in disregarding Tracy's pretrial *pro se* motions.

Commentary: Defendants in Texas accused of Class C misdemeanors have the right to counsel (the right to be represented by counsel but not the right to appointed counsel (See, *Setting the Record Straight: Class C Misdemeanors, the Right to Counsel, and Commitment to Jail*, Special Edition of The Recorder, October 2016, at 30.)). As this case reiterates, they do not have the right to hybrid representation (partially pro se and partially by counsel). See, *Landers v. State*, 550 S.W.2d 272 (Tex. Crim. App. 1977).

The open court doctrine was not violated when a trial court denied spectators entry into the courtroom where all the seats were taken and the largest courtroom in the facility was used. The right to a public trial is forfeited if there is no objection and subsequent ruling on the objection at trial.

Dixon v. State, 595 S.W.3d 216 (Tex. Crim. App. 2020)

In a criminal jury trial, three events occurred that the defendant claimed violated his right to a public trial. First, bailiffs excluded a sketch artist from the courtroom because "there was no room." Second, bailiffs denied spectators entry to the courtroom because the judge "[did not] want anyone standing." Third, after the attorneys from each side became embroiled in an argument, the court asked everyone except the attorneys to excuse themselves from the courtroom. The defense objected, claiming a violation of the open court doctrine, but the conversation shifted, and a ruling was never obtained.

As to the first and second events, the Court of Criminal Appeals held that there was no violation of the open court doctrine. Under *Presley v. Georgia,* 558 U.S. 209 (2010), "trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Here, because the courtroom was full (all seats were occupied), the Court found that the trial court did enough to meet its requirements under the open court doctrine. The Court also cited *Estes v. Texas*, 381 U.S. 532 (1965), which held that a trial is public, in a constitutional sense, "when a courtroom has facilities for a reasonable number of the public to observe the proceedings." Thus, the exclusion of spectators because the courtroom is full is not, on its own, a violation of the open court doctrine. There is no requirement that courts permit a limitless number of spectators to watch a proceeding. The Court also pointed out that the trial was held in the largest courtroom in the facility, which indicates that they took reasonable efforts to accommodate as many spectators as possible.

In addressing the third event, the Court noted that under *Peyronel v. State*, 465 S.W.3d 650 (2015), "[t]he right to a public trial is forfeitable and must be preserved by a proper objection at trial." Furthermore, a ruling must be made on the objection. Because the defense did not ask for a ruling on its objection once the discussion shifted away from the objection, the ability to appeal was forfeited.

Commentary: In *Lily v. State*, 365 S.W. 3d 321 (Tex. Crim. App. 2012) the Court of Criminal Appeals opined that the right to a public trial extends to a plea hearing in a court open to the public. Since *Peyronel* the Court has arguably taken a more limited approach to open court claims. *Dixon* is just one example. Amidst all the buzz about Zoom hearings and "virtual courts," it will be interesting to see how (or if) such case law can be reconciled with virtual proceedings necessitated by COVID-19.

II. Substantive Law

Evidence of the defendant's Post-Traumatic Stress Disorder (PTSD) was irrelevant to his statutory defense of duress because the statute requires the determination of compulsion be weighed under the objective "person of reasonable firmness" standard.

Moreno v. State, No. PD-1044-19, 2020 Tex. Crim. App. LEXIS 412 (Tex. Crim. App. June 17, 2020, no pet.)

Moreno was prosecuted for aggravated kidnapping. At trial, Moreno raised the defense of duress. In connection with this defense, he offered evidence that he suffered from PTSD, which he had developed after witnessing the shooting death of his father during a home invasion. He argued that his PTSD made him more susceptible to feeling threatened by the primary kidnapper and more emotionally affected by perceived threats.

The trial court excluded the evidence, but the defense of duress was submitted to the jury, who found Moreno guilty. Moreno appealed, arguing that the PTSD evidence was admissible at the guilt stage of trial because it was relevant to his defense of duress. The court of appeals agreed, relying on battered-woman-syndrome cases from other jurisdictions to draw analogies to PTSD.

The State appealed to the Court of Criminal Appeals. Writing for the Court, Presiding Judge Keller noted that the court of appeals' reliance on battered-woman-syndrome cases from other jurisdictions was misplaced. Texas courts are constrained to the statutory definitions of "duress" found in Section 8.05 of the Penal Code. Under the statute, it is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by force or threat of force. The statute limits the availability of this affirmative defense by restricting the meaning of "compulsion" in subsection (c). Compulsion within the meaning of this section exists only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure. This limitation constrains the duress defense to the type of compulsion that a person of "reasonable firmness" could not resist. PTSD evidence would show merely that the defendant has a greater sensitivity to compulsion than a person of reasonable firmness and was therefore properly excluded.

Commentary: Duress can be an affirmative defense to prosecution in any case, including Class C misdemeanors. The statute creates separate levels of compulsion for felony vs. non-felony cases. In a prosecution for an offense that does not constitute a felony, it is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by less-than-lethal force or the threat of force.

Anecdotally, the most common law school hypothetical for duress involves speeding. It usually goes something like this: "An officer stops a car going 80 m.p.h. in a 60 m.p.h. zone. The driver explains that his pregnant wife is in the back seat; her water has broken and they are rushing to the hospital. Will a duress defense be successful at trial?" Did the wife threaten the husband with force? Is the implicit threat to the wife's life sufficient compulsion? The answer is (as always) it depends.

When a judge revokes a defendant's bond and remands the defendant to jail but allows the defendant to turn himself into the jail later the same day, the defendant is "released from custody" and his subsequent failure to appear at the jail constitutes the Penal Code offense of Bail Jumping and Failure to Appear.

Timmins v. State, 601 S.W.3d 345 (Tex. Crim. App. 2020)

On the 4th of July, Timmins was in a head-on collision which killed a married couple driving home to Helotes from a celebration. Timmins was indicted in Bandera County for manslaughter and criminally negligent homicide. He was arrested and subsequently released on bail. Prior to trial, the prosecution moved to revoke Timmins's bail, alleging he had used drugs in violation of the conditions of his bail bond. The trial court set a hearing on the State's motion. Because Timmins had no driver's license, his elderly mother drove him from San Antonio to Bandera County for the bail revocation hearing.

At the hearing, the trial court revoked Timmins's bail. The court allowed Timmins, at the request of Timmins's attorney, to accompany his mother on her return to San Antonio because of a concern regarding her ability to navigate her way home by herself. The trial court ordered Timmins to report to the county jail by 3:00 p.m. that same day. Timmins accompanied his mother to San Antonio but did not report to jail as ordered. He was subsequently indicted and convicted by a jury for failing to appear under Section 38.10 of the Penal Code (Bail Jumping and Failure to Appear). He was tried, convicted, and sentenced to two concurrent 20-year sentences.

On appeal to the Fourth Court of Appeals, Timmins challenged the legal sufficiency of the conviction, arguing that his failure to report to the county jail was not an offense under Section 38.10. He argued that he was not "released" from custody and did not fail to "appear," which he contended was a technical term meaning one's physical presence in court for a judicial proceeding. He argued that he was "in custody" for purposes of the Bail Jumping statute because a judge falls within the Penal Code definition of "public servant." In addition, Timmins argued, he was under restraint by a public servant (the judge) pursuant to an order of a court when he accompanied his mother to San Antonio.

In a matter of first impression, the Fourth Court of Appeals construed the term "appear" in Section 38.10 as including places, other than a courtroom, where a defendant may be required to report or be physically present as required by the conditions of the defendant's release from custody. The court of appeals concluded that there was legally sufficient evidence that Timmins failed to appear in accordance with the terms of his release. The Texas Court of Criminal Appeals subsequently granted Timmins's petition for discretionary review.

In a unanimous opinion, Judge Keasler affirmed the judgment of the court of appeals. The Court first analyzed whether, at the time of the alleged offense, Timmins was "a person lawfully released from custody." Section 38.01(1) of the Penal Code defines "custody" as being "under arrest by a peace officer or under restraint by a public servant pursuant to an order of a court of this state or another state of the United States." A person may be in "custody" for Chapter 38 purposes even if he is not under "actual, physical, hands-on restraint." Timmins argued that he was not "released" because he was under the trial court's "constructive custody." Timmins further argued that an offense under Section 38.10 requires a defendant to be released from both forms of custody (direct and constructive). The Court disagreed, explaining that bail always imposes a restriction on the defendant's freedom because defendants must come back to the court at a certain time and day. According to the Court, under Timmins's argument, no one could be prosecuted under Section 38.10 because a person in constructive custody could never be "released." Furthermore, Timmins's interpretation would lead to implausible outcomes in cases in which the bond conditions themselves restrict the defendant's freedom of movement (e.g., a condition of bail where a stalking defendant is ordered to not go near a victim's house).

Under Section 38.10, the phrase "released from custody" includes incremental or incomplete releases. A judge may modify a person's custodial status from more-restrictive to less-restrictive. When a judge frees a person from a more-restrictive form of custody "on condition that he subsequently appear," but leaves some restrictions on the person's freedom of movement, the person is "released" from custody. A judge's decision to keep a person in "constructive custody," whatever that entails on a case-by-case basis, does not negate this fact. Accordingly, a factfinder could rationally conclude that when Timmins failed to comply with the trial judge's order to report to the Bandera County Jail, he was "a person lawfully released from custody." In this case, the trial judge released Timmins from a more-restrictive form of custody to a less-restrictive constructive custody in which Timmins was allowed to take his mother home before self-reporting to jail.

The Court then analyzed whether Timmins's failure to report to the county jail amounted to a failure to "appear" under Section 38.10, which requires a person "to *appear* in accordance with the terms of his release" (emphasis added). The Court considered three different constructions of the term. Timmins argued that "appear" and "appearance" have technical meanings: they are limited to appearing in court. Thus, he argued, his failure to appear did not run afoul of Section 38.10 because he failed to appear at the county jail, not a court of law. The State argued that "appear" has a broader meaning, which includes "to show up." The released person, the State

argued, is required to be physically present whenever and wherever the releasing court orders him to show up when the court released him from custody. Thus, Timmins's failure to report to the county jail constituted a failure to "appear" under Section 38.10 because he did not "show up" when and where the trial judge ordered him to show up when he released him from custody. In its opinion, the court of appeals explained that "appear" could also be used in a technical sense to mean "com[ing] formally before an authoritative body"—persons or groups of persons with authority to take some official action. The Court explained its preference to construe words and phrases in accord with their technical meanings, so long as they are not plainly excluded by the surrounding text. Because Timmins's construction was the only one under which his sufficiency challenge could theoretically succeed, the Court said that it only needed to decide whether Timmins's courtroom-only interpretation was a permissible construction in context. The Court concluded that it was not permissible for three reasons. First, it would render at least one part of the defense outlined in Section 38.10(b) unnecessary. Section 38.10(b) provides: "It is a defense to prosecution under this section that the appearance was incident to community supervision, parole, or an intermittent sentence." Second, the statutory history of Section 38.10 showed no textual or contextual indication that the word "appearance" itself has a different meaning now than it did previously under its predecessor (former Article 22.01a of the Code of Criminal Procedure). Third, in *Azeez v. State*, 248 S.W.3d 182 (Tex. Crim. App. 2008), the Court held that Section 543.009 of the Transportation Code and Section 38.01 of the Penal Code are *in pari materia*. Thus, "appear" and "appearance" have the same meaning in both statutes.

The Court concluded that regardless if the words "appear" and "appearance" in Section 38.10 have a technical meaning in the legal profession, they do not have the narrow, courtroom-restrictive technical meaning advocated by Timmins. The State's common-use/authoritative-body technical construction explained by the court of appeals was broad enough to cover Timmins's conduct. The Court found the State's interpretation to be more convincing. Thus, there was sufficient evidence to support his conviction. The Court, however, left further examination of the meanings of "appear" and "appearance" for another day.

Commentary: Obstructing governmental operations is morally blameworthy. It implicates a wide range of prohibited conduct in Chapter 38 of the Penal Code, including Bail Jumping and Failure to Appear (FTA) under Section 38.10. In several instances since the 2008 *Azeez* decision, TMCEC has warned readers to avoid the possible temptation to oversimplify non-appearance crimes. *Timmins* is another reminder. Non-appearance crimes have generally been regarded as unique in that the "scene of the crime" is the courtroom…until now. The Court's new incremental approach to custody ("released from custody" includes incremental or incomplete releases) under Section 38.10 will likely raise a lot of new questions. The Court rejected what it labeled as a narrow "courtroom-only technical" approach to failure to appear. The Court did not fully embrace the court of appeals' "authoritative-body construction" approach or the "show-up-wherever" approach advocated by the State. Most FTA cases in Texas involve Class C misdemeanors. *Timmins* may prove to be the basis for a whole new genus of FTA prosecutions. Should a defendant who is ordered to appear for a meeting with a juvenile case manager, but who fails to do so, be charged with failure to appear? What about a defendant ordered to appear at a specific location to perform community service but who does not? What about a defendant who does not "show up" for a Zoom hearing? *Timmins* does not provide answers to these questions—and the Court leaves the task of further winnowing the meaning of "appear" and "appearance" for another day. The stage has been set.

License suspensions under Section 12.01(c) of the Penal Code are civil penalties, not sentences.

Burg v. State, 592 S.W.3d 444 (Tex. Crim. App. 2020)

A trial court ordered a defendant's license suspended for one year following a Driving While Intoxicated conviction. The defendant did not object at the sentencing hearing, but later appealed the suspension as an "illegal sentence."

The Court held that the defendant was barred from bringing such an appeal because the license suspension was not part of the "sentence." Rather, it was a civil penalty under Section 12.01(c) of the Penal Code and thus not

designed to be punitive but rather to ensure public safety. The Court explained that "…a license suspension is not considered punishment because it is not incarceration, probation, a fine, or enhancement, regardless of whether it is included in the so-called sentence." The Court compared license suspensions to court costs, which are likewise not meant to be punitive. Under *Mizell v. State*, 119 S.W.3d 918 (2003), an illegal sentence claim need not be preserved for appeal at trial in accordance with Rule 33.1 of the Texas Rules of Appellate Procedure. But, in *Burg*, the Court ruled that the defendant was unable to rely on *Mizell* to appeal it without objecting at the sentencing hearing because a license suspension is not a sentence.

A violation of the quota prohibition under Section 720.002 of the Transportation Code constituted an abuse of official capacity under Section 39.02(b) of the Penal Code (Abuse of Official Capacity).

Becker-Ross v. State, 595 S.W.3d 261 (Tex. App.—Texarkana 2020, no pet.)

The city administrator for the City of Mount Enterprise contacted the city marshal on numerous occasions and urged him to write a certain number of traffic tickets within a specified period. Specific text messages related that the City needed "at least twenty to forty [tickets] each week." The city marshal also recorded several instances where the city manager prompted him to "get that ticket count up," warned him that the city council said he was on probation, and threatened him by saying, "If you don't get tickets up you ain't going to be City Marshall, do you hear me?"

In a three-count information, the State accused the city manager of abuse of official capacity. A public servant abuses their official capacity under Section 39.02(b) of the Penal Code if, "with intent to obtain a benefit . . ., they intentionally or knowingly . . . violate a law relating to the public servant's office or employment."

The city manager was charged by an information alleging that, on three separate occasions, she, "with intent to obtain a benefit, intentionally and knowingly violate[d] a law related to the defendant's office OR employment as a public servant, namely, violate[d] Texas Transportation Code Section 720.002 while acting a[s] City of Mount Enterprise city/court administrator, by requiring or suggesting to Mount Enterprise City Marshall Parker Sweeney, a peace officer, that Parker Sweeney was required to or expected to issue a predetermined or specific number of any type or combination of types of traffic citations within a specified period."

A Rusk County jury found her guilty on all three counts. On appeal, she challenged that (1) the evidence was legally insufficient to support the jury's findings; (2) the trial court erred in denying her motion to quash the information; and (3) the jury charge improperly included an instruction on the law of parties.

Her legal sufficiency argument posits that Section 720.002 is not a law related to her office of employment and that she did not benefit from the violation. Section 720.002 states, "A political subdivision. . . may not establish or maintain, formally or informally, a plan to evaluate, promote, compensate, or discipline a peace officer according to the officer's issuance of a predetermined or specified number of any type or combination of types of traffic citations."

The Court found that Section 720.002(e) clearly establishes that the law applies to any official who suggests to a peace officer that he is required or expected to meet a traffic-offense quota. Further, the Court determined that the city manager did benefit from the violation. Evidence showed that she was the highest paid city official in Mount Enterprise, that her salary was paid from the City's budget, and that a large part of the City's budget came from traffic fines. Based on these facts, her emails to the city marshal showing that salaries would have to be cut if the city marshal did not meet the traffic-offense quota, and testimony that her salary was cut due to the failure to bring in traffic fine revenue, the jury could have reasonably concluded that she intended to obtain the benefit of maintaining her higher salary by violating Section 720.002.

Next, the Court addressed the sufficiency of the information. The city manager argued that the information did not provide adequate notice since it did not allege how she intended to benefit from the imposition of a traffic-

offense quota, rendering it impermissibly vague. The information tracked the language of the statute, alleging that she acted with intent to benefit. The term "benefit" is defined in Section 1.07(a)(7) of the Penal Code as "anything reasonably regarded as economic gain or advantage." The Court found that, because "benefit" is defined in the Penal Code, she had notice that the State intended to show how she intended to benefit (i.e., by economic gain or advantage). Further, the Court determined that showing how the appellee benefitted was evidentiary in nature. So, the State was not required to allege further details about the "benefit" in the charging instrument.

Commentary: TMCEC has committed substantial resources to educating court personnel and city officials that revenue generated by Class C misdemeanors should be viewed as an incidental byproduct of law enforcement and court operations. The facts of this case are disheartening. Public confidence in law enforcement and in local courts is undermined by such conduct and simply cannot be tolerated.

A defendant could only be convicted of one failure-to-appear charge for his failure to appear at a single court setting on a two-count indictment for which he had been released from confinement on two separate bonds.

Kuykendall v. State, 592 S.W.3d 967 (Tex. App.—Houston [1st Dist.] 2019, pet. granted)

Kuykendall was lawfully released from custody pending felony charges on the condition that he subsequently appear in court. The cases were set for the same day, in the same court, and subject to the same two-count indictment. When he did not show up to court, a Kerr County grand jury returned a single indictment containing two counts against appellant for failure to appear. Kuykendall pled guilty to both counts and was convicted. On appeal, Kuykendall contended that his convictions violated the Double Jeopardy Clause, U.S. Const. amend. V, because he was convicted of failure to appear on two cases that were set for the same day, in the same court, and subject to the same two-count indictment.

For purposes of a double jeopardy analysis, an accused is subject to multiple punishments in violation of the Fifth Amendment when he is convicted of more offenses than the legislature intended beyond the allowable unit of prosecution. Under *Loving v. State*, 401 S.W.3d 642, 647 (Tex. Crim. App. 2013), when a statute does not indicate or define an allowable unit of prosecution, the best indicator of legislative intent regarding the unit of prosecution is the "gravamen," or focus, of the offense.

The First Court of Appeals looked to Judge Johnson's dissent in *Ex parte Marascio* which stated, "the state's role in a criminal prosecution is to prosecute the offender. It is in no way the role of the state to safeguard the income of a bondsman." Put another way, the harm of financial loss to the bondsman is not relevant to the harm suffered by the State in criminal prosecution and is not relevant to the defendant's punishment. Johnson concluded that "the sole gravamen of the offense remains the act of failing to appear, thus the unit of prosecution is the number of times the offense was committed."

Following this reasoning, the court of appeals held that, since Kuykendall only failed to appear one time, he should only face one failure-to-appear charge so as not to violate double jeopardy. Accordingly, the court of appeals vacated one of Kuykendall's two failure-to-appear convictions.

Commentary: In this case, the court recognized that the controlling case on this issue is *Ex parte Marascio*, 471 S.W.3d 832 (Tex. Crim. App. 2015). However, instead of following the majority opinion, the court of appeals instead followed the dissent and deviated from established precedent. Noting this discrepancy, the State petitioned for discretionary review to the Court of Criminal Appeals, which was granted in March 2020. If the court of appeals' decision stands, Texas could see a shake-up in docketing for hearings related to non-appearance.

III. Procedural Law

A. Bail

Judges do not have standing to challenge the Governor's Executive Order GA-13, which suspends the authority of the judiciary to release certain defendants on personal bond, in their capacity as judges.

In re Abbott, No. 20-0291, 2020 Tex. LEXIS 351, at *4 (Tex. Apr. 23, 2020)

In March 2020, the spread and impact of the novel coronavirus was becoming difficult to ignore. Pursuant to his powers as Governor of the State of Texas, Greg Abbott issued a proclamation certifying that COVID-19 posed an imminent threat of disaster in Texas and declared a state of disaster for all counties on March 13. As the coronavirus began to impact wide swathes of Texans, several counties reportedly considered broad-scale release of arrested and jailed individuals to lessen the impact of COVID-19 on detention facilities. On March 29—relying on his statutory emergency powers—the Governor issued Executive Order GA-13 suspending the authority of the judiciary to release on personal bond defendants charged, convicted, or with a history of offenses involving physical violence or threats of physical violence. In response, on April 8, 16 Harris County judges sued the Governor and Attorney General.

The lawsuit claimed that the executive order improperly interfered with their judicial authority to make individualized bail decisions. On April 10, a temporary restraining order was issued. The Governor and Attorney General sought mandamus relief. On April 23, the Supreme Court of Texas granted relief, resolving the case on the issue of standing.

The U.S. Supreme Court articulated the three elements of standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) that have been adopted by the Supreme Court of Texas. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest that is (1) concrete and particularized and (2) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Here, the judicial plaintiffs are the real party in interest. They alleged injury from both (1) difficulty in knowing which law to apply in setting bail and (2) threats of criminal prosecution by relator Attorney General under Section 418.173 of the Government Code.

As to the first alleged injury, the Court determined that GA-13 did not prevent judges from doing their duty to interpret governing laws and issue rulings on personal bonds. Indeed, judges have no personal, legally cognizable stake in achieving clarity or ease of application in the law. Next, the Court turned to the second alleged injury. Determining that, since neither the Attorney General nor relator Governor could bring a prosecution without a district attorney's participation, the Attorney General's implicit threats of prosecution did not amount to an injury. Additionally, judges could assert the protections of judicial immunity. The Court ultimately determined that neither of these factors amounted to a personal, legally cognizable injury against the judges. Therefore, the judicial plaintiffs lacked standing to seek invalidation of the executive order.

Commentary: This case was decided on the standing issue without reaching the merits of whether GA-13 provides the governing rule of decision in an individual bail determination. But in doing so, the Court left open the door for challenges. The Court identified parties who could have standing to challenge the emergency order on the merits: inmates seeking to be released on pre-trial bail who cannot obtain release because of GA-13.

Under Articles 23.01 (Definition of a "Capias") and 23.04 (In Misdemeanor Cases) of the Code of Criminal Procedure, the judge of a court that obtains jurisdiction of a misdemeanor case upon the filing of an information or complaint may issue a capias after commitment or bail and before trial.

Tex. Att'y Gen. Op. No. KP-0321 (2020)

The Nueces County District Attorney wrote to the Attorney General seeking clarification on an apparent disagreement between Articles 23.01 and 23.04 of the Code of Criminal Procedure. Article 23.04 provides that "[i]n misdemeanor cases, the capias or summons shall issue from a court having jurisdiction of the case *on the filing of an information or complaint*." Article 23.01 defines capias, in part, as "a writ that is . . . issued by a judge of the court having jurisdiction of a case *after commitment or bail and before trial*." The request for opinion asked whether a trial court has authority to issue a capias in a misdemeanor case on the filing of an information of complaint even when the accused has not been arrested or posted bail. The Attorney General phrased the issue as whether Article 23.01 should be construed as limiting when a capias may issue or as identifying the court that may issue it. According to the Attorney General, Article 23.01 identifies the court that may issue a capias.

The Attorney General used the "last antecedent" canon of construction to resolve the issue. Also called the "nearest reasonable referent," the canon counsels "that a qualifying phrase in a statute [ordinarily] must be confined to the words and phrases immediately preceding it to which it may, without impairing the meaning of the sentence, be applied." *Spradlin v. Jim Walter Homes, Inc*., 34 S.W.3d 578, 580 (Tex. 2000).

Under Article 23.01(1), the nearest reasonable referent for the phrase "after commitment or bail and before trial" is "having jurisdiction of a case," which in turn modifies "judge of the court." Applying the last-antecedent canon, the subsection identifies *who* may issue the writ (i.e., the judge with jurisdiction at that stage of the criminal proceedings). The lack of a comma or other break reinforces this reading as modifying the nearest reasonable referent rather than the more remotely located word "issued" at the beginning of the subsection. Similarly, Article 23.04 states "[i]n misdemeanor cases, the capias or summons shall issue from a court having jurisdiction of the case on the filing of an information or complaint." Again applying the last-antecedent canon, the phrase "on the filing of an information or complaint" is closest to "the court having jurisdiction of the case" and so identifies *who* may issue the capias or summons.

To answer the question of *when* a capias may issue, the Attorney General found the Code's section headings instructive. Chapter 23 is located in the subpart titled "After Commitment or Bail and Before the Trial." Altogether, the Attorney General determined that Chapter 23 generally governs post-bail and post-commitment settings. Articles 23.01 and 23.04 both identify the court that may issue a capias under those provisions after commitment or the posting of bail.

Commentary: The request for this opinion stemmed from a disagreement between county judges and the district attorney in Nueces County. The judges claimed they had no authority to issue a capias in misdemeanor cases where the defendant had not been arrested and taken to jail, based on their belief that they have no jurisdiction prior to commitment or bail. At the request of the Attorney General, TMCEC submitted a letter brief in this matter. The AG agreed with TMCEC that the judge of a court with misdemeanor jurisdiction, upon the filing of an information or complaint, may issue a capias after commitment or bail and before trial.

B. Prosecutors/Attorneys Pro Tem

Attorneys pro tem and special prosecutors are two distinguishable roles comprising different authorities and responsibilities.

Tex. Att'y Gen. Op. No. KP-0273 (2019)

This Attorney General Opinion distinguishes attorneys pro tem and special prosecutors, two terms which are sometimes (incorrectly) used interchangeably. Under Article 2.07(a) of the Code of Criminal Procedure, an attorney pro tem serves as prosecutor when the regular attorney is unable to perform, absent, or disqualified. A special prosecutor assists, but does not replace, the regular prosecutor. Special prosecutors might also only assist in investigative matters and not try the case before the court. The level of a special prosecutor's involvement is subject to the direction of the prosecuting attorney. Given these differences, attorneys pro tem must take an oath of office prior to serving whereas special prosecutors do not—even if a special prosecutor assists in trying a case before a court.

Commentary: In S.B. 341 (2019), the Texas Legislature placed limits on who may be appointed as an attorney pro tem starting September 1, 2019. Article 2.07(a) now provides that only prosecutors (county attorneys with criminal jurisdiction, district attorneys, or criminal district attorney, or their assistants) and assistant attorneys general may serve as attorneys pro tem.

S.B. 341 may be one of the best examples of municipal courts being inadvertently impacted by legislation intended to affect county and district courts. The bill was aimed at limiting which attorneys can be appointed as an attorney pro tem in county and district courts. However, the bill also repeals the authority of a municipal judge to make an attorney pro tem appointment. Let's hope that the Legislature resolves problems inadvertently created by S.B. 341 for municipal courts next session.

C. Charging Instruments

An information charging theft of property can survive a motion to quash when it does not list every item alleged to be stolen so long as other details (types of items, value, location, and date) are sufficient to give the defendant notice to prepare a defense.

Rodgers v. State, No. 01-19-00181-CR, 2020 Tex. App. LEXIS 6799 (Tex. App.—Houston [1st Dist.] Aug. 25, 2020, no pet.)

Sworn complaints authorizing seizure of dangerous dogs under Section 822.002 of the Health & Safety Code do not require personal knowledge; a finding that an attack is unprovoked is not a required element for dog destruction under Section 822.003; the 10-day hearing deadline under Section 822.003 does not limit courts' inherent authority to control their dockets.

Tex. Att'y Gen. Op. No. KP-0284 (2020)

State Representative Angie Chen Button wrote the Attorney General's office with three construction questions relating to Chapter 822 of the Health and Safety Code, which governs the regulation of dogs that attack or are a danger to persons.

The first question asks: Does Section 822.002, which governs the regulation of dogs that attack persons or are a danger to persons, require the affiant to have personal knowledge of the facts contained in the "sworn complaint?" The Attorney General concluded that it does not. The plain language of Section 822.002 does not require an affiant of a sworn complaint alleging that a dog caused death or serious injury to a person to have personal knowledge of that event—and a court is thus unlikely to impose one. The opinion points to Section 822.002(a) to support this point. The section expressly authorizes a county attorney, city attorney, or peace officer to file the sworn complaint. These individuals typically will not have personal knowledge of the facts underlying a dog attack. Nevertheless, the Legislature included them, which suggests, by extension, that those without personal knowledge can serve as an affiant in these cases.

Next, the opinion addresses a provocation question: Does non-provocation constitute an element that one must prove before a court may order a dog destroyed under Section 822.003? The Attorney General opines that it

does not. If a court finds that a dog caused death or serious bodily injury to a person, the fact that the dog's attack was unprovoked is not an element a court must find before ordering a dog destroyed under Section 822.003. While it is true that Section 822.041 of the Health & Safety Code defines "dangerous dog" as one that makes an "unprovoked attack," the phrase "dangerous dog" is not used in Section 822.003. Thus, there is no express or imputed requirement that an attack be unprovoked before ordering a dog destroyed.

Finally, the opinion addresses whether Subsection 822.003(a)—requiring a court to conduct a hearing within 10 days after the date on which a warrant is issued to determine whether to seize a dog that caused death or serious bodily injury to a person—limits the court's inherent authority to control its docket. The opinion argues that the 10-day deadline is not an unlawful statutory restriction enacted by the Legislature on the court's inherent authority to control its docket because it does not set a deadline by which the court must rule or otherwise limit the court's authority to continue a hearing once called. Additionally, the court does not lose jurisdiction if the Subsection 822.003(a) hearing is held outside of the 10-day period.

Commentary: See also, *Tex. Att'y Gen. Op. No. KP-0274* (summarized under Local Government), which discusses potential conflicts between municipal ordinances and Chapter 822 of the Health and Safety Code.

D. Jury Selection

Prosecutors and judges do not have a duty to *sua sponte* disclose a familial relationship to a potential jury member during jury selection.

Hicks v. State, No. 01-18-00603-CR, 2020 Tex. App. LEXIS 2652 (Tex. App.—Houston [1st Dist.] Mar. 31, 2020, pet. ref'd)

This case centers around a prosecutor's failure to disclose that a member of a criminal trial's jury pool, and eventual member of the jury, was his brother-in-law. In the same trial, a member of the jury pool that did not ultimately serve on the jury was the judge's brother. Defense counsel argued that this violated the Fifth Amendment; the requirements set forth in *Brady v. Maryland*, 373 U.S. 83 (1963); and the Michael Morton Act (Article 39.14 of the Code of Criminal Procedure).

The First Court of Appeals concluded that because defense counsel did not ask the venire whether any of them knew or were related to the prosecutor or judge, they forfeited such challenges for cause. Furthermore, according to the court, neither *Brady* nor the Michael Morton Act impose a duty upon the judge or prosecutor to actively disclose any familial relationships between themselves and the venire members. Finally, the court cited precedent from the Court of Criminal Appeals, including *Armstrong v. State*, 897 S.W.2d 361 (1995), which declined to impose a requirement that judges and prosecutors *sua sponte* disclose that they have a familial relationship to a potential juror.

E. Jury Charge

A jury charge stating that speed in excess of the posted speed limit is *prima facie* evidence that a defendant's speed was not reasonable and prudent does not create a presumption of guilt, shift any burden of proof to the defendant, or decrease the State's burden to prove guilt beyond a reasonable doubt.

Dahl v. State, No. 01-19-00864-CR, Tex. App. 2020 LEXIS 5204 (Tex. App.—Houston [1st Dist.] Jul. 14, 2020, no pet.)

A defendant was convicted of speeding in municipal court. He appealed and his case was tried *de novo* in a county court. The jury charge in the new trial included language that exceeding the posted speed is *prima facie* evidence that a driver's speed is not "reasonable and prudent," which would constitute a violation of Subsection

545.352(a) of the Transportation Code. The defendant appealed his county court conviction to the intermediate court of appeals, arguing that this jury charge lessened the State's burden to prove its case beyond a reasonable doubt and shifted the burden to the defendant to prove that he was not guilty.

The First Court of Appeals disagreed. The Court reasoned that no particular weight is assigned to *prima facie* evidence: it simply connotes a legally sufficient way to prove guilt. The State maintained its burden to prove that the defendant was driving faster than the posted speed limit. Furthermore, the county's jury charge contained language reiterating that the State bore the burden of proving its case beyond a reasonable doubt. The jury charge allowed, but did not require, the jury to find that the defendant was driving faster than the posted speed limit.

Commentary: *Dahl* serves as a tidy reminder of how to craft jury charges so as not to blur which side of the aisle the burden of proof lies. In this case, it was uncontested that the defendant was driving over the posted speed limit. Paired with this fact, the jury charge language likely made for an easy decision for the jury.

F. Jury Deliberation

Article 36.28 of the Code of Criminal Procedure does not allow a written transcript of disputed testimony to be provided to the jury during deliberations.

Stredic v. State, No. 14-18-00162-CR, 2020 Tex. App. LEXIS 6376 (Tex. App.—Houston [14th Dist.] Aug. 13, 2020, no pet.)

The denial of a defendant's motion to quash the jury panel was proper where he was not provided access to the jury questionnaires until the morning of the trial, but the State received them the day before.

Sullivan v. State, No. 10-18-00231-CR, 2020, Tex. App. LEXIS 2266 (Tex. App.—Waco Mar. 18, 2020, pet. ref'd)

G. Sentencing

When defendants in municipal or justice courts invoke their right to a jury trial for a Class C misdemeanor, a judge or justice has no ministerial duty to deny defendants the opportunity to elect the court to determine the punishment in the event of a jury verdict of guilty.

In re Yeager, 601 S.W.3d 356 (Tex. Crim. App. 2020)

Bledsoe was accused of a Class C misdemeanor traffic offense. He entered a plea of not guilty in the Austin Municipal Court and invoked his right to a jury trial. Before the jury was sworn in, the municipal judge asked Bledsoe whether, in the event he was found guilty by the jury, he wanted punishment to be assessed by the jury or by the judge. Bledsoe replied that he wanted punishment to be assessed by the municipal judge. The prosecution objected to what it described as "the bifurcation of the trial" and asked the municipal judge to follow an unpublished opinion from a Travis County Court at Law that the prosecution asserted was binding local precedent. The municipal judge overruled the objection and said he would assess punishment if the jury found Bledsoe guilty. The prosecution requested a stay, which was granted by the municipal judge, and filed a writ of mandamus to prohibit the municipal judge from assessing punishment.

A county court at law judge conditionally granted mandamus, holding that the municipal judge "lack[ed] discretion to assess punishment in a jury trial and must instead leave punishment to the jury as a ministerial duty." The county court at law judge agreed with the prosecution and stated that the municipal judge should have followed the unpublished opinion. The county court further stated that the jury must assess punishment in fine-only crimes, that there is no provision for the accused to make an election as to who is to assess punishment

in fine-only cases, and that there is no procedure allowing a judge to intervene between the verdict and the judgment or to make any decision on the punishment. Furthermore, according to the county court at law judge, the unpublished opinion was "vertical precedent" that the municipal judge was "bound by it, and that other Austin Municipal Court judges should consider themselves bound by it." The county court at law judge ordered the municipal judge to refrain from assessing punishment once the jury reached its verdict in the underlying cause. The municipal judge sought mandamus relief *from* the county court at law judge's order by seeking mandamus relief *against* the county court at law judge.

Mandamus is an extraordinary remedy. Mandamus relief is proper when the party seeking relief (the "relator") (1) has no other adequate legal remedy and (2) the act sought to be compelled is purely ministerial. *In re State ex rel. Weeks*, 391 S.W.3d 117 (Tex. Crim. App. 2013). An act is purely ministerial when the facts and circumstances of the case dictate only one rational decision under unequivocal, well-settled, and clearly controlling legal principles (i.e., when the relator has a clear and indisputable right to the relief sought). *In re McCann*, 422 S.W.3d 701 (Tex. Crim. App. 2013). When the Court of Criminal Appeals is asked to issue a writ of mandamus requiring a lower court to rescind its mandamus order, it conducts a *de novo* review of the lower court's application of the two-pronged mandamus test.

Judge Keel, writing for the majority and joined by six members of the Court of Criminal Appeals, found that the county court at law judge erred and abused his discretion in granting mandamus relief against the municipal judge. Accordingly, the Court conditionally granted the municipal judge mandamus relief. The Court looked to Article 37.07 of the Code of Criminal Procedure, which outlines separate hearings on proper punishment. It held that, because it is unclear whether Article 37.07 requires juries to assess punishment in Class C misdemeanor cases on pleas of not guilty, the municipal judge did not have a ministerial duty to deny defendants the opportunity to elect the court for punishment in the event of a jury verdict of guilty. The prosecution did not have a clear right to mandamus relief against the municipal judge from assessing punishment.

Judge Hervey, joined by two other members of the Court, concurred in the judgment of the majority opinion. Judge Hervey believed that the county court at law judge erred when he issued a writ of mandamus enjoining the municipal judge: the law was too unsettled to warrant mandamus relief. However, she wrote separately to explain why she believed Article 37.07 prevented a municipal judge from assessing punishment after a defendant is convicted by a jury on a not-guilty plea. She concluded that because justice and municipal courts deal with fine-only offenses, it may have been the Legislature's intention that in such cases, if the defendant elects a jury to assess guilt, that the jury must also determine the punishment.

Commentary: Do defendants charged with Class C misdemeanors in justice and municipal courts have the same jury trial options as defendants facing the same charges in county courts? This is a significant decision pertaining to the scope of a defendant's right to jury trial for a Class C misdemeanor when the trial is in a municipal or justice court. It is rare that a city attorney seeks to mandamus a municipal judge. It is also rare that such extraordinary relief is sought from a statutory county court and not a district court. It is rarer still for a municipal judge seeking relief from mandamus to pursue the matter to the Court of Criminal Appeals, the Third Court of Appeals, and back to the Court of Criminal Appeals again.

In this case, the municipal judge construed the law to allow a defendant who exercised his right to a jury trial to also choose, in the event of conviction, whether the fine would be set by the jury or the judge. The prosecution, in contrast, read the law to give defendants in municipal and justice courts no such choice. Simply stated, according to the prosecution, the invocation of the right to a jury trial also statutorily required the jury to set the fine. From the judge's point of view, the issue was a matter of election of punishment. In the prosecution's view, allowing the election of punishment constituted a bifurcation of trial which is not authorized in municipal and justice courts. The Court of Criminal Appeals says Article 37.07 can be read to support both interpretations.

Yeager is a poignant reminder that mandamus is not an appropriate remedy when a statute can be interpreted in different ways. When the construction of a statute is subject to reasonable disagreement, a judge has no clear ministerial duty to construe the law in a specific way. Mandamus is reserved for mandating compliance with *settled* law. In this case, not only was there unsettled law regarding how to interpret Article 37.07, but the prosecution's contention was based on the novel, yet unsettling argument, that an unpublished opinion from a county court at law constitutes "vertical precedent" binding all municipal and justice courts in the county. Like Judge Yeager, the Court of Criminal Appeals found this argument unpersuasive. While there is a lot of unsettled law pertaining to the interplay between local and county trial courts of limited jurisdiction, county courts are not the courts of appeals. In exercising incidental appellate jurisdiction of cases originating from municipal courts of record, a county level court can make decisions *based on* case law, but they do not *make* case law.

Trial courts have a ministerial duty to sign and commit oral judgments and orders to writing.

*In re Pete, N*o. 14-20-00456-CR, 2020 Tex. App. LEXIS 6385 (Tex. App—Houston [14th Dist.] Aug. 13, 2020, no pet.)

After finding a defendant indigent, a court cannot order him to pay attorney fees absent proof of a material change in circumstances.

Junell v. State, No. 06-19-00146-CR, 2020 Tex. App. LEXIS 4912 (Tex. App.—Texarkana Jul. 2, 2020, no pet.)

On trial for intoxication manslaughter, Junell was found indigent and counsel was appointed to represent him. After his conviction, the court assessed $5,250.00 in attorney fees against him. Among many issues on appeal, Junell challenged the imposition of attorney fees. He argued that, because the trial court found him indigent, he was presumed to remain indigent absent proof of a material change in his circumstances.

Under Article 26.05(g) of the Code of Criminal Procedure, a trial court has the authority to order the reimbursement of court-appointed attorney fees only if the court determines that a defendant has financial resources that enable him to offset some or all of the costs associated with the legal services provided. The defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees of legal services provided. Here, the trial court made no new of finding of the defendant's ability to pay at any time after the initial indigence determination. Thus, the attorney fees were not allowable. The court of appeals modified the trial court's judgment by deleting the assessment of attorney fees all together.

Commentary: This case reasserts the importance and staying power of indigence determinations. While "indigence" is undefined in the Code of Criminal Procedure, judges should use their discretion in making such determinations.

H. Appeals

Rule 34.6(f) of the Texas Rules of Appellate Procedure offers a remedy when a record is created and later lost or destroyed, but no remedy when a record was never created in the first place.

International Fidelity Insurance Co. v. State, 586 S.W.3d 9 (Tex. Crim. App. 2019)

International Fidelity Insurance Company (IFIC) timely filed a motion for new trial in a bond forfeiture proceeding arising out of a criminal case. The trial court held a hearing on the motion, at which point the parties announced that a court reporter was needed. A court reporter was called into the courtroom and appeared to transcribe the proceedings. Evidence was offered and, believing the hearing had been transcribed, the attorneys exchanged contact information with the court reporter.

After the trial court denied IFIC's motion, IFIC timely filed a notice of appeal and request for a reporter's record. But no reporter's record was filed. The court reporter filed an affidavit indicating that she did not have "a steno file nor audio file" for the date of that hearing. At the State's request, the court of appeals abated the appeal and remanded to the trial court to determine whether (1) a reporter's record was created; (2) the record was lost or destroyed; (3) the record was necessary to resolve the appeal; and (4) the parties could agree on a replacement of the lost or destroyed record.

IFIC asserted that it was entitled to a new trial under Rule 34.6(f) of the Texas Rules of Appellate Procedure, arguing that the reporter's record had been "lost or destroyed." At the abatement hearing, the court reporter testified that she was at work on the date of the motion for new trial hearing and that she was the court reporter for the court in which the motion was heard. However, she did not believe it was possible that a recording had been created. She noted that in her nearly thirty years as a court reporter, she had never recorded a hearing and been unable to find its record. When asked by the State's counsel if it was possible that she made a recording that was subsequently lost, she conceded, "I guess anything is possible."

Based on the testimony of the court reporter, the trial court found that the hearing "was not stenographically or otherwise recorded" and was "neither lost nor destroyed." The court of appeals agreed with the trial court's conclusion, holding that Rule 34.6(f) did not afford IFIC relief in the form of a new trial under these facts.

On appeal to the Court of Criminal Appeals, Judge Richardson agreed. Looking to the plain language of Rule 34.6(f), Judge Richardson identified that an appellant is only entitled to a new trial when a reporter's record is "lost or destroyed." But in order to be lost or destroyed it must first be created. In this case, evidence presented at trial suggested that the record was not created in the first place. The Court determined that the rule does not contemplate a situation in which a record was never created in the first place. In addition, Rule 34.6(f) places a burden on an appellant to prove that a record existed in the first place. The Court concluded that IFIC had failed to show that the hearing was ever recorded and thus had not proved that the trial court abused its discretion in denying its motion for new trial under Rule 34.6(f).

Commentary: According to Rule 1.1, the Texas Rules of Appellate Procedure govern procedure in appellate courts and post-trial procedure in trial courts in criminal cases. Indeed, the Rules of Appellate Procedure generally take a back seat in municipal courts when the Government Code or Code of Criminal Procedure offer more specific rules (neither Chapter 30 of the Government Code pertaining to municipal courts of record nor the Code of Criminal Procedure address a remedy for a lost or destroyed court record). However, some of the Rules of Appellate Procedure do apply to municipal courts. For example, clerks' records, bills of exception, and a reporter's record are generated in municipal courts but must conform to provisions in both the Rules of Appellate Procedure and the Code of Criminal Procedure.

Here, the Court addresses a clear gap in the rule book. Although the Court was sympathetic to IFIC's situation and recognized that the court reporter's failure to transcribe the hearing was not IFIC's fault, the Court ultimately determined that the rules did not provide for relief. At the end of its opinion, the Court recognized that the result in this case made evident a flaw in the rules that the Court Rules Committee should address through its rulemaking authority. Municipal courts of record would likely be affected by any future rule changes in this arena.

I. Expunctions

Expunction procedures, while located in the Code of Criminal Procedure, are civil matters. Because they are a statutory privilege and not a constitutional or common law right, courts must enforce the statutory requirements as written and may not impose equitable or practical exceptions that the Legislature did not enact.

Ex Parte E.H., 602 S.W.3d 486 (Tex. 2020)

IV. Court Administration

A. COVID-19

Commissioner's courts and county judges may require face coverings in courtrooms, courthouses, and other county buildings.

Tex. Att'y Gen. Op. No. KP-0322 (2020)

County judges can require facial coverings in courtrooms, courthouses, and other county buildings (1) under judges' broad inherent authority in Subsection 21.001(a) of the Government Code to control orderly proceedings in their courtrooms; (2) because the guidance from the Office of Court Administration (OCA) requires facial coverings; (3) under emergency authority granted by Section 418.108 of the Government Code; and (4) under Executive Order GA-29.

In addition, pursuant to the requirement in Subsection 291.001(3) of the Local Government Code to maintain and regulate county courthouses, offices, and buildings, a commissioners court may require any person entering courthouse or other county-owned or controlled building to wear a facial covering.

Commentary: Although KP-0322 does not directly address municipal courts, much of the law cited certainly applies to municipal courts. Specifically, Subsection 21.001(a) of the Government Code (Inherent Power and Duty of Courts) applies to municipal courts. Also, the Emergency Order of the Supreme Court of Texas requiring courts to follow guidance from OCA applies to municipal courts. Thus, KP-0322 can generally be read to apply to municipal courts. See, Ned Minevitz, *Courts Are Authorized to Require Face Coverings*, The Recorder, August 2020 at 11.

B. Public Information

A justice of the peace can omit identifying information regarding a child sex offense victim from a probable cause affidavit.

Tex. Att'y Gen. Op. No. KP-0275 (2019)

The Corsicana Independent School District Police Department secured arrest warrants in four separate alleged sexual abuse cases involving a teacher by presenting probable cause affidavits to a justice of the peace acting as a magistrate. Local media then submitted records requests for those probable cause affidavits. The affidavits were ultimately released with identifying information redacted. This prompted the Navarro County District Attorney to seek guidance on whether probable cause affidavits that are likely to identify child sex abuse victims may be released to the public upon a request made to a justice of the peace.

The opinion turns on the interaction between two articles in the Code of Criminal Procedure: Article 15.26 (which makes probable cause affidavits public information) and Article 57.02 (which generally prohibits the disclosure of identifying information regarding a child victim of sexual assault). Article 57.02(h) contains an exception to that prohibition when "other law" or a court order requires or permits disclosure of that information.

The opinion first looks to Article 15.26 to determine whether "other law" requires or permits the disclosure of identifying information regarding a child sex offense victim. The article classifies arrest warrants and supporting affidavits as public information. But it makes no reference to the particular content such documents may contain. As such, the opinion determines that a court could conclude that Article 15.26 does not require or permit disclosure.

Next, the opinion looks to whether a justice of the peace can issue a court order compelling the disclosure of this information. Under Article 57.02(g), "[a] court of competent jurisdiction may order the disclosure of a victim's name, address, and telephone number only if the court finds that the information is essential in the trial of the defendant for the offense or the identity of the victim is in issue." Therefore, the ability of a justice of the peace to issue an order of disclosure pursuant to Article 57.02(g) depends on the nature of the underlying offense.

But assuming that no law or court order expressly requires the disclosure of identifying information regarding a child sexual assault victim, a justice of the peace may redact identifying information regarding a child victim of alleged sexual assault from a probable cause affidavit.

C. Court Reporters

A court is unlikely to conclude that a judge of a court of record may appoint a court recorder (electronic or other) in lieu of an official court reporter because Section 52.041 of the Government Code expressly requires each judge of a court of record to appoint an official court reporter.

Tex. Att'y Gen. Op. KP-0318 (2020)

V. Local Government

A. Public Information Act

Deferred prosecution agreements are excepted from required public disclosure under the Public Information Act's law-enforcement exception in Section 552.108(a)(1) & (2) of the Government Code.

Paxton v. Escamilla, 590 S.W.3d 617 (Tex. App.—Austin 2019, pet. denied)

B. Firearm Regulation

Municipal or county officials may not restrict the sale of firearms by deeming them a non-essential business through an emergency declaration.

Tex. Att'y Gen. Op. No. KP-0296 (2020)

This opinion seeks to answer the question whether Sections 229.001 and 236.002 of the Local Government Code prohibit municipalities and counties from restricting the sale of firearms pursuant to a disaster declaration under Tex. Gov't Code Chapter 418. The Attorney General concluded that they do. Sections 229.001 and 236.002 of the Local Government Code provide that municipalities and counties, respectively, may not adopt regulations relating to the transfer, possession, ownership, or sale of firearms. He focuses on language preceding these sections which states, "Notwithstanding any other law…" Thus, he concluded that these sections trump the authorities granted in Chapter 418.

C. Dangerous Dog Ordinances

Municipal dangerous dog ordinances that cannot be harmonized with Chapter 822 of the Health & Safety Code are likely to be deemed invalid.

Tex. Att'y Gen. Op. No. KP-0274 (2019)

This opinion looks at four types of dangerous dog ordinances and their potential for conflict with Subchapter D, Chapter 822 of the Health and Safety Code.

First, the opinion looks at Section 822.042, which allows thirty days for an owner to comply with the applicable requirements for owning a dangerous dog. A municipal ordinance imposing a shorter compliance deadline cannot be harmonized with the statute and therefore the ordinance would be invalid.

Second, Subsection 822.0423(c-1) provides for an appeal bond in an amount established by the court. A municipal ordinance seeking to change the amount of an appeal bond is unenforceable. The section does not, however, purport to limit other fees or costs that a municipality may impose on an owner.

Next, the analysis turns to destruction questions. Though a municipal ordinance providing for the destruction of a dog running at large could be a valid exercise of a municipality's police power, the government's impoundment or destruction of personal property invokes the constitutional protection of due process of law. A municipal ordinance affording an owner no process to redeem the dog or to appeal certain determinations whatsoever would likely fail a procedural due process challenge. In addition to due-process concerns, a municipal ordinance providing for the destruction of a dangerous dog during the appeal process would be contrary to state law. Section 822.0424 provides a right to appeal certain determinations made with respect to a dangerous dog and its owner and Subsection 822.042(e) expressly protects a dangerous dog from destruction during the pendency of such an appeal.

Finally, the opinion addresses whether a municipal ordinance may control what an owner does with a dog once taken out of its jurisdiction and whether a city's authority to govern the dog extends to any location throughout the state and county for the life of the dog. It concludes that a municipality may exercise its powers only within its corporate limits unless its power is extended by law to apply to areas outside those limits. Nothing in Subchapter D authorizes a city to extend a dangerous dog ordinance outside of its city limits.

Commentary: The opinion reiterates that Subchapter D does not expressly preempt all local regulation of dangerous dogs, but instead authorizes them to the extent that they do not conflict with state law or constitutional protections. See also, *Washer v. City of Borger*, 2018 Tex. App. LEXIS 5929 (Tex. App.—Amarillo July 31, 2018, no pet.) discussing conflicts between municipal ordinances and state law regulating dangerous dogs (summarized in the AY 19 Case Law & Attorney General Opinion Update).

Clerks' Corner

CERTIFICATION EMERGENCY DECLARATION POLICIES Academic Year 2021
Texas Court Clerks Association

EMERGENCY DECLARATION POLICIES
In the event of an Emergency Declaration by the Governor of the State of Texas for the State and/or counties therein the Texas Court Clerks Association, through the Education and Certification Committee has the right to make "emergency" adjustments to the Policies and Procedures of "The Committee."

For the TMCEC Academic Year 2021 "The Committee" has adopted the following Emergency Policies.

I. **Continuing Education hours for Level 1 or Level 2 Certification: 12 hours required**
   - A. 12 hours of continuing education may be achieved through live, virtual live or virtual education, such as webinars.
   - B. Hours achieved through TCCA or TMCEC are pre-approved.
   - C. Hours outside of TCCA or TMCEC require approval through the TCCA online request portal.

II. **Continuing Education hours for Level 3: 20 hours required**
   - A. No more than 12 hours of continuing education may be achieved through pre-recorded education or "webinars."
   - B. A minimum of 8 hours must be achieved through live or "*virtual live*" education through an "approved provider."
   - C. Hours achieved through TCCA or TMCEC are pre-approved.
   - D. Hours outside of TCCA or TMCEC require approval through the TCCA online request portal.

III. **INTIAL CERTIFICATION for Level 1 or Level 2 Certification: 40 hours required within the previous 3-year period.**
   - A. No more than 8 hours of continuing education may be achieved through pre-recorded education or "webinars."
   - B. If not previously attended: Clerk <u>must</u> attend a 32 hour "v*irtual live*" New Clerks Education session through TMCEC.
   - C. If a clerk previously attended a New Clerks Seminar; or has a long tenure as court staff: The clerk must:
     - a. Attend a "*virtual live"* Regional for a minimum of 16 hours of live credit with pre-conference session, or
     - b. Attend a *"virtual live*" program(s) offered by TMCEC, other than a regional—for a minimum of 16 hours of live credit.
     - c. The Committee will make determination of "long tenure" upon submission by the clerk. This may be done prior to submittal of certification application, but will be entertained when the application is submitted.
   - D. Live hours from the previous three years will be needed to "round out" the requirement of 40 hours for initial certification at the level requested.

IV. **INTIAL CERTIFICATION for Level 3**
   Please contact the Education Committee Chair or Mentor for information; as most cases for emergency review are evaluated on a case-to-case basis.

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