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Case Law and Attorney General Opinion Update: Part II

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Except where noted, the following decisions and opinions were issued between the dates of October 1, 2017 and October 1, 2018. Acknowledgments: Thanks to Judge David Newell, Victoria Ford, Ned Minevitz, and Patty Thamez. **(See November issue of *The Recorder* for Part I of this update.)**

II. Substantive Law

A. Penal Code

Manipulating an image, though the original image is a work of art, into a close-up image of a child's genital area resulted in the creation of a different image that constituted child pornography for purposes of Section 43.26(b) of the Penal Code.

State v. Bolles, 541 S.W.3d 128 (Tex. Crim. App. 2018)

The image at issue in this case was a zoomed-in cropped image of a photograph entitled *Rosie* by the nationally-known photographer Robert Mapplethorpe. According to Section 43.26(b)(2) of the Penal Code (Possession of Child Pornography), the term "sexual conduct" has the meaning assigned by Section 43.25(a)(2) of the Penal Code, which defines the term as including, among other things, the "lewd exhibition of the genitals." The defendant argued that the cropped image is not "lewd" because the original photograph

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AROUND THE STATE

Fort Worth Court Director Theresa Ewing Receives National Award

Mark Goodner
Deputy Counsel and Director of Judicial Education, TMCEC

Theresa Ewing is the Director of Municipal Court Services for the Fort Worth Municipal Court. Earlier this year, the National Center for State Courts selected Ms. Ewing to receive its 2018 Distinguished Service Award. This award is presented annually to honor those who have made substantial contributions to the field of court administration and to the work of the National Center for State Courts. I was able to sit down with Ms. Ewing recently and ask her questions about the award as well as her work in Fort Worth.

The National Center for State Courts selected you to be the recipient of the 2018 National Center for State Courts Distinguished Service Award presented to honor those who have made substantial contributions to the field of court administration and to the work of the National Center. How does it feel to have your name next to those words?

Humbling… Terrifying… It's beyond comprehension really because as I look back on the people who have received this award in the past, they're all of the people that I look to as my mentors and my heroes of court administration over the years. To be recognized among the legends is just humbling.

You've worked in courts for 28 plus years but you came to Texas in 2016. Is there anything that struck you as different about the way that Texas courts work?

I think one of the biggest distinctions between Texas courts in the municipalities is that this is the first time that I've ever worked in the executive branch of government as opposed to the judicial branch of government, and so the relationship factor is so much more important. It really is a mutual relationship on how you run the courts as opposed

to the judges [in other states' systems] dictate how the courts are run and your [the court administrator's] job is to execute those things. You really do have to have a really symbiotic relationship with your presiding judge in order to make the court function. Before, I've always worked in an institution where your chief judge gives the directive and you're required to execute that. It's a very different dynamic knowing that there's not a direct report, but there must be a relationship in order to make the court work most effectively.

What are you most proud of about your work with the Fort Worth court?

There are so many things I'm proud of. My most proud moment is, of course, we instituted warrant forgiveness month which was a success beyond what any of us could've ever imagined. I think one of the other big undertakings is our cross-training and our actual certification of staff in the TMCEC certification levels because that had not been anything that had been previously pursued. We had staff working in silos and bubbles, and didn't understand the impact of their jobs versus what happened next in the process. So really pushing to get that education piece done and developing leaders in the future courts—that is really what we should all be doing.

What do you think is the biggest challenge to court administration (either current or coming challenge) in Texas municipal courts?

I think it's not just Texas municipal courts, but nationally, is really engaging the public in relevancy. Why are courts relevant in this day and age when there are so many different alternative methods of dealing with disputes? We talk about ADR. We talk about putting pretrial services in place. We're trying to put different modalities in place, but trying to get people to remember the courts are the neutral party you can go to. Just because you've been accused of a crime doesn't mean that's definitive. People forget that's why we have courts. We have courts because they need to have a place they can come to see a neutral arbitrator that can say, "State, you presented your case, now I want to hear the other side of the story. Let's put it together and let's make a final decision." That's why courts exist. And we are forgetting that is why we exist even at the municipal court level where we see thousands upon thousands of people that have an opportunity to come to such a neutral arbitrator. So education and relevancy, for us, has been a big push because if people don't understand the role of the court, that's where you get fear. That's where you get noncompliance because they're afraid to come in and talk to us.

For Municipal Courts Week, we had three different sets of groups come in and do mock trials with us. We had young men and women in high school and junior high walking through metal detectors scared to death about the fact they were coming into a court and they could not believe that we were "nice." Judge Rodgers and I had an opportunity to talk to all of the groups and say this is what we do and this is why we exist and have a conversation about judicial versus nonjudicial and the role that the clerks play in the way that justice is administered.

Judge Rodgers and I will say, "Does everybody have to be a lawyer to be in the court?" And, of course, most of the kids are kinda like "Yeah!" They often don't realize there are so many roles (non-attorneys) that get performed that support the judicial branch. With the stroke of a keystroke, we can put people in jail. That's why it's so important to remember that I work for a court. I have the opportunity to help in the administration of justice.

Congratulations to Theresa Ewing on receiving this tremendous honor! Under the leadership of Theresa Ewing and Chief Judge Danny Rodgers, the Fort Worth Municipal Court is doing great work, and it is wonderful to see this national recognition bestowed upon one of Texas' own.

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• *Luttrell v. El Paso Cty.*, 2018 Tex. App. LEXIS 5813 (Tex. App.—El Paso July 26, 2018, no pet.).....29
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• *State v. T.S.N.*, 547 S.W.3d 617 (Tex. 2018).....30
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- *Guthrie-Nail v. State*, 543 S.W.3d 255 (Tex. Crim. App. 2018).....33

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- *Hamlett v. Comm'n for Lawyer Discipline*, 538 S.W.3d 179 (Tex. App.—Amarillo 2017, no pet.) 34

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- *Penright v. State*, 537 S.W.3d 916 (Tex. Crim. App. 2017) 34

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- *William Johnson v. State*, 537 S.W.3d 929 (Tex. Crim. App. 2017).....34

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- *Carreon v. State*, 548 S.W.3d 71 (Tex. App.—Corpus Christi-Edinburg 2018, no pet.).....35

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- *Carl Johnson v. State*, 550 S.W.3d 247 (Tex. App.—Houston [14th Dist.] 2018, no pet.).....35

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- *Macias v. State*, 539 S.W.3d 410 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) 35

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- *Gonzalez v. State*, 2018 Tex. App. LEXIS 1879 (Tex. App.—El Paso Mar. 14, 2018, no pet.); *Ruffin v. State*, Tex. App. LEXIS 3440 (Tex. App.—Tyler May 16, 2018, pet. ref'd) (mem. op., not designated for publication); *Osuna v. State*, 2018 Tex. App. LEXIS 4954 (Tex. App.—Austin July 3, 2018, no pet.); *Bree v. State*, 2018 Tex. App. LEXIS 5492 (Tex. App.—Eastland July 19, 2018, no pet.) 36

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- *Allen v. State*, 2018 Tex. App. LEXIS 7216 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, no pet.).....36

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- *Tarr v. Timberwood Park Owners Ass'n*, 2018 Tex. LEXIS 442 (Tex. May 25, 2018) 40

(See November issues of *The Recorder* for Part I of this Update.)

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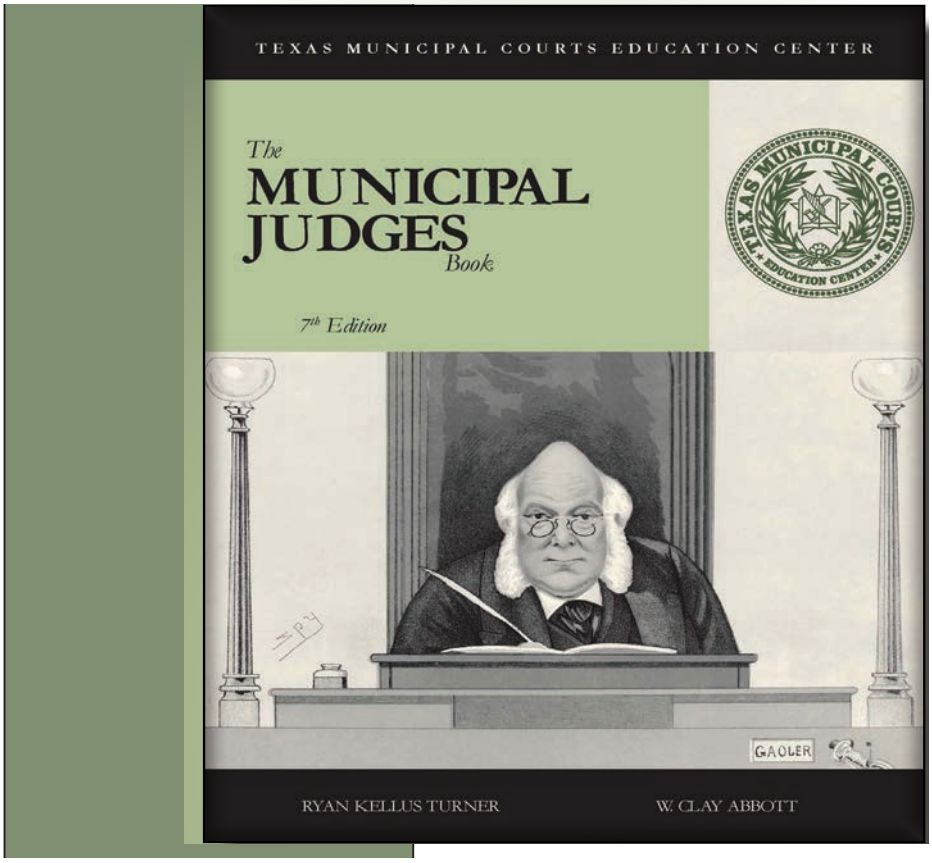

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is not "lewd," i.e., a portion of a legal photograph (protected by the 1st Amendment) cannot be considered illegal. The State argued on appeal that the original full image of the child does involve the "lewd exhibition" of the child's genitals, and therefore, the cropped image of the child's genitals is also a "lewd exhibition of the genitals." The State also argued on appeal and at trial that the cropped image of the child's genitals is a separate and distinct image and a lewd exhibition in its own right.

Considering only the zoomed-in, cropped image, the trial court held that the image constituted possession of child pornography. The court of appeals disagreed, and held that the zoomed-in cropped image did not constitute child pornography. The Court found that the zoomed-in cropped image, standing alone, is sufficient evidence of child pornography because (1) the cropped image depicts the genitals of a child under the age of 18, (2) child pornography can result from image manipulation of an original image that may not be considered child pornography, and (3) this determination is consistent with the plain meaning of "engaging in," "sexual activity," and "lewd exhibition," as well as application of case law (federal *Dost* factors).

In support of the first reason, the Court found that zooming in and taking a magnified picture of a small portion of an existing photograph of a child—even a work of art—constitutes the creation of a new and separate visual depiction of that child. But such image re-creation does not reset the date that the original image of that same underage child "was made," such that the newly created image is no longer of a child under the age of 18. The manipulation of an existing image of a child is simply the creation of a different piece of visual material of that child at that age.

As to the second point, the Court found support in several courts in other jurisdictions that cropping or editing an otherwise innocent picture can result in child pornography, such as the 6th, 8th, 9th, and 11th circuit courts. The Court emphasized that the determination of whether an image is a lewd exhibition of the genitals must be done on a case-by-case, picture-by-picture basis.

Applying the *Dost* factors the Court uses as a guide, it found that (1) child's genital area is the focal point of the cropped image, (2) since the image is of only the child's genital area, it could be viewed as unnatural and sexually suggestive, (3) since the image is a close-up of the child's genitals, it is an image depicting a child who is at least partially nude, (4) the visual depiction suggests sexual coyness or a willingness to engage in sexual activity, and (5) the visual depiction appears to have been intended and designed to elicit a sexual response in the viewer.

A defendant does not commit the offense of Continuous Sexual Abuse of a Child (Section 21.02, Penal Code) if one of the two acts of sexual abuse does not occur in Texas. Both acts must occur in Texas to be governed by Section 21.02.

Lee v. State, 537 S.W.3d 924 (Tex. Crim. App. 2017)

The evidence is legally sufficient to support a conviction for Failure to Appear/Bail Jumping when a trial court revokes a defendant's bail in open court, remands the defendant to jail, and the defendant fails to report to jail as ordered.

Timmins v. State, 2018 Tex. App. LEXIS 5422 (Tex. App.—San Antonio July 18, 2018, no pet.)

On the 4th of July, Timmins was in a head-on collision which killed a married couple driving home to Helotes. 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' 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 could not drive and believed he would not be taken into custody, Timmins had his elderly mother drive him from San Antonio to Bandera County for the bail revocation hearing.

At the hearing, the trial court revoked Timmins' bail, but allowed Timmins to accompany his mother on her return to San Antonio. The trial court ordered Timmins to report to the county jail by 3:00 p.m.

later 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 (Failure to Appear(FTA)/Bail Jumping).

On appeal, Timmins challenged the legal sufficiency of the conviction. Timmins argued his failure to report to the county jail was not an offense under Section 38.10 because he was not "released" from custody and did not fail to "appear," which he contended is a technical term meaning one's physical presence in court for a judicial proceeding. Timmins did not challenge the "custody" element of the offense. Instead, he argued that a judge falls within the Penal Code definition of "public servant." Timmins was under restraint by a public servant pursuant to an order of a court. Hence, Timmins was "in custody."

In a matter of first impression, the 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 in violation of Section 38.10(a) of the Penal Code because it showed that he had criminal charges pending, he was released on bail, the trial court revoked his bail, the trial court released him from the courtroom and imposed a condition on his release, the terms of his release required him to report to and be physically present at the county jail by 3:00 p.m. later that day to await trial, and Timmins failed to report to and be physically present at the county jail as required by the terms of his release.

Commentary: Ostensibly there could be broader implications to this decision. Petition for Discretionary Review was filed in this case on September 18, 2018. There are good reasons for it to be granted. Most FTA cases in Texas involve Class C misdemeanors. (Could 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? Although it is dicta, in footnote 1 the court of appeals seemingly accepts the argument that a judge is a public servant and that a person who is subject to a judge's order is in custody for purposes of Failure to Appear (FTA)/Bail Jumping. Could this be construed to mean that where a defendant makes an initial appearance in court but fails to make subsequent appearances each one could be a separate FTA?

Evidence was legally sufficient to convict a justice of the peace for bribery stemming from setting of bail. The trial court did not err in refusing to include an instruction on entrapment in the jury charge.

Zarate v. State, 551 S.W.3d 261 (Tex. App.—San Antonio 2018, pet. ref'd)

The evidence was sufficient for the jury to have found beyond a reasonable doubt that Judge Zarate intentionally and knowingly agreed to confer on the arrestee a benefit as consideration for a violation of his legal duty to set a bond under Article 17.15 of the Code of Criminal Procedure. Directing jail staff to reduce the bonds from $30,000 to $5,000 was sufficient to allow the jury to reasonably conclude that Judge Zarate agreed to accept the $500 bribe. The record does not suggest that Judge Zarate was either subjectively or objectively induced to commit the offense by such persuasion that would cause an ordinarily law-abiding person of average resistance to commit the crime of bribery.

Commentary: Judge Zarate was sentenced to five years in prison. The sentence was probated.

For the purposes of the evading arrest or detention statute (Section 38.04 of the Penal Code), the defendant fled when he got out of the car and walked away from a lawful detention and did not stop when commanded by officers until he was about 40 feet away.

Rush v. State, 549 S.W.3d 755 (Tex. App.—Waco, 2017, no pet.)

Rush contends "walking" is not "fleeing," and

therefore, the evidence is insufficient to support the element of fleeing. The court disagrees, looking to fleeing cases involving motor vehicles. In that context, "fleeing" has been held to be "anything less than prompt compliance with an officer's direction to stop." *Horne v. State*, 228 S.W.3d 442, 446 (Tex. App.—Texarkana 2007, no pet.). "The statute does not require high-speed fleeing, or even effectual fleeing. It requires only an attempt to get away from a known officer of the law. Thus, under the law, fleeing slowly is still fleeing." *Mayfield v. State*, 219 S.W.3d 538, 541 (Tex. App.—Texarkana 2007, no pet.) (evading with a vehicle). The court sees no reason to state a different standard for fleeing when the act of fleeing is on foot.

B. Transportation Code

1. Red Light Cameras

Section 29.003(g) of the Government Code, stating that the municipal court has "exclusive appellate jurisdiction" over appeals from red light camera hearings conducted by administrative hearing officers, is not unconstitutional.

City of Richardson v. Bowman, 2018 Tex. App. LEXIS 4759 (Tex. App.—June 27, 2018, pet. filed)

The court of appeals held that the grant of exclusive appellate jurisdiction to the municipal court in cases arising under Chapter 707 within a city does not violate Article V, Section 3 or Section 6 of the Texas Constitution. The Legislature granted the hearing officer sole authority to make an initial determination in a dispute involving red light camera ordinances. Accordingly, Bowman was required to exhaust administrative remedies regarding his claim that the City did not comply with Section 707.003(c) and (e) of the Transportation Code. Bowman's challenges to the constitutionality of the laws regulating red light cameras presented pure questions of law outside of the exclusive jurisdiction of the hearing officer. In terms of these questions, Bowman was not required to exhaust his administrative remedies. The State and City each had legitimate interests in deterring red light violations and in funding emergency medical services and traffic safety programs. The civil penalty provided by red light camera laws is rationally related to those interests.

Petition for review was filed with the Texas Supreme Court on July 12, 2018.

The trial court erred in granting a plea to the jurisdiction because the City failed to publish its red light camera ordinance before adoption as required by city charter.

Hunt v. City of Diboll, 532 S.W.3d 904 (Tex. App.—Tyler 2017, pet. filed)

The court of appeals held that the district court lacked jurisdiction to hear the two appellants' equitable claims that the red light camera ordinance was unconstitutional because they showed no irreparable injury giving the trial court equitable jurisdiction. The plaintiffs, however, did not have to exhaust administrative remedies because the ordinance was not published. One of the plaintiffs could sue on behalf of a class because the City of Diboll had placed a registration hold on his vehicle, which constituted a remediable concrete injury. Governmental immunity did not bar declaratory judgment claims contesting the ordinance because Sections 37.004 and 37.006(a) of the Civil Practice and Remedies Code waived it. Another plaintiff pleaded sufficient facts to confer jurisdiction for a takings claim.

Petition for review was filed on January 16, 2018 with responses filed as recently as May 21, 2018. The petition is pending.

Commentary: Notably, the attorney representing Hunt and the corporate plaintiff in this case is Russell J. Bowman who is the respondent in the more recent case involving the City of Richardson. The stage is set for what purports to be a "make-it or break-it" moment for red light cameras in Texas. It has regularly been a contested issue at the Capitol during session. Now, in addition to these two cases pending before the Texas Supreme Court, Governor Abbott has called for the abolition of law authorizing red light cameras. Stay tuned!

2. Junked Vehicles

The administrative board lacked the authority to assess $8,000 in administrative penalties. Section 683.0765 of the Transportation Code does not authorize a municipality to alternatively enforce its junked-vehicle ordinance via an administrative adjudication process. It permits a municipality to utilize an alternative administrative process only if it first adopts, by ordinance, provisions for such procedures. Having a municipal court of record does not suffice.

In re Pixler, 2018 Tex. App. LEXIS 5791 (Tex. App.—Fort Worth July 26, 2018, no pet.)

Pixler owns Tim's Auto Tech in the City of Newark. The City sued Pixler in district court: (1) for injunctive relief, (2) to enforce administrative penalties totaling $8,000, (3) to recover $80,000 in civil penalties for violating the City's junked-vehicle ordinance, and (4) for violating the Texas Uniform Fraudulent Transfers Act (TUFTA). The City alleged that Pixler, with the intent to hinder, delay, or defraud the City, violated TUFTA by transferring real property valued at over $800,000 to one or more entities that he controls shortly before accruing a debt (i.e., the summary judgment ordered by the district court).

Pixler filed a mandamus petition in the court of appeals seeking to compel the district court to dismiss the City's lawsuit for want of subject-matter jurisdiction. Finding all but one of the City's claims jurisdictionally sound (the exception being the administrative-penalties claim), the court of appeals granted in part and denied in part Pixler's petition.

This case involves Chapter 54 of the Local Government Code (Enforcement of Municipal Ordinances). Subchapter B of Chapter 54 is entitled *Municipal Health and Safety Ordinances*. In Subchapter B there are three key provisions. Section 54.012 (Civil Action) authorizes a city to bring a civil action for the enforcement of certain types of ordinances. Section 54.013 (Jurisdiction; Venue) states that jurisdiction under Subchapter B is in either a district court or a county court at law in which the city is located. Section 54.016 (Injunction) authorizes a city to seek an injunction on a showing of substantial danger of injury or an adverse health impact to other people or property.

The court of appeals decided that Sections 54.012, 54.013, and 54.016 collectively allowed the City to file a civil action for the purpose of enforcing and enjoining the violation of its junked-vehicle and off-street parking ordinances and that the district court had subject-matter jurisdiction over both the City's claim for civil penalties and its TUFTA claim.

The court of appeals decided, however, that the administrative board did not have the authority to assess $8,000 in administrative penalties against Pixler. Accordingly, it was void, and the city could not enforce the administrative penalty in district court.

Chapter 683 of the Transportation Code is entitled *Abandoned Motor Vehicles.* Section 683.0765 of the Transportation Code (Alternative Procedure for Administrative Hearing) states that "[a] municipality by ordinance may provide for an administrative adjudication process under which an administrative penalty may be imposed for the enforcement of an ordinance adopted under this subchapter. If a municipality provides for an administrative adjudication process under this section, the municipality shall use the procedure described by Section 54.044, Local Government Code." Section 54.044 of the Local Government Code (Alternative Procedure for Administrative Hearing) is contained in Subchapter C of Chapter 54 (Quasi-judicial Enforcement of Health and Safety Ordinances). Section 54.044 sets out various provisions relating to notice, a hearing, an order, and an appeal that apply when an alternative administrative process is used. It also allows a municipality to enforce an order issued under the subsection by filing a civil suit for the collection of a penalty assessed against the person.

Because the City utilized an alternative administrative process like the one set out in Section 54.044 without having adopted an ordinance permitting it to do so, the administrative board lacked the authority to assess $8,000 in administrative penalties against Pixler. Section 54.044 provides no authority for the City to enforce the penalty in

the district court, extinguishing the district court's statutory subject-matter jurisdiction to consider the claim. The court of appeals also rejected the City's claim that by adoption of an ordinance under Chapter 30 of the Government Code making the Newark Municipal Court a municipal court of record, it also conferred civil jurisdiction on the municipal court to provide for an administrative adjudication process under Subchapter E of Transportation Code, Chapter 683.

III. Procedural Law

A. Pleas

When the prosecution amends a criminal complaint after entering a plea agreement with the defendant, a defendant may be sentenced pursuant to the new plea agreement under the amended complaint if the defendant was allowed to withdraw his original guilty plea.

Kernan v. Cuero, 138 S. Ct. 4 (2017)

The Court in a per curiam opinion reversed the 9th Circuit of Appeals, holding that it erred when it held that federal law as interpreted by the U.S. Supreme Court in *Santobello* v. *New York*, 404 U. S. 257 (1971), clearly establishes that specific performance is constitutionally required when a criminal complaint is amended as in this case. The Court made it clear that it was deciding no other issue in *Kernan*.

Commentary: Even if the state violated the Constitution by seeking to amend the complaint, U.S. Supreme Court precedent did not clearly establish a remedy of specific performance. Now there is case law that expressly states as much.

At first impression, this opinion seems a bit odd. Perhaps it is just an example of the U.S. Supreme Court correcting the 9th Circuit for mischaracterizing *Santobello* (holding a defendant may not be bound to a plea agreement following a prosecutorial breach of an enforceable provision of such an agreement). However, it has the potential to be cited out of context in cases in which a charging instrument is amended.

Readers should keep in mind that the amendment of the charging instrument in this case occurred in a sentencing hearing after Kernan changed his plea from not guilty to not guilty/no contest. The plea form, however, inaccurately understated the range of punishment, which is why the prosecution sought to have it amended before sentencing.

B. Discovery

By entering a plea of guilty in state court a defendant waives a *Brady* Section 1983 municipal liability claim.

Alvarez v. City of Brownsville, No. 16-40772 (5th Cir. 2018)

In November 2005, George Alvarez, a then-17 year old ninth grade special education student, was arrested by the Brownsville Police Department and taken to a detention center on suspicion of public intoxication and burglary of a motor vehicle. While in custody, he was involved in a scuffle with law enforcement after he refused to comply with commands to enter a detention cell. The altercation was captured on video. Subsequently, an internal administrative investigation concluded that use of force against Alvarez did not violate the Brownsville Police Department's use of force policy. Notably, the video was reviewed by the internal affairs division but was neither requested nor shared with the criminal investigation division.

A criminal investigation was conducted by the Brownsville Police Department to determine if there was probable cause for recommending that the district attorney's office criminally charge Alvarez for assault. Alvarez was indicted for assault and pleaded guilty. After violating terms of community supervision, he received an eight-year sentence of incarceration.

Four years later, during the course of a 42 U.S.C. Section 1983 lawsuit, the video surfaced. The nondisclosure of the video resulted in a state district court recommending that the writ of habeas corpus be granted and that Alvarez be given a new trial. The Court of Criminal Appeals concluded that Alvarez was "actually innocent" of committing the assault.

Alvarez's assault conviction was then set aside and all charges against Alvarez were later dismissed.

Alvarez argued that under *Brady v. Maryland*, 373 U.S. 83 (1963), the videos of the skirmish constituted exculpatory evidence that he was constitutionally entitled to before the entry of his guilty plea. Following a two-day trial in federal district court, Alvarez was awarded $2.3 million.

On appeal, the 5th Circuit Court of Appeals considered whether the City of Brownsville should have been subjected to municipal liability for Alvarez's claim under *Brady* and whether Alvarez was precluded from asserting his constitutional *Brady* claim for his Section 1983 action against the City of Brownsville because he pleaded guilty. The 5th Circuit Court reversed the district court's judgment and rendered judgment in favor of the City of Brownsville. Alvarez's action against the City of Brownsville was dismissed with prejudice.

Under *Brady*, the defendant has the right to review exculpatory material from the prosecution in order to prepare for trial. The decision of the federal trial court expanded the scope of *Brady*. However, it is settled precedent in federal court that there is no constitutional right to *Brady* material prior to a guilty plea.

Commentary: The case is a good reminder of the distinction between federal and state law when it comes to criminal discovery matters. As the dissent notes, since 1979, Texas has interpreted the federal *Brady* right to require the government to provide exculpatory information to defendants who plead guilty as well as to those who plead not guilty. In contrast to federal law, Texas law construes due process to require disclosure of exculpatory evidence to defendants who plead guilty.

The habeas court did not abuse its discretion in concluding Martinez failed to prove that the prosecutors engaged in conduct—withholding of potential impeachment evidence under *Brady* or Article 39.14(h)—with the intent to goad or provoke the defense into moving for a mistrial after jeopardy attached or to avoid a possible acquittal.

Ex parte Martinez, 2018 Tex. App. LEXIS 5856 (Tex. App.—San Antonio July 31, 2018, no pet.)

The evidence at issue was the disclosure that the second-chair prosecutor previously had a "one-time sexual encounter" with a witness in the case. The second-chair prosecutor did not continue on the case after reading the prosecution guide prepared by law enforcement and recognizing one of the witnesses. The State did not disclose this information until after the jury had been impaneled and evidence had been presented. Much conflict and confrontation between the State and the defense ensued after the disclosure. Nine days after voir dire, the defense moved for a mistrial in open court based on the untimely disclosure of information that might constitute impeachment evidence under *Brady*. Although the State agreed to a mistrial, it denied any wrongdoing or that the defense was forced into requesting a mistrial based on any action by the State. The trial court granted the motion for mistrial and reset the trial. Thereafter, Martinez filed his pretrial application for writ of habeas corpus, alleging further prosecution was barred based on double jeopardy.

In Texas, when a defendant moves for a mistrial and subsequently claims retrial is barred by double jeopardy, the habeas court, and all subsequent reviewing courts, must determine whether: (1) the prosecutor engaged in conduct to goad or provoke the defense into requesting a mistrial (see, *Ex parte Lewis*, 219 S.W.3d 335, 337, 371 (Tex. Crim. App. 2007)); or (2) the prosecutor deliberately engaged in the conduct at issue with the intent to avoid an acquittal (see, *Ex parte Masonheimer*, 220 S.W.3d 494 (Tex. Crim. App. 2007) (held the record supported a finding that the defendant's two prior motions for mistrial were "necessitated" by the State's deliberate failure to disclose *Brady* material with the specific intent to avoid the possibility of an acquittal)).

Applying the non-exclusive factors provided by the Texas Court of Criminal Appeals in *Ex parte Wheeler*, 203 S.W.3d 317 (Tex. Crim. App. 2006), in

determining whether the prosecutor had the requisite intent so as to bar any retrial based on double jeopardy, the court found that the habeas court was within its discretion in concluding Martinez failed to establish by a preponderance of the evidence that prosecutors intended to goad him into moving for a mistrial or feared an acquittal.

Evidence supporting the habeas court's ruling included: (1) it did not reasonably appear in the time leading up to the mistrial that Martinez was likely to obtain an acquittal; (2) there is no evidence that the first-chair prosecutor or any other prosecutor or member of the District Attorney's Office continued to withhold information after being ordered to disclose it; (3) the decision to withhold disclosure of the second-chair prosecutor's one-time encounter with a witness was based on his good-faith desire to protect a colleague's reputation in the legal community and at the courthouse; (4) the one-time sexual encounter between the second-chair prosecutor, who was firewalled from the case prior to indictment, with a potential "star witness," would not tend to negate Martinez's guilt or reduce his sentence; and (5) the decisions by the prosecution to seek advice from the head of the appellate and ethical integrity units—and subsequently the trial court itself—belies any intent to engage in misconduct. The court also noted that the district attorney's unprofessional behavior (ranting and making threats in an off-the-record meeting in chambers, mentioning mistrial) was conducted in an effort to deter the defense from alleging prosecutorial misconduct, not to force a mistrial.

The trial court did not abuse its discretion by admitting evidence in the punishment phase of the trial that had not been produced pursuant to Article 39.14 of the Code of Criminal Procedure because it was not material.

Watkins v. State, 554 S.W.3d 819 (Tex. App—Waco 2018, no pet.)

The court disagrees with the State's assertions that Article 39.14 does not apply to punishment evidence or that it would never apply to extraneous offenses. The court laments that if it were writing on a clean slate to interpret what evidence is "material to any matter," it would be inclined to construe this phrase, at a minimum, to include any evidence the State intends to use as an exhibit to prove its case to the factfinder in both the guilt and punishment phases of a trial. However, the phrase was not modified or defined by the Legislature when it passed the amendments to Article 39.14. Applying well-established precedent, materiality for purposes of Article 39.14(a) means that "there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different."

At issue are exhibits providing documentary evidence of extraneous offenses that had resulted in convictions and incarceration that the State was using in part to establish the enhancement paragraphs of the indictment. Other documentary evidence of extraneous offenses was admitted in support of the State's pursuit of a lengthy sentence. The State had provided notice of its intent to produce evidence of these convictions both in its Article 37.07 notice as well as the enhancement paragraphs in the indictment itself. Watkins pleaded true to the enhancements at the punishment hearing. The court does not believe that even if the exhibits had been produced that there is a reasonable probability that the outcome of the trial would have been different, or that the sentence Watkins received would have been reduced.

Commentary: The Waco Court of Appeals had a discovery-themed docket on July 25, 2018. This case and at least three others were decided the same day and centered on the Texas Discovery statute, Article 39.14 (also referred to as the Michael Morton Act). See, the summary for *Majors v. State*, infra, and its commentary. The court used identical language in its analysis in this case and *Carrera v. State*, 554 S.W.3d 800 (Tex. App.—Waco 2018, no pet.). In *Carrera*, the defendant challenged the admission of three photographs taken shortly before the trial depicting the inside of portions of the Navarro County Jail where the offense occurred and a page from the Navarro County Policy Manual which described the policies for the use of force in the jail. Carrera was accused of hitting a jail officer who was attempting to move him to another location within the jail. Carrera was being moved after he had refused to follow

directions given to him to stop communicating with the woman who was arrested with him who had been placed in an adjacent cell. The three photographs were admitted to further explain the jail layout shown in a drawing which was previously admitted. The page of the Navarro County Policy Manual was admitted to show the procedures that were required in order to use force against a prisoner. However, Carrera did not make any argument that the evidence was material. Further, he made no showing to the trial court that the exhibits were material at the time of their admission. So he did not establish that he was entitled to the production of the exhibits in question.

Because the defendant filed a motion but did not seek a ruling from the trial court and the record did not reflect that he otherwise requested production of the photographs, the State did not have a duty to produce the photographs pursuant to Article 39.14 of the Code of Criminal Procedure (Discovery).

Majors v. State, 554 S.W.3d 802 (Tex. App.—Waco 2018, no pet.)

Article 39.14 provides that "after receiving a timely request from the defendant," the State is required to produce certain items in discovery. The defendant's motion for discovery, however, was a motion addressed to the trial court, not a notice or request to the State. The court likens this motion to a request pursuant to Article 37.07 of the Code of Criminal Procedure or Rule of Evidence 404(b) relating to extraneous offenses. The Court of Criminal Appeals has held that when a document seeks trial court action, it cannot also serve as a request for notice triggering the State's duty under Article 37.07 of the Code of Criminal Procedure or Rule 404(b) until it is actually ruled on by the trial court.

Commentary: In another case decided the same day by the Waco Court of Appeals, *Hinojosa v. State*, 554 S.W.3d 795 (Tex. App.—Waco 2018, no pet.), the defendant complained that the trial court erred by admitting evidence of statements given by Hinojosa relating to her participation in extraneous offenses that had not been provided to Hinojosa prior to trial pursuant to amendments to Article 39.14 of the Code of Criminal Procedure. However, the court overruled this issue because nothing in the record indicates that Hinojosa ever made a request to the State that would trigger a duty to disclose evidence under Article 39.14. The Waco Court of Appeals decided two other cases on the same day (see, *Watkins v. State*, supra, and its commentary) with the Texas Discovery statute (also referred to as the Michael Morton Act) at issue.

Information obtained by an assistant district attorney (imputed to the prosecutor for purposes of Article 39.14 of the Code of Criminal Procedure) in a civil capacity, to the extent it is exculpatory, must be disclosed to the defendant, regardless of attorney-client privilege or certain statutory confidentiality.

Tex. Atty. Gen. Op. KP-0213 (09/23/18)

The Attorney General addresses several discovery-related questions pertaining to prosecutors who work in an office that handles both civil and criminal matters. At issue are facts underlying the civil representation can later form the basis for a criminal complaint and prosecution by such office and the intersection of the attorney-client privilege and the Michael Morton Act (Article 39.14 of the Code of Criminal Procedure). The Attorney General first opines that the knowledge of an assistant criminal district attorney is imputed to the prosecutor as "the State" for purposes of Article 39.14, noting that one appellate court has so held.

To the extent information provided to an assistant criminal district attorney acting in a civil capacity constitutes an item described by Subsection 39.14(a) but is protected by the attorney-client privilege, the plain language of Subsection (a) would exempt its disclosure to the defendant. However, a court would likely conclude that any exculpatory information meeting the requirements of Subsection 39.14(h) obtained by such an attorney must be disclosed to the defendant, notwithstanding any attorney-client or other evidentiary privilege.

To the extent that information obtained by an assistant criminal district attorney acting in a civil capacity is confidential under Section 261.201 of the Family Code, any duty of disclosure in Subsection 39.14(a) would not be triggered except pursuant to

court order obtained under Subsection 261.201(b) or (c). A court would likely conclude that any exculpatory information obtained by an assistant criminal district attorney that meets the requirements of Subsection 39.14(h) but that is made confidential by Section 261.201 shall be disclosed only pursuant to court order obtained under subsection 261.201(b) or (c).

C. Competency

At an informal competency hearing, a court should limit its review to the evidence suggestive of incompetency and it must grant the defendant appointment of an expert and a formal competency hearing if there is some evidence that would support a finding that the defendant is incompetent to stand trial.

Boyett v. State, 545 S.W.3d 556 (Tex. Crim. App. 2018)

Here, the court of appeals erred by considering facts and circumstances tending to show that Boyett, who was known to have a diagnosis of schizophrenia, was competent, examining the evidence to determine whether it established a substantial possibility of Boyett's incompetence to stand trial, but holding that she had failed to meet this standard.

Commentary: What is a municipal judge to do when he or she encounters a person suspected of being incompetent to proceed because of mental illness? With the creation of the Texas Judicial Commission on Mental Health there is increasing discussion and focus on mental health issues in judicial proceedings. Yet, on its face, cases like *Boyett* seem to provide little direction. Because Chapter 46B of the Code of Criminal Procedure is only compulsory to proceedings in county and district court, some municipal and justice courts may wonder what, if anything, is legally required of them when a person is believed to be unfit to proceed because of competency issues stemming from mental health.

While it would be nice if the Legislature would provide express guidance to municipal and justice courts, remember that all criminal courts, including municipal courts, are bound by case law construing constitutional rights. *Boyett*, arguably, is an example of how both the trial court and the court of appeals missed the mark; a constitutional mandate stated in case law, not Chapter 46B of the Code of Criminal Procedure. This case is an important reminder to all judges that it's possible to over-rely on statutes for guidance.

While *Boyett* hinged on *Turner v. State*, 422 S.W.3d 676 (Tex. Crim. App. 2013), holding that any "suggestion" of incompetency to stand trial calls for an "informal inquiry" to determine whether evidence exists to justify a formal competency trial under statutory scheme, *Turner* cites three U.S. Supreme Court cases that are fundamental in *all* criminal trial courts: (1) *Pate v. Robinson*, 383 U.S. 375 (1966), holding when evidence warrants a determination of competency, and the trial court denies the defendant a hearing on the matter, the defendant is deprived of due process of law and a fair trial; (2) *Drope v. Missouri*, 420 U.S. 162 (1975), holding a trial court's failure to make sufficient inquiry into defendant's competency can violate due process, and (3) *Dusky v. U.S.*, 362 U.S. 402 (1960), holding that all criminal defendants have a right under the 14th Amendment to have a competency evaluation before proceeding to trial. Regardless of what is or is not plainly stated or expressly implied in the Code of Criminal Procedure, municipal courts are bound by *Pate*, *Drope*, and *Dusky*.

D. Pretrial

Article 28.01 of the Code of Criminal Procedure does not entitle the State to any additional notice when a pretrial hearing occurs on the day of trial.

State v. Velasquez, 539 S.W.3d 289 (Tex. Crim. App. 2018)

The defense had filed 16 pre-trial motions including a motion to suppress evidence that was duly acknowledged by the State. On the day of trial, before voir dire, over the objection of the State, the court considered and ruled on the motions. Evidence was suppressed. The State appealed the suppression and the court of appeals reversed the trial court.

In a 5-4 decision written by Judge Keasler, the Court of Criminal Appeals reversed the court of appeals and held that the court's ruling on the motions did not occur in a pre-trial "setting," as envisioned by Art. 28.01 of the Code of Criminal Procedure, but instead, it occurred on the setting designated for trial on the merits. Accordingly, Article 28.01 was inapplicable and did not require the judge to give advance notice to the parties. The notice requirements in Section 1 of Article 28.01 only apply when a trial court decides to conduct a hearing on a separate pre-trial setting, not when the court decides to conduct a hearing "pre-trial."

Judge Hervey in a concurring opinion noted that the State knew about the motion to suppress, had announced ready for trial and did not ask for a continuance. Furthermore, the State conceded that it had the evidence to oppose the motion to suppress, but declined to participate in the hearing.

Judge Richardson, joined by Presiding Judge Keller, dissented because the court of appeals properly interpreted Article 28.01 and the Court should have dismissed this case as improvidently granted.

Judge Yeary and Judge Keel dissented without written opinion.

Commentary: Is this one of those instances where bad facts make for bad case law? It can be problematic when a trial court sets certain pre-trial motions without providing notice to either the State or the defense as this leaves little time for witnesses to be contacted and for attorneys to prepare before being called into a hearing. You might recall that is why in 2017, the 85th Legislature passed Article 29.035 (For Insufficient Notice of Hearing or Trial). It requires, in certain instances, continuances be granted. But as Judge Hervey points out, in this case, the State had notice and chose not to make a motion for continuance. It is hard to tell if there was a misunderstanding or a miscalculation on the State's part.

Following the State's appeal per Article 44.01 of the Code of Criminal Procedure, a trial court does not regain jurisdiction over the case until an appellate mandate is issued.

Ex parte Macias, 541 S.W.3d 782 (Tex. Crim. App. 2017)

Macias was charged with committing assault with family violence. The trial court granted Macias' motion to suppress a statement he made to law enforcement. The State appealed per Article 44.01 of the Code of Criminal Procedure and filed a motion to stay further trial court proceedings. The court of appeals reversed but did not at the time issue a mandate.

The trial court called the case for a jury trial. After the jury charge was read to the jury, it was brought to the court's attention that the appellate-mandate had not issued. The judge concluded that that the trial was a nullity and that the trial court did not even have the authority to declare a mistrial. The jury was dismissed. The mandate from the appellate court issued nearly two weeks later.

Macias filed a pre-trial habeas application alleging that any future trial on the charged offense was barred by double jeopardy. The trial court denied the application. Even though the mandate had not yet issued, the court of appeals concluded that its decision reversing the trial court's order lifted its earlier stay order. Accordingly, the trial court had jurisdiction over the case and jeopardy had attached. The court of appeals reversed the trial court and granted Macias relief on his habeas application.

In a unanimous opinion written by Presiding Judge Keller, the Court of Criminal Appeals reversed the judgment of the court of appeals. When the State appeals a motion to suppress and a stay in the proceeding is granted, all further proceedings in the trial court are suspended until the trial court receives an appellate-court mandate. Tex. R. App. P. Rule 25.2(g). The trial court does not have jurisdiction over a case until the appellate mandate is issued. Accordingly, the trial court in the present case did not have jurisdiction, jeopardy had not attached, and the trial court properly denied habeas relief.

Commentary: It seems simple. If the prosecution appeals per Article 44.01, the trial court must wait for an appellate-court mandate. However, it may not be that simple in either a municipal or justice

court. There is a lot that remains unknown about the interplay between local trial courts of limited jurisdiction (municipal and justice courts) and county trial courts of limited jurisdiction (county courts and county courts-at-law). It is generally understood that county-level courts are *not* courts of appeals. Yet, most county-level courts have what is best described as incidental appellate jurisdiction of direct appeals from municipal and justice courts. Unfortunately, the scope of such authority is sometimes unclear. Consequently, when related questions arise, appellate courts are occasionally left to button down the hatches that were overlooked by the Legislature. Consider the Court of Criminal Appeals decision in *State v. Alley*, 158 S.W.3d 485 (Tex. Crim. App. 2005), affirming the court of appeals' dismissal of an Article 44.01 appeal from a justice court's dismissal of misdemeanor complaints accusing defendants of separate offenses of failure to stop at a stop sign. Relying on Articles 4.08 and 45.042 of the Code of Criminal Procedure, the Court of Criminal Appeals decided that such appeals had to be taken to the county court because 44.01(f) does not create jurisdiction.

Remember, in municipal or justice courts, an Article 44.01 appeal by the State and the issues presented in *Macias* have to be read in light of *Alley*. More specifically, it means remembering not to proceed until an appellate-court mandate is received and someone potentially explaining to a county judge why an appellate-court mandate is required. While a county judge may be accustomed to receiving one from the court of appeals, it is unlikely the county judge is accustomed to be the one issuing the appellate-court mandate.

Article 24.01(b)(2) does not prohibit an employee of the prosecutor's office from serving a subpoena for a criminal proceeding in which the employee is not a participant when the subpoena issues.

Tex. Atty. Gen. Op. KP-0207 (05/16/18)

E. Trials
1. Judicial Conduct

Because Article 38.05 of the Code of Criminal Procedure provides that trial judges have an independent duty to refrain from commenting on the weight of evidence, a defendant can argue on direct appeal that a trial court's statements violated Article 38.05 although there was no objection preserved on the record.

Proenza v. State, 541 S.W.3d 786 (Tex. Crim. App. 2017)

The Court of Criminal Appeals in a 6-3 decision, Judge Keasler writing for the majority, opined that the judge had an independent duty under Article 38.05 to refrain from conveying to the jury her opinion of the case. Article 38.05 states, "In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case."

Because the judge had a duty to conform with Article 38.05, Proenza was under no obligation to object. The judge's improper comments, however, were not within the third class of forfeitable rights under *Marin v. State*, 851 S.W.2d 275 (1993), but were at least a category-two, waiver-only right. The court of appeals erred in failing to apply the non-constitutional harm analysis to the defendant's claim under Rule 44.2(b) of the Texas Rules of Appellate Procedure. The case was remanded for further consideration.

Judge Newell, joined by Judges Hervey and Alcala, concurred. Judge Newell addressed why the Court should be wary about placing too much emphasis on *Marin*. Judge Newell opined that *Marin* is useful once a right has been categorized, but it is not helpful in categorizing rights. Not all rights fit neatly into one of *Marin*'s three categories.

Presiding Judge Keller filed a dissenting opinion, which was joined by Judge Yeary and Judge Keel. The dissent asserted that the contemporaneous objection requirement is the general rule applied to claims of error. Complaints under Article 38.05 should require preservation and the Court should

have held that the statutory language of Article 38.05 does not create a non-forfeitable right.

Commentary: Under *Marin*, claims of error fall into one of three distinct kinds: category-one rights are absolute requirements and prohibitions, category-two rights are rights of litigants which must be implemented by the legal system unless expressly waived, and category–three rights are rights of litigants which are to be implemented upon request. Determination of the category turns on the nature of the right, not the circumstances in which it was raised. While category-three rights require an objection at trial to preserve error, category-one and category–two rights do not.

No objection is required to preserve for appellate review the question of whether a trial court abused its discretion by activating electric shocks from a stun belt to enforce courtroom decorum.

Morris v. State, 554 S.W.3d 98 (Tex. App.—El Paso 2018, no pet.)

Commentary: Sometimes a case summary cannot adequately capture the essence of the opinion. This is one of those cases. The following are excerpts from the slip opinion.

> "When the trial judges of this State don their robes and ascend the bench each morning, those with criminal dockets are often confronted with defendants who are rude, disruptive, noncompliant, belligerent, and in some cases, even murderously violent. In the face of this reality, Texas trial judges shoulder another heavy burden: the burden to tame the chaos before them, impose order, and uphold the dignity of the justice system. 'The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated.' *Illinois v. Allen*, 397 U.S. 337, 343 (1970). When challenging defendants breach decorum and threaten to tarnish proceedings with bad behavior, we afford trial judges 'sufficient discretion to meet the circumstances of each case.' *Id.* But discretion has its limits." *Morris* at 102. "While the trial court's frustration with an obstreperous defendant is understandable, the judge's disproportionate response is not. We do not believe that trial judges can use stun belts to enforce decorum. A stun belt is a device meant to ensure physical safety; it is not an operant conditioning collar meant to punish a defendant until he obeys a judge's whim. This Court cannot sit idly by and say nothing when a judge turns a court of law into a Skinner Box, electrocuting a defendant until he provides the judge with behavior he likes. Such conduct has no place in this State's courts. We have no choice but to reverse." *Id.* at 63-64.

2. Evidence

The trial court did not err in admitting a recording of a recording where it determined the officer supplied facts sufficient to support a reasonable determination that the videotape was authentic under Rule 901 of the Texas Rules of Evidence.

Fowler v. State, 544 S.W.3d 844 (Tex. Crim. App. 2018)

Officers Torrez and Meek went to the Family Dollar store that issued a receipt for items found next to a stolen ATV in order to view the video surveillance from the time stamp on the receipt. The manager of the store retrieved a videotape stamped with the same date and time as on the receipt. Since the video was not in a format that allowed it to be copied, under Officer Torrez's supervision, Officer Meek used his Royse City Police Department camera to record a copy of the surveillance video. After the videotape was recorded by the police, they went back to the Royse City Police Department where the video recording was then downloaded onto a hard drive and attached to the case report. There was no audio on the tape.

Defense counsel objected to admission of the video because it was incomplete (officer zeroed in on one or two different panes when the video had four panes) and because the State must establish why the original is not available. The trial court overruled the defense counsel's ultimate objection that the proper predicate had not been laid. The jury found the defendant guilty.

The court of appeals found that the video had not been properly authenticated under Rule of Evidence 901. The Court of Criminal Appeals granted the State's petition for discretionary review to answer the following question: may the proponent of a video sufficiently prove its authenticity without the testimony of someone who either witnessed what the video depicts or is familiar with the functioning of the recording device? The Court answered yes, it is possible.

Judge Richardson delivered the opinion for a unanimous Court. Agreeing with the court of appeals that the State could have done more, the Court nevertheless notes that even though the most common way to authenticate a video is through the testimony of a witness with personal knowledge who observed the scene, that is not the only way. Under Rule 901(b)(4), evidence can also be authenticated by "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Video recordings without audio are treated as photographs and are properly authenticated when it can be proved that the images accurately represent the scene in question and are relevant to a disputed issue. The State presented the following circumstantial evidence to authenticate the video recording: (1) the officer's in-person request of the manager of the Family Dollar store to pull the surveillance video on a certain date at a certain time; (2) the distinctive characteristic that there is a date and time stamp on the videotape; (3) the fact that the date and time on the videotape correspond to the date and time on the receipt that was found within three feet of the ATV; and (4) the fact that the videotape pulled by the manager reveals the defendant at the store on that date at that time purchasing the items listed on the receipt that was found near the stolen ATV. Though the State could have done more, a zone of reasonable disagreement is exactly that—a zone.

The trial court erred in admitting Facebook messages concerning drug use by the accused six to seven hours before the crime, as the evidence's probative value was substantially outweighed by the danger it would confuse and distract the jury; however, the error was harmless because given the State's lack of emphasis on the evidence, and the strong evidence of defendant's guilt, the brief discussion of his drug use and possession was unlikely to have influenced the jury's verdict.

Gonzalez v. State, 544 S.W.3d 363 (Tex. Crim. App. 2018)

The State argues that the appellant's use of ecstasy on the day of the crime was relevant to his claim of self-defense, in that his "intoxication would tend to make it less probable that his belief that the degree of force he used was immediately necessary was objectively reasonable." Judge Newell delivered the unanimous opinion of the Court. The Court agrees that evidence of intoxication under certain circumstances can be relevant in a given case. The Court has held that evidence of extraneous offenses can be admissible to show the context and circumstances in which the criminal act occurred.

However, evidence of drug use is not relevant if it does not apply to a "fact of consequence." The Court finds that it does not need to decide the precise outer boundaries of the relevance for the prior drug use in this case. Even if the Court assumes that the appellant's drug use six-to-seven hours before the offense was relevant, the trial court abused its discretion by determining that its probative value was not substantially outweighed by the danger of unfair prejudice.

Rule 403 of the Texas Rules of Evidence provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence."

The record was silent as to what type of drug ecstasy is, what the intoxicating effects of ecstasy are, and how long those effects persist. Assuming the relevance of the evidence, the inference that the appellant was actually under the influence of ecstasy at the time of the offense was weak at best. The State's need for the evidence was equally weak.

Further, the low probative value of the evidence also lowered its ability to directly rebut the appellant's self-defense claim.

Conversely, evidence of the appellant's drug use and possession in school had the potential to impress the jury in some irrational and indelible way. The evidence of prior drug use had great potential to lure the jury to declaring guilt based upon the appellant's delinquent behavior at school independent of the specific offense charged. Even assuming the evidence was relevant, the probative force of the evidence rested entirely upon the ability to draw an inference of intoxication at the time of the offense. Without additional evidence regarding the effects of taking ecstasy several hours prior to the offense or testimony equating the appellant's behavior with intoxication, the jury was ill-equipped to evaluate the probative force of the evidence.

That said, the erroneous admission of evidence is non-constitutional error. Non-constitutional errors are harmful, and thus require reversal, only if they affect the appellant's substantial rights. Significantly, the State did not emphasize the drug evidence in this case beyond introducing it. The entirety of the evidence relating to the drug use and possession was elicited in five pages of the State's 32-page cross-examination of the appellant. Much of those five pages consists of questions related to the smiley faces and emojis used between the appellant and his girlfriend in the messages. The State did not bring the drug evidence up at all during the rest of trial. The prosecutor did not mention it during closing argument.

Most importantly, the evidence of drug use and possession was not the only evidence that called the appellant's credibility into question. The trial was riddled with inconsistencies in the appellant's trial testimony and prior statements made at the time of the incident. Given the amount of inconsistencies between the trial testimony and the prior statements, the Court was not convinced that the brief discussion of drug use and possession would influence the determination of the jury's verdict. Having but a slight effect on the jury's verdict; therefore, the appellant's substantial rights were not affected.

A lay witness was not testifying as to the complainant's truthfulness in the particular allegations, which would violate Rule 608 of the Texas Rules of Evidence, where the witness was testifying to the emotional state of the victim (i.e., that she was genuinely afraid and hysterical).

Webb. v. State, 2018 Tex. App. LEXIS 1391 (Tex. App.—Texarkana February 22, 2018, pet. ref'd)

The trial court did not err in allowing a disabled victim witness' guardian to remain in the courtroom during the victim's testimony after initially being excluded from the courtroom under Rule 614 of the Texas Rules of Evidence (The Rule).

Garcia v. State, 553 S.W.3d 645 (Tex. App.—Texarkana 2018, pet ref'd)

Juan Carlos Garcia was convicted by a jury of aggravated sexual assault of Sally Smith, a disabled individual. The evidence at trial established that, as a result of a guardianship proceeding, Ronnie Smith, Smith's mother, was appointed as Smith's permanent legal guardian of Smith's person and estate. Before hearing any evidence, Rule 614 was invoked, and the trial court excluded potential witnesses, including Ronnie Smith. However, after Ronnie testified, the State asked that she be allowed to remain in the courtroom during Smith's testimony. Garcia objected.

The trial court overruled the objection and based its ruling on Article 38.074 of the Code of Criminal Procedure. Under that Article, a trial court may allow "any person whose presence would contribute to the welfare and well-being of a child." The court agreed with Garcia that Article 38.074 did not apply because Smith was 20 years old at the time of the offense, and not a child. However, the court agreed with the State that Article 36.03 permitted Ronnie's presence in the courtroom.

Article 36.03 was enacted as a part of 2001 legislation strengthening the ability of crime victims and particular witnesses to participate in certain criminal justice proceedings. The current version of Article 36.03 states:

(a) Notwithstanding Rule 614, Texas Rules of Evidence, a court at the request of a party may order the exclusion of a witness who for the purposes of the prosecution is a victim, close relative of a deceased victim, or guardian of a victim only if the witness is to testify and the court determines that the testimony of the witness would be materially affected if the witness hears other testimony at the trial.

(b) On the objection of the opposing party, the court may require the party requesting exclusion of a witness under Subsection (a) to make an offer of proof to justify the exclusion.

A trial court is "without authority to exclude [a qualifying witness] unless the court determine[s] her testimony would be materially affected if she heard the other testimony at trial." *Wilson v. State*, 179 S.W.3d 240, 248 (Tex. App.—Texarkana 2005, no pet.). In the absence of such a showing, a trial court does not err in allowing the witness to remain in the courtroom. *Id*. Additionally, unlike Rule 614, Article 36.03 places the burden on the party seeking exclusion of a witness to make an offer of proof to justify the exclusion. Thus, "legal guardians of crime victims should generally be permitted to stay in the courtroom." *Parks v. State*, 463 S.W.3d 166, 174 n.6 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing Article 36.03(a)).

The court found that Garcia failed to argue or make any showing that Ronnie's testimony would be materially affected if she heard Smith's testimony, presumably because Ronnie testified before Smith and was not recalled. Additionally, the record also shows that Garcia failed to make an offer of proof justifying Ronnie's exclusion.

The complainant's statement was properly admitted as a recorded recollection under Rule 803(5) of the Texas Rules of Evidence, even though her daughter had written the statement in English and read it back to the complainant in Vietnamese for confirmation it was accurate.

Gomez v. State, 552 S.W.3d 422 (Tex. App.—Fort Worth 2018, no pet.)

This case arises from a domestic dispute between the appellant and his wife, Lien Lam. Because of her lack of memory at trial, the State also offered Lam's statement to her daughter. At the time Lam gave her statement, Lam's daughter wrote out the statement in English, read it back to Lam in Vietnamese, and then Lam signed it. The defendant argued this statement was inadmissible hearsay. The trial court admitted it.

In interpreting the predecessor of Rule 803(5), the Court of Criminal Appeals has held that the proponent seeking admission of a recorded recollection (hearsay exception) must satisfy four elements: (1) the witness must have had firsthand knowledge of the event, (2) the written statement must be an original memorandum made at or near the time of the event while the witness had a clear and accurate memory of it, (3) the witness must lack a present recollection of the event, and (4) the witness must vouch to the text of the note for the accuracy of the written memorandum. Here, the appellant challenges the fourth element.

The court found that Lam's testimony met these requirements. First, Lam testified that she could not remember the night's events. Next, she testified that she told her daughter what happened and her daughter wrote down her description of the incident. Then Lam testified that her daughter then interpreted the statement and read it back to her, and Lam agreed it was accurate and signed it. Finally, when the appellant's counsel asserted, "And so there was no way for you to verify what [your daughter] put in the statement, [was] there?" Lam replied, "Because when the incident happened, I told her the story and then that detail that I provided to her, so she put it in the statement."

As to the trustworthiness requirement present in the rule, there was no evidence that Lam's daughter experienced any difficulty in translating her mother's statements into the English language, nor was there any evidence of any motive on Lam's daughter's part to fabricate her mother's statements. To the contrary, Lam's testimony indicated that she was confident that her statement as translated and transcribed by her daughter was accurate.

A patrol officer who identified the pills at issue in the case could not sponsor excerpts from a website or a book pursuant to Rules 803(18) and 702 of the Texas Rules of Evidence because he was not an expert.

Amberson v. State, 552 S.W.3d 321 (Tex. App.—Corpus Christi-Edinburg 2018, no pet.)

Alma Amberson was charged with intentionally or knowingly possessing a controlled substance, specifically clonazepam, in an amount of less than 28 grams. Amberson plead not guilty. The relevant testimony elicited during the guilt/innocence phase of the case came from Allen McCollum, a patrol officer with the Corpus Christi Police Department (CCPD) and Pablo Hernandez, a CCPD patrol officer at the time of Amberson's arrest, who had been promoted to detective in the narcotics/vice division three months before trial.

During voir dire examination, Hernandez testified that because the Texas Department of Public Safety (DPS) will not test drugs unless requested by the district attorney's office, Hernandez relies on the website drugs.com and the Drug Bible to identify drugs. On cross-examination, Hernandez acknowledged that drugs.com contains a disclaimer and that it is not necessarily a reliable source and that he has no medical training and no experience administering drugs. Amberson argued that Hernandez was not an expert because Hernandez acknowledged that anyone can look up a code and that he lacked any scientific or medical training that would enable him to identify a drug without resorting to a book. Therefore, according to Amberson, Hernandez could not rely on a learned treatise, assuming drugs.com and the Drug Bible constituted such. The trial court allowed Hernandez to testify. The jury found Amberson guilty.

On appeal, Amberson argues that the trial court erred in admitting hearsay evidence of drug identity based upon drugs.com and the Drug Bible. Amberson further argues that Hernandez was not qualified as an expert, and therefore, he could not rely on the learned treatise exception. The State responds by arguing that: (1) drugs.com and the Drug Bible do not constitute hearsay; (2) Hernandez's description of the steps he took to identify the pills constitutes lay witness testimony; and (3) even if the statements in drugs.com and the Drug Bible constitute hearsay, they fall within exceptions to the hearsay rule regarding (1) learned treatises and (2) market reports and similar commercial publications.

The court found that, based on the record, the information relied on by Hernandez constitutes hearsay. The court then determines that Hernandez is not an expert because he failed to explain what training he received in pill identification. Because Hernandez is not an expert, he could not sponsor excerpts from either drugs.com or the Drug Bible.

The court also rejects the State's alternative "theory" on Rule 803(17) (Market Reports and Commercial Publications) because it was not presented at trial in such a manner that Amberson was fairly called upon to present evidence on the issue. Even if the court addressed the merits of this theory, the court finds the record is still lacking.

3. Jury Argument

The right not to be subjected to improper jury argument is forfeitable and even mention of a very inflammatory word that is outside the record does not dispense with error preservation requirements.

Hernandez v. State, 538 S.W.3d 619 (Tex. Crim. App. 2018)

Judge Keel delivered the opinion of the unanimous Court. Here, the defendant did not pursue his objection to an adverse ruling; therefore he did not preserve his complaint about the State's jury argument. The Court follows precedent and declines to elevate the right to be free of improper jury argument to the status of an absolute requirement like jurisdiction. Erroneous jury argument must be preserved by objection pursued to an adverse ruling; otherwise, any error from it is waived.

4. Jury Instructions

The trial court's refusal to instruct the jury on self-defense and necessity, if error, was harmful to the defense.

Rogers v. State, 550 S.W.3d 190 (Tex. Crim. App. 2018)

Self-defense and necessity are confession-and-avoidance defenses. Failure to instruct on a confession-and-avoidance defense is rarely harmless "because its omission leaves the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense." *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013).

Judge Keel delivered the opinion for a unanimous court. Here, the jury had no opportunity to consider or reject either necessity or self-defense because the trial court's rulings prohibited any mention of them. Those rulings are other relevant information that may inform the harm analysis and should be considered by the court of appeals as such. The court of appeals instead looked to the punishment verdict for other relevant information. Assuming for the sake of argument that a heavy sentence might suggest harmlessness from an erroneous failure to instruct on a defensive issue, it is difficult to draw any reliable conclusions about the jury's assessment of the appellant's blameworthiness when it was prevented from hearing any defensive theories, evidence, or argument.

Because an instruction to disregard improper testimony would have been sufficient, the defendant could not complain on appeal of the trial court's failure to grant his motion for mistrial.

Lee v. State, 549 S.W.3d 138 (Tex. Crim. App. 2018)

Judge Yeary delivered the opinion for a unanimous Court. The court of appeals reversed an impaired driving conviction, holding that the trial court abused its discretion in failing to grant the defendant's motion for new trial. The Court reversed the judgment of the court of appeals. An instruction to disregard would have served to obviate any harm in the jury's having been exposed to the remaining objectionable testimony. For this reason, the court of appeals should not have proceeded to conduct a *Hawkins* mistrial analysis. If a curative instruction would have sufficed, it cannot be said that the trial court abused its discretion to deny the appellant's final mistrial request.

If a jury instruction includes the elements of the charged crime but incorrectly adds an extra, made-up element, a sufficiency challenge is still assessed against the elements of the charged crime, regardless of the source of the extra element.

Ramjattansingh v. State, 548 S.W.3d 540 (Tex. Crim. App. 2018)

The State, in a separate paragraph in the charging instrument, instead of tracking the language of the statute, added an extra element. Judge Newell delivered the unanimous opinion of the Court. The question before the Court was whether the filing of a charging instrument containing non-statutory language prohibited the appellate court from considering the hypothetically correct jury charge in a sufficiency review. According to the Court, this extra language was a non-statutory allegation that had nothing to do with the allowable unit of prosecution, fitting the test for an immaterial variance. Only a "material" variance in the jury charge, one that prejudices a defendant's substantial rights, will render the evidence insufficient. Further, the State did not invite error by including the extra language in the charging instrument. The Court had previously held variances between surplusage in the charging instrument and the proof at trial to be immaterial in such cases. Because the variance between the non-statutory allegation and the proof presented at trial is immaterial, the hypothetically correct jury charge need not include it.

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

Burnett v. State, 541 S.W.3d 77 (Tex. Crim. App. 2017)

The Court of Criminal Appeals agreed with the Eastland Court of Appeals that the full definition of intoxication should not have been included in the jury charge. The charge should have been limited to alcohol consumption because the evidence in the record was insufficient for a rational jury to infer the appellant's intoxication was due to his consumption of any substance other than alcohol.

The Court also agreed that the facts of this case were distinguished from those of *Ouellette v. State*, 353 S.W.3d 868 (Tex. Crim. App. 2011), where the Court held that the full definition of intoxication should have been included in the jury charge because a rational juror could have found that the defendant consumed a drug found in her vehicle in addition to alcohol. The facts were distinguishable for four reasons: (1) Burnett was unable to identify the white pills in his vehicle as hydrocodone, (2) the record did not establish what kind of drug hydrocodone is, (3) whether it can cause intoxicating effects, or (4) whether the symptoms of intoxication Burnett was experiencing were also indicative of intoxication by hydrocodone. The jury charge did not reflect the law as it applied to the evidence produced at trial. It was error for the trial court to offer a jury instruction containing the full statutory definition of "intoxication" when evidence only supported intoxication by alcohol.

Because evidence pertaining to voluntariness of the appellant's statement was submitted to the jury, the trial court was required to submit an instruction on voluntariness to the jury; however, the appellant did not suffer egregious harm given the presence of other significant evidence of intent.

Paz v. State, 548 S.W.3d 778 (Tex. App.—Houston [1st Dist.] 2018, pet ref'd)

The appellant argued that the trial court was required to include an instruction in the jury charge regarding the voluntariness of his statement. A trial judge has an absolute duty to prepare a jury charge that accurately sets out the law applicable to the case. When a statute requires an instruction under certain circumstances that are present in a case, the instruction is the "law applicable to the case." The trial court must give the instruction for the law applicable to the case regardless of whether it has been specifically requested.

There are multiple statutory provisions that can trigger a right to a jury instruction on the voluntariness of a statement. In this appeal, the appellant relies on Section 6 of Article 38.22 of the Code of Criminal Procedure. Under that statute, some evidence must be presented to the jury that raises the issue of voluntariness. If this evidence would allow a reasonable jury to find that the statement was involuntary, the instruction must be given to the jury. The court held that there was some evidence presented to the jury indicating that an officer lunged at the appellant in a threatening way and other threatening behavior during police questioning. A jury instruction was required.

However, when a defendant does not object (in this case, he did not request a voluntariness instruction or object to the jury charge), or states that he has no objection to a jury charge, an error will not result in reversal unless the record shows "egregious harm" such that the defendant was denied a fair trial. Egregious harm "is present whenever a reviewing court finds that the case for conviction or punishment was actually made clearly and significantly more persuasive by the error." The court found that there was significant proof of intent (i.e., extreme severity of injuries), such that the appellant did not suffer egregious harm by the omission of a voluntariness instruction.

The trial court did not err by refusing to provide a definition of "imminent" in the jury charge for duress because both the lack of a definition for imminent in the Penal Code and the Code's frequent use of imminent as an undefined modifier supported the conclusion that imminent had a common meaning.

Cormier v. State, 540 S.W.3d 185 (Tex. App.—Houston [1st Dist.] 2017, pet ref'd)

The law applicable in this case is as follows. A defendant who properly requests that a defensive

theory raised by the evidence be submitted to the jury is entitled to an instruction on that theory. In submitting a defensive theory, trial courts have broad discretion in submitting proper definitions and explanatory phrases to aid the jury. When submitting defensive theories, however, the trial court must do so correctly. If, as here, the accused makes a timely and pertinent objection at trial, reversal is required if the accused suffered "some harm" from the error.

Duress is an affirmative defense that applies if the defendant "engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another." (Subsection 8.05(a) of the Penal Code). In this case, the statute does not define "imminent." Because it does not; ordinarily the jury charge does not require a specific instruction. Rather, jurors are presumed to apply a common understanding to the meaning of these terms. But terms with a technical legal meaning may require definition even when the term is not defined in a statute "when there is a risk that jurors may arbitrarily apply their own personal definitions of the term or when a definition of a term is required to assure a fair understanding of the evidence." Cormier contends that the trial court erred in refusing to define "imminent" for the jury because it has a known and established legal meaning in the context of a duress defense.

Even outside the context of a duress defense, the Penal Code does not define "imminent." (See, Section 1.07 of the Penal Code). Courts have employed various definitions for the term in deciding whether the evidence is sufficient to support a conviction in the face of a defense of duress. The Legislature uses "imminent" in varied contexts throughout the Penal Code. The widespread use of the term, without definition, undermines Cormier's position that a specific, technical definition of "imminent" applies to the duress defense (he also cites Court of Criminal Appeals decisions the court finds inapplicable to the defense of duress and a jury instruction on that defense). Because of the word's common use, the court holds that the trial court acted within its broad discretion in refusing to submit the tendered definition.

E. Sentencing

A trial court's imposition of a fine assessed by a jury is proper despite the court's failure to orally pronounce it.

Ette v. State, 2018 Tex. Crim. App. LEXIS 902, (Tex. Crim. App. Sep. 19, 2018)

On direct appeal, Ette contended that the $10,000 fine in his case should not be imposed because the fine had not been orally pronounced at sentencing by the trial judge, and because the oral pronouncement has been held to control over the written judgment. Ette argued that the fine should be deleted from the judgment. In a split decision, the court of appeals rejected this argument and upheld the fine assessed by the jury.

In a unanimous opinion by Judge Alcala, the Court of Criminal Appeals affirmed. Despite the trial judge's failure to separately orally pronounce the fine assessed by the jury, Ette was not deprived of notice that his punishment included the fine, which could properly be imposed because the jury verdict that was read aloud in Ette's presence correctly included the fine and the trial court was required to include that fine in the written judgment.

Commentary: Texas criminal case law has long contained a tug of war between the "judgment" and the "sentence." This is the Court of Criminal Appeals' newest installment in the canon. It aims to strike a balance with precedent and practical understanding of the relationship between judgment and sentence. Notably, this case pertains to the general judgment statute (Article 42.01, Code of Criminal Procedure). Absent from *Ette* is any reference to *Ex parte Minjares* in which the Court wrestled with whether "judgment" and "sentence" are one and the same or distinct under Article 45.041 of the Code of Criminal Procedure (the specific judgment statute governing judgments in municipal and justice courts). Nevertheless, this case could arguably have application in municipal and justice court cases (i.e., in Class C misdemeanor cases where pleas are entered by mail or over the internet, etc., the defendant has notice of the fine amount, but

the judgment/sentence is not orally pronounced.) Of course, the long lingering issue in such cases is that Article 45.041(d) states that "[a]ll judgments, sentences, and final orders of the justice or judge shall be rendered in open court."

Trial court was authorized to consider the full range of punishment despite recommendation of a lesser sentence because the defendant agreed to consideration of the full range of punishment if she failed to appear for sentencing.

Hallmark v. State, 541 S.W.3d 167 (Tex. Crim. App. 2017)

Hallmark entered into a plea agreement. According to the agreement, she would be sentenced to three years unless she failed to show up for her sentencing hearing, in which case she would be sentenced within the full range of punishment. Hallmark did not show up for her sentencing and she was sentenced to 10 years.

The court of appeals determined that the "full range of punishment" part of the plea agreement was added by the trial court and that the trial court did not follow the parties' plea bargain when it assessed the full range of punishment. Furthermore, the trial court abused its discretion in refusing to permit Hallmark to withdraw her plea.

In a 7-2 opinion by Presiding Judge Keller, the Court of Criminal Appeals concluded that the court of appeals erred in finding an abuse of discretion because the "full range of punishment" term was a part of the plea agreement and Hallmark failed to timely complain about any participation by the trial judge in the plea-bargaining process.

Judge Walker, joined by Judge Alcala, dissented. Judge Walker would have affirmed the court of appeals, finding that the record indicated that the agreement in which Hallmark was to show up on an agreed date for sentencing was not part of the plea agreement. It was instead a side agreement made between the trial court and Hallmark created after the plea agreement between Hallmark and the State. Furthermore, Hallmark preserved error on the issue by objecting at her sentencing hearing.

The trial court did not err in considering for sentencing purposes whether a defendant who offered evidence at a punishment hearing testified untruthfully because a defendant's truthfulness while testifying on his own behalf, almost without exception, is probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing.

Thomas v. State, 551 S.W.3d 382 (Tex. App.—Houston [14th Dist.] 2018, pet ref'd)

The State and the defendant may offer evidence as to any matter the court deems relevant to sentencing. In this regard, it has long been the rule that, in assessing punishment, a trial judge is entitled to consider a defendant's truthfulness as he testifies. It is both necessary and proper for a trial judge to evaluate a defendant's credibility, as manifested by his conduct at trial and testimony under oath. A trial judge's conclusions about a defendant's trial conduct are properly considered in deciding punishment.

The trial court also permissibly considered the defendant's untruthfulness as an extraneous "bad act" contemplated by Article 37.07, Section 3(a)(1) of the Code of Criminal Procedure, and assessed punishment accordingly. The Court of Criminal Appeals has indicated that lying while testifying is, in fact, an "extraneous bad act."

If a defendant exercises his right to offer evidence under Article 37.07, Section 3(a), and professes honesty in the hope the court will find him so and, as a result, exhibit leniency in assessing punishment, then he must be prepared to accept the consequences if the court finds him to lack veracity and, as a result, does not exhibit leniency in assessing punishment.

F. Restitution

Although the appellant elected to have the jury assess his punishment, the trial court had statutory authority to impose a restitution order during sentencing.

Marshall v. State, 2017 Tex. App. LEXIS 9553 (Tex. App.—Austin Oct. 12, 2017, no pet.)

Although Article 42.037 of the Code of Criminal Procedure expressly authorizes "the court" to order restitution and requires "the court," when deciding the amount of restitution, to consider "the amount of loss sustained by any victim" and "other factors *the court* deems appropriate," no statutory provision authorizes the jury to make that determination.

A private attorney under contract for collection services pursuant to Article 103.0031 of the Code of Criminal Procedure may collect delinquent restitution owed to a crime victim.

Tex. Atty. Gen. Op. KP-0173 (11/13/17)

The question in the request for opinion focused on the nature of criminal restitution: it is not owed to nor does it belong to the governing body. Does this "non-ownership" affect the governing body's ability to delegate its collection to the attorney under contract? The opinion says no. The Legislature authorized all courts to order a defendant to make restitution (Article 42.037 of the Code of Criminal Procedure), recognizing that an entity collecting restitution on the behalf of a victim or compensation fund does not itself own the funds. A court would presume that the Legislature was aware of this when it expressly included restitution as an authorized item of collection under Article 103.0031(a) of the Code of Criminal Procedure.

G. Contempt

The proper method to collaterally attack a criminal contempt judgment as being void is through either a petition for a writ of habeas corpus when the contemnor has been subjected to jail time, or a petition for a writ of mandamus when the contemnor is subjected only to a fine.

Luttrell v. El Paso Cty., 2018 Tex. App. LEXIS 5813 (Tex. App.—El Paso July 26, 2018, no pet.)

El Paso County judges improperly assessed court costs in addition to fines on individuals who failed to obey a jury summons. Luttrell and other plaintiffs sought relief by filing a declaratory action against the county. The court of appeals concluded that a declaratory judgment is not the proper remedy for misuse or misconstruction of contempt. The declaratory judgment claim by prospective jurors who had been held in contempt and fined for failure to obey a jury summons, alleging that the county had created an unauthorized jury duty court, was dismissed because they failed to identify any statute that was invalid but instead challenged the past contempt proceedings and fines against them, which was not a proper subject of a declaratory judgment. The jurors had other means of challenging the fees imposed on them in the judicial proceeding itself, or they could have filed extraordinary writ proceedings raising their due process and unauthorized fee claims, and therefore did not pay under duress.

A contempt hearing is not a "trial," as that term is used and contemplated by the Texas Constitution concerning a criminal case involving the violation of a penal statute.

In re Hesse, 552 S.W.3d 893 (Tex. App.—Amarillo 2018, no pet.)

Being initially found guilty of direct contempt for using language in the courtroom during a criminal proceeding that the trial court found inappropriate, Hess, an attorney practicing before the court, was neither entitled to a jury "trial" when the trial judge found him to be in contempt, nor did his statutory right to a de novo hearing before a different judge under Section 21.002(d) of the Government Code expressly or impliedly grant him that right. Hess was not entitled to mandamus relief because the law does not expressly provide for the right to a jury trial in a contempt proceeding involving an officer of the court, and he failed to show that he was otherwise entitled to a jury trial.

Commentary: This is a good example of how years of case law describing contempt as "quasi-criminal" can result in quasi-confusion and potentially a quasi-mess. Hess could not cite to any authority holding that an officer of the court is entitled to a jury trial in a contempt proceeding under Section 21.002(d) of the Government Code because, as the court of appeals pointed out, none exists. These kinds of arguments typically seek to advance the contemnor's

interests – and are sometimes successful – by playing between the blurred lines in the law. See generally, *Ex parte Reposa*, 541 S.W.3d 186 (Tex. Crim. App. 2017) (denying, without addressing the denial of Relator's request for a jury trial, his motion for emergency personal bond, bail, or personal recognizance bond pending appeal, following a Section 21.002(d) contempt proceeding where he was ordered incarcerated). In *Ex parte Reposa*, Judge Alcala, joined by Judge Richardson and Judge Newell, dissented from the Court's decision to deny Reposa's motion for leave and request for bond because the Court should have allowed further briefing. See also, *In re State ex rel. Escamilla*, 2017 Tex. App. LEXIS 11483 (Tex. App.—Austin December 11, 2017, no pet.), holding that: (1) a district court judge in a neighboring county lacked any authority to take action on attorney-contemnor's application for writ of habeas corpus; (2) the district court judge had a ministerial duty to refrain from granting attorney-contemnor's motion for leave to file an application; and (3) except in limited circumstances, the State may not appeal from a trial court's decision to grant habeas relief.

H. Expunction

Where the defendant was arrested for two unrelated charges and she pleaded guilty to theft but not guilty to assault, Article 55.01(a)(1)(A) of the Code of Criminal Procedure entitled her to expunction of all records relating to her arrest for the assault charge for which she was tried and acquitted.

State v. T.S.N., 547 S.W.3d 617 (Tex. 2018)

T.S.N. was charged for the misdemeanor offense of theft by check, and a warrant issued for her arrest. Months later she was arrested for a different offense (assault with a deadly weapon). During the arrest process, the officer also executed the previous warrant and arrested T.S.N. on the theft by check charge as well as the assault charge. The theft and assault charges were filed in different courts with different cause numbers. T.S.N. pleaded guilty to the theft charge but not guilty to the assault charge. The assault charge was tried to a jury and she was acquitted. Following her acquittal, T.S.N. filed a petition pursuant to Article 55.01 of the Code of Criminal Procedure, seeking expungement of the records and files relating to the assault charge. The State opposed her petition, asserting that Article 55.01 entitles an individual to expunction of arrest records only if the results of the prosecutions as to all of the charges underlying the arrest meet the statutory requirements for expunction. The trial court disagreed and granted the petition. The State appealed, arguing that the expunction statute is "arrest-based;" whereas T.S.N. argued the statute is "offense-based." The court of appeals affirmed, concluding that the statute linked "arrest" to a single "offense," permitting expunction under the facts of this case, where the charge T.S.N. was acquitted of, and the charge she pleaded guilty to, did not relate to a single episode of criminal conduct.

The Texas Supreme Court held that Article 55.01(a)(1)(A) entitles T.S.N. to expunction of all records and files relating to her arrest for the assault charge for which she was tried and acquitted (although the relevant expunction language is located in the Code of Criminal Procedure, an expunction proceeding is civil in nature). If the Legislature intended that all the offenses underlying a single arrest must meet the requirements for expunction under Article 55.01(a)(1)(A) in order for expunction to be permitted, then the exception under Subsection (c) (multiple offense, criminal episode provision) would be unnecessary. Though many courts of appeals have broadly held Article 55.01 is arrest-based, the Court disagrees.

Article 55.01 is neither entirely arrest-based nor offense-based. Addressing only the expunction provision in Subsection (a)(1) (concerning acquittals and pardons), the Court finds that although the Legislature has specifically provided for expunction under only limited, specified circumstances, that it has done so at all evidences its intent to, under certain circumstances, free persons from the permanent shadow and burden of an arrest record, even while requiring arrest records to be maintained for use in subsequent punishment proceedings and to document and deter recidivism.

The Department of Public Safety (DPS) filed an amicus brief joining the State in emphasizing the difficulties of effectuating "partial" expunction. The State asserts that permitting expunction in multiple-

offense circumstances as to offenses for which a person has been acquitted or pardoned will result in widespread record keeping inconsistencies. DPS cautions that under T.S.N.'s interpretation, state employees may well be placed in jeopardy because of the complexities regarding releasing records in circumstances where a multi-charge arrest has been made and one of the charges resulted in acquittal and subsequent expunction. Additionally, DPS asserts that requiring expunction as to one offense will require the destruction of all documents mentioning the expunged offense, even if another offense from the arrest is successfully prosecuted.

Recognizing that there are practical difficulties posed by partial expunctions and redactions, but given the Legislature's demonstrated acceptance of selective redaction and expunction of records as valid remedial actions, the Court is unconvinced by the arguments of the State and DPS. Article 55.02(5) explains that when an official or agency or other governmental entity named in the expunction order is unable to practically return all of the records and files subject to the order, obliteration (i.e., redaction) is required as to those portions of the record or file that identify the individual.

Commentary: Expunctions were on the Legislature's collective mind in the 2017 85th Legislative Session. H.B. 557 greatly expanded the expunction process outlined in Article 55.02. Municipal courts of record and justice courts now have concurrent jurisdiction with the district courts to expunge fine-only offenses. Notably absent from courts given expunction authority under Chapter 55: non-record municipal courts. A person who is eligible for an expunction (for example, under Article 55.01(a)(1)(A) or (a)(1)(B)(ii)) may file under the process described in Article 55.02 in a municipal court of record or justice court in the county where either the petitioner was arrested or the offense was alleged to have occurred.

The phrase "all records and files relating to the arrest" refers to the arrest records stemming from each individual offense or charge, at least when the charges are unrelated; Article 55.01(a)(2) (Expunction) provides that one arrest for multiple offenses equates to multiple arrests, each arrest tied to its own individual offense.

Ex parte N.B.J., 552 S.W.3d 376 (Tex. App.—Houston [14th Dist.] 2018, no pet.)

The Texas Department of Public Safety (DPS) appealed the trial court's order granting expunction relief to appellee N.B.J. After N.B.J. was arrested on the same day on two unrelated charges, the State dismissed one of the charges, which N.B.J. then sought to have expunged. DPS argued that, because expunction is not available for both charges, it is not available for the dismissed charge.

Under Article 55.01(a)(2), a person who has been arrested is entitled to have all records and files relating to the arrest expunged if: (1) the person has been released; (2) the charge, if any, has not resulted in a final conviction and is no longer pending; (3) there was no court-ordered community supervision for the offense; and (4) the applicable limitations period has expired.

DPS's sole contention is that, because N.B.J. received court-ordered community supervision for the initial charge, he does not satisfy the statutory requirements for expunction of his arrest records relating to the subsequent charge. As the court puts it, DPS argues that, when an individual is arrested, charged with multiple offenses, and later seeks expunction relief for less than all of the charges, the petitioner "is ineligible to expunge an offense for which [he was] arrested if the petitioner was convicted or served community supervision *for any charge* arising out of that arrest." (Emphasis in the case). According to DPS, the expunction statute provides that "the arrest" is the single unit of measurement for expunction, not individual charges.

The court notes that other courts of appeals have held that the expunction statute is to be interpreted and applied on an "arrest-based" approach, not an "offense-based" or "charge-based" approach. But the Texas Supreme Court recently handed down an opinion interpreting a subsection of the expunction statute on facts similar to this one, so the court turns to that case (See, *State v. T.S.N.*, 547 S.W.3d 617 (Tex. 2018), supra).

Applying that case to Subsection (a)(2) (and acknowledging that the Supreme Court's opinion

in *T.S.N.* only addressed expunction following an acquittal and expressly declined to address a petitioner's entitlement to expunction under Subsection (a)(2), which is the basis for N.B.J.'s petition), the court finds that DPS's arrest-based reading of the statute would, in essence, change Article 55.01(a)(2)(B) to permit N.B.J. to have all records and files relating to the arrest expunged only if, in addition to other requirements not at issue, "prosecution of the person for all the offense[s] for which the person was arrested is no longer possible because the limitations period has expired." The subsequent charge was dismissed and did not result in a final conviction and the statute of limitations has expired.

As did the Texas Supreme Court in T.S.N., the court disagrees with DPS that the unit of measurement in the expunction statute is "the arrest," and that, therefore, all of the offenses charged in an arrest must satisfy the statutory requirements before a petitioner may be granted expunction. The right to expunction of arrest records following a dismissal is linked at the outset to a particular charge or offense.

The Texas Supreme Court opted not to decide whether Subsection (a)(2) also is arrest-based, citing several limitations on expunction listed in that section. "Under (a)(1), the acquittal or pardon is the only prerequisite to expunction . . . [w]hereas under (a)(2), the dismissal or plea bargain is only the beginning of the analysis." *T.S.N.*, 2018 Tex. LEXIS 403 at 5. The court notes that the examples of limitations on expunction cited by the high court, such as where a person is arrested for another offense "arising out of the same transaction," relate only to Subsection (a)(2)(A) and not subsection (a)(2)(B), which is a separate option for seeking expunction. Here, it is undisputed that prosecution of N.B.J. for the subsequent charge is no longer possible. There is no remaining prerequisite to expunction.

I. Forfeiture

The handguns were not subject to forfeiture under Article 18.19(e) of the Code of Criminal Procedure because under Article 18.19(d), conviction alone was not sufficient for forfeiture, and reading the statute as permitting Article 18.19(e) to serve as the basis for forfeiture following a Penal Code Chapter 46 conviction rendered Article 18.19(d) meaningless since all forfeiture proceedings under Article 18.19 would then fall within Article 18.19(e).

Tafel v. State, 536 S.W.3d 517 (Tex. 2017)

Tafel's appeal to the Supreme Court presents two arguments. First, he maintains that Article 18.19(e) forfeiture proceedings are criminal law matters. That being so, he argues, the court of appeals erroneously classified and docketed the forfeiture proceedings as civil instead of criminal. The State asserts that forfeiture under Article 18.19(e) is a civil in rem proceeding. That is so because property, not a person, is what is subject to seizure.

The Court begins its jurisdiction analysis by noting that Article 18.19's location within the Code of Criminal Procedure is not dispositive as to whether forfeitures under it are criminal matters. While Article 18.18 specifically includes prohibited weapons and Article 18.19 encompasses weapons that are not categorized as prohibited, the distinction is immaterial. Because forfeiture proceedings are against property, the proceedings are civil in rem matters.

Second, the appellant argues that the trial court ordered forfeiture pursuant to Article 18.19(e); he was only in possession of the guns and not using them in any manner; and under Article 18.19(e), his mere possession of them does not constitute their "use." The State argues that "use" has been interpreted by the Court of Criminal Appeals, albeit in regard to a different statute, to include simple possession if such possession facilitates the associated felony. The Court finds it need not determine when possession constitutes "use," if ever, because of Article 18.19's bifurcated design and the principle of statutory interpretation by which all the words used by the Legislature are given meaning. If the State wishes to pursue forfeiture based on a conviction for a possession offense under Chapter 46, Article 18.19(d) is the mandatory path. The Court also rejects the State's argument on the basis of judicial notice and trial by consent and reversed.

J. Appeals

A pre-sentence waiver of appeal in exchange for the State's waiver of a jury trial is valid.

Carson v. State, 2018 Tex. Crim. App. LEXIS 905 (Tex. Crim. App. Sep. 19, 2018)

Carson's pre-sentence waiver of his right to appeal was valid because he negotiated with the State and promised to waive his right to appeal in exchange for the State's promise to waive a jury trial, and, as such, the State's waiver of its right to a jury was sufficient consideration to render defendant's waiver of his right to appeal knowing and intelligent under Article 1.14(a) of the Code of Criminal Procedure. The judgment of the court of appeals was reversed and remanded to that court with instructions.

Commentary: Unlike in district and county courts (which are governed by Article 1.13 of the Code of Criminal Procedure), in justice and municipal courts, the State does not have to consent to a defendant's waiver of their right to a jury trial. (See, Article 45.025, Code of Criminal Procedure.) The Texas District and County Attorneys Association's (TDCAA) analysis of this case included the following commentary: "Waivers of appeal in criminal cases are increasingly important to the criminal justice system as the Texas population continues to increase." TDCAA, Weekly Case Summaries: September 28, 2018, https://www.tdcaa.com/casesummaries/september-28-2018, (accessed October 1, 2018). If a defendant can waive their right to appeal in other misdemeanors, should not the same be true in cases involving a Class C misdemeanor? Under the right circumstances, such a waiver seems possible. See, Ryan Kellus Turner, "Waiver of Right to Appeal in Local Trial Courts of Limited Jurisdiction" *The Recorder* (May 2003).

A judgment voided on appeal and remanded is not appealable based on oral ratification of that judgment on remand; a new judgment must be entered.

Guthrie-Nail v. State, 543 S.W.3d 255 (Tex. Crim. App. 2018)

The court of appeals lacked jurisdiction because upon remand after the Court of Criminal Appeals voided the trial court's nunc pro tunc judgment, the trial court, after the required hearing, did not enter a new nunc pro tunc judgment so there was nothing to appeal. Though the record from that hearing reflects that it was the trial court's intent to orally ratify its previous nunc pro tunc judgment, there is no authority for the court of appeals to assert jurisdiction over the case grounded on a docket entry and oral ratification of a pre-existing judgment.

There is no requirement that a party, in order to preserve error of appeal on an evidentiary issue, must make sure the appellate argument comports with any related motion to suppress when there is an actual trial objection that comports with the appellate argument.

Gibson v. State, 541 S.W.3d 164 (Tex. Crim. App. 2017)

Judge Walker delivered the opinion of the Court. The court of appeals erred in relying on the motion to suppress and the suppression hearing in order to find a failure to preserve error. The appellant's argument need only comport with the trial objection. The objection was a trial objection and was sufficient to make the trial judge aware of the basis of the objection. To preserve a complaint for review, a party must have presented a timely objection or motion to the trial court stating the specific grounds for the ruling desired. Rule 33.1(a)(1)(A) of the Texas Rules of Appellate Procedure.

Presiding Judge Keller filed a concurring opinion, agreeing with the Court that the appellant preserved error regarding his new claim, but pointing out that his brief was the cause of the court of appeals' failure to recognize that. Judge Keller thinks the court of appeals was justified in relying on the motion to suppress and the suppression hearing to find that the claim was not preserved.

Nevertheless, the appellant did preserve his claim, and even though his brief misled the court of appeals, he did include a citation in a footnote that led to the part of the record where he made his new claim at trial. Because of the footnote citation, the appellant

has shown that he is entitled to have his claim reviewed on the merits.

K. Attorney Misconduct

The trial court's finding that defense counsel violated Texas Disciplinary Rule of Professional Conduct 8.02(a) because she made statements with reckless disregard as to their truth or falsity concerning the integrity of a city judge was supported by evidence that she filed 31 meritless motions to recuse a city judge in order to manipulate plea negotiations for her clients; she falsely alleged that the judge would not grant certain relief for her clients.

Hamlett v. Comm'n for Lawyer Discipline, 538 S.W.3d 179 (Tex. App.—Amarillo 2017, no pet.)

Evidence in the record illustrated that the municipal judge had granted Hamlett's clients the relief in question, as expressly acknowledged by Hamlett at trial. These circumstances are more than a scintilla of evidence permitting a rational fact-finder to conclude that Hamlett's accusation against the judge constituted a statement impugning the judge's integrity. Knowing of information that negated the truthfulness of her accusation yet uttering it anyway is also more than a scintilla of evidence permitting a fact-finder to reasonably infer that the accusation was made with a high degree of awareness of its probable falsity or with reckless disregard as to its falsity.

IV. Court Costs, Fees, and Indigence

A defendant whose petition for discretionary review raising the issue of the constitutionality of consolidated fees was pending when the Court decided *Salinas* is entitled to relief.

Penright v. State, 537 S.W.3d 916 (Tex. Crim. App. 2017)

Judge Keller writing for the majority in a 9-1-1 decision modified the trial court judgment. The court of appeals rejected a constitutional challenge to the consolidated fee statute, Section 133.102 of the Local Government Code (Consolidated Court Cost). In his petition for discretionary review, the appellant complained that the court of appeals decision failed to explain how the comprehensive rehabilitation fee is a legitimate criminal justice purpose. In *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017), the Court of Criminal Appeals held that that the portions of the consolidated fee statute that were allocated to "comprehensive rehabilitation" and "abused children's counseling" were unconstitutional in violation of the Separation of Powers provision of the Texas Constitution. The Separation of Powers holding applied retroactively to any defendant who raised the same claim.

Judge Newell concurred without written opinion.

Judge Yeary dissented for the reasons stated in the dissent in *Salinas*.

When court costs are not assessed until after judgment is entered, there is no opportunity for the defendant to object. Accordingly, a defendant may raise a challenge to the court costs for the first time on appeal.

William Johnson v. State, 537 S.W.3d 929 (Tex. Crim. App. 2017)

This was a per curiam opinion by seven members of the Court of Criminal Appeals. Judge Hervey did not participate.

In a concurring opinion, Judge Newell agreed that the judgment should be reformed in light of *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017). He explained that this case provides an example of how applying that retroactivity dicta results in the unequal treatment of defendants on direct appeal. Judge Newell and Judge Richardson previously dissented to the court granting review in a case involving perceived inequality (See, *Horton v. State*, 537 S.W.3d 515 (Tex. Crim. App. 2017).

Judge Yeary dissented for the reasons stated in the dissent in *Salinas*.

The court abused its discretion by revoking the defendant's community supervision because revocation would violate his 14th Amendment right prohibiting the State from revoking an

indigent defendant's community supervision for failure to pay restitution, monthly community supervision fees, fines, court costs, and restitution.

Carreon v. State, 548 S.W.3d 71 (Tex. App.—Corpus Christi-Edinburg 2018, no pet.)

Commentary: This case is a lesson in what does not constitute "willful" nonpayment in the context of a commitment hearing.

The trial court revoked probation after extensive testimony and evidence of the probationer's inability to pay. The judge noted *Bearden v. Georgia* and it is clear from the record the judge had read it. The judge is most concerned about the failure to pay restitution, pointing out more than once that the defendant had paid "zero" toward restitution and that it was "one of the most important things on that probationary judgment: …to make a victim whole." Based on a finding that the probationer "willfully refused to pay restitution on multiple years and failed to make sufficient bona fide efforts to seek employment," the trial judge revoked probation. The judge says more than once: "I can't extend him anymore. It's been ten years." "Now we're at ten years and well, there's nothing more that I can do. I can't work with him on probation anymore. It's done."

In addressing the 14th Amendment claim, the court holds that the trial court's finding of willfulness, unaided by the State, is supported by legally insufficient evidence. The trial court lamented that because Carreon's term of community supervision had lapsed, it could not consider alternate measures. But, as the Supreme Court pronounced, incarceration is only meant for situations where the alternate measures "are not adequate to meet the State's interest in punishment and deterrence." *Bearden*, 461 U.S. at 672. Here, the trial court was primarily concerned with the victim, who made no appearance at the revocation hearing. There is no indication that making the burglary victim "whole" was part of the "punishment" or "deterrence" goals articulated by *Bearden*.

The summoning witness/mileage fee assessed against the defendant as court costs under Article 102.011(a)(3) and (b) of the Code of Criminal Procedure did not violate Johnson's confrontation and compulsory process rights in light of the appellate court's ruling in a judicial precedent.

Carl Johnson v. State, 550 S.W.3d 247 (Tex. App.—Houston [14th Dist.] 2018, no pet.)

Because the court of appeals had recently addressed and rejected the same argument issued raised by Johnson here, the argument was rejected. See, *Merrit v. State* 529 S.W.3d 549, 557-59 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

The statute authorizing defendants to be assessed court costs for "summoning witnesses/mileage" was not unconstitutional as applied to Macias. Indigent status does not exempt a defendant from assessment of court costs.

Macias v. State, 539 S.W.3d 410 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd)

Because Macias failed to identify any witness who he had wished to subpoena but was unable to subpoena because of the $5 cost of summoning the witness, it did not operate to deny the defendant his right to have compulsory process for obtaining witnesses in his favor. Article 102.011(a)(3) did not deny Macias his rights to confront the witnesses against him or to have compulsory process for obtaining witnesses in his favor.

The assertion that it is unfair and unconstitutional to assess a court cost against an indigent defendant is an unsubstantiated conclusory assertion. Indigence does not preclude the recovery of court costs, so long as court costs are not required to be paid in advance.

Commentary: Another issue of interest in this case pertained to the visiting judge's oath of office. Macias argued that in absence of evidence of the oath, the judgment of the trial court was void. However, the court of appeals rejected the argument because Macias pointed to no evidence that the visiting judge failed to take the oaths of office and merely alleged, unsupported by any proof, that the judge did not take the required oaths. Notably, the court of appeals rejected this argument by invoking the presumption of regularity (a judicial construct that requires an

appellate court, absent evidence of impropriety, to indulge every presumption in favor of the regularity of the trial court's judgment). Nevertheless, it is important for municipal judges to take responsibility for maintaining a current oath of office even if reappointed by operation of law. See, Regan Metteauer, "When the Acts of Judges May be Void," *The Recorder* (May 2013).

A defendant's indigent status is not a bar to the assessment of court costs. The Texas Supreme Court holding in *Campbell v. Wilder*, 487 S.W.3d 146 (Tex. 2016), that an indigent party to a civil proceeding may not be required to pay court costs, is inapplicable to criminal cases.

Gonzalez v. State, 2018 Tex. App. LEXIS 1879 (Tex. App.—El Paso Mar. 14, 2018, no pet.); *Ruffin v. State*, Tex. App. LEXIS 3440 (Tex. App.—Tyler May 16, 2018, pet. ref'd) (mem. op., not designated for publication); *Osuna v. State*, 2018 Tex. App. LEXIS 4954 (Tex. App.—Austin July 3, 2018, no pet.); *Bree v. State*, 2018 Tex. App. LEXIS 5492 (Tex. App.—Eastland July 19, 2018, no pet.)

It is important to emphasize that criminal court costs and civil court costs are legally distinct. Court costs in criminal cases are non-punitive legislatively mandated obligations resulting from a conviction. In civil cases, the inability to pay court cost denies people their day in court. In contrast, criminal defendants are not deprived of access to the courts because court costs are not assessed until the defendant is convicted. Furthermore, as the court of appeals explained in *Gonzalez*, challenges to court costs in criminal cases are reviewed to determine if there is a basis for the cost, not to determine whether there is sufficient evidence offered at trial to prove each cost.

The "summoning witness/mileage" fee is for a direct expense incurred by the State.

Allen v. State, 2018 Tex. App. LEXIS 7216 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, no pet.)

Allen contended that the "summoning witness/mileage" fee assessed against criminal defendants pursuant to Article 102.011(a)(3) and (b) of the Code of Criminal Procedure is a facially unconstitutional separation-of-powers violation under *Salinas* because Article 102.011(a)(3) and (b) do not specifically identify a judicial purpose to which the fees are to be directed. However, *Salinas* did not address reimbursement-based court costs. Accordingly, the court of appeals concluded that *Salinas* does not apply to the "witness summoning/mileage" fee. Allen owed the fee as a direct expense.

In a dissenting opinion, Justice Jennings found the "summoning witness/mileage" unconstitutional. He would have removed the cost from the judgments and urged the Legislature to reevaluate the fee system currently in place in light of the enormous and potentially unjustified burden it often imposes on poor people trapped in the Texas criminal justice system.

Justice Jennings, unpersuaded by the majority opinion's distinction regarding reimbursement-based court costs as a direct expense noted that the 14th Court of Appeals had reached a different conclusion in finding the jury fee authorized by Article 102.004(a) of the Code of Criminal Procedure facially unconstitutional. See, *Jermaine Johnson v. State*, 2018 Tex. App. LEXIS 7216 (Tex. App.—Houston [14th Dist.] Mar. 27, 2018). In striking down the jury fee, the 14th Court of Appeals noted that just because funds from a court cost can be used for a legitimate criminal justice purpose does not satisfy the *Salinas* legal standard. *Id.* at 4. As of October 1, *Johnson* was pending on a motion for rehearing.

A court would likely conclude that because collections by a private collections firm are governed by contract under Article 103.0031 of the Code of Criminal Procedure, the contract may allow the firm to collect payables into its own account, retain the additional collections fee, and deposit the remaining money with the appropriate treasurer, provided that the firm does so within the time permitted by statute.

Tex. Atty. Gen. Op. KP-0203 (5/16/18)

V. Local Government

The City of Laredo's "bag ban" ordinance is preempted by the Texas Solid Waste Disposal Act.

City of Laredo v. Laredo Merchs. Ass'n, 550 S.W.3d 586 (Tex. 2018)

The City of Laredo adopted an ordinance to reduce litter from one-time-use plastic and paper bags. To discourage use of these bags, the ordinance made it unlawful for any "commercial establishment to provide or sell certain plastic or paper bags" to customers. The ordinance applied to commercial enterprises that sell retail goods to the general public and included the business' employees and associated independent contractors. A violation of the ordinance was a criminal offense (a Class C misdemeanor with a fine not to exceed $2,000 plus court costs).

Chief Justice Hecht, affirming the decision of the court of appeals, delivered the opinion of the Texas Supreme Court. (Justice Blacklock did not participate.) The ordinance's purpose was to manage solid waste; it was preempted by Section 361.0961(a)(1) of the Health and Safety Code (which states "A local government or other political subdivision may not adopt an ordinance, rule, or regulation to prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law"). While home-rule cities have the power of self-governance unless restricted by state law, Section 361.0961(a)(1) applies to local regulation when the manner is not authorized by state law. Accordingly, the Court rejected the City's contention that laws granting the city general regulatory authority authorized the City to regulate the use of single-use plastic and paper bags.

Justice Guzman, joined by Justice Lehrmann, wrote a concurring opinion to highlight the urgency of the matter. "As a society, we are at the point where complacency has become complicity." Justice Guzman urged the Legislature to take direct ameliorative action or create a specific exception to preemption of local control. "Standing idle in the face of an ongoing assault on our delicate ecosystem will not forestall a day of environmental reckoning—it will invite one."

The district court lacked subject matter jurisdiction to grant Waller County a declaratory judgment that its courthouse signage does not violate Section 411.209(a) of the Government Code relating to concealed handgun license holders.

Holcomb v. Waller City, 546 S.W.3d 833 (Tex. App.—Houston [1st Dist.] 2018, pet. denied)

This declaratory-judgment action arises from a dispute between Waller County and Terry Holcomb, Sr. as to whether the County may bar holders of concealed-handgun licenses, like Holcomb, from entering the Waller County Courthouse with a handgun, and whether signage purporting to do so violates Section 411.209(a) of the Government Code. The County obtained a declaratory judgment that its signage does not violate Section 411.209(a), and Holcomb appealed. The court reversed the trial court's judgment and remanded the case to the district court with instructions to dismiss the County's suit for lack of subject-matter jurisdiction.

Holcomb's letter to Waller County providing notice of an ostensible violation of Section 411.209(a) is the basis for the County's suit against him. As a matter of law, however, writing a letter to a political subdivision to complain about its allegedly unlawful conduct is not a wrong that confers subject-matter jurisdiction on a court. Holcomb had a statutory right to notify the County of his contention that its courthouse signage violates the Government Code and request that the County cure this violation (Section 411.209(d)). Even in the absence of a statute, he had a constitutional right to "apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance." Holcomb's letter therefore does not constitute a redressable wrong.

Nor can the County fairly trace any injury to Holcomb's letter. While Holcomb had a right to write the County about an ostensible violation of Section 411.209(a) and complain to the Attorney General if the County failed to act, he could not have filed suit over the matter. See, Section 411.209(d). The Attorney General alone has the authority to investigate an alleged violation and decide if it

merits further action. Thus, any legal dispute over the lawfulness of the County's signage would be between the County and the Attorney General, not Holcomb. The County tacitly conceded as much in its petition for declaratory judgment, in which it contended that its prohibition of concealed handguns from the entire courthouse was lawful and disputed the contrary interpretation of the law made by the Attorney General in his opinion letters. Holcomb is not a proper party to any lawsuit concerning the County's disagreement with the Attorney General.

Waller County effectively sought and obtained a declaratory judgment in its favor as to its disagreement with the Attorney General without making him a party. Because only the Attorney General has the authority to decide whether a suit for violation of Section 411.209(a) is warranted, he was a necessary party and the judgment rendered in his absence was an impermissible advisory opinion. A trial court has no subject-matter jurisdiction to declare the rights of a non-party.

Commentary: For a discussion of Attorney General Opinion KP-0047 (addressed in this case), see Ryan Kellus Turner and Regan Metteauer, "Case Law and Attorney General Opinion 2017" *The Recorder* (December 2016) at 46. See also, Regan Metteauer, "Everything Has Not Changed: What Municipal Courts Need to Know about Guns and New Legislation" *The Recorder* (January 2016) for a discussion of Section 411.209.

The city lacked authority to require a landowner developing property in its extraterritorial jurisdiction (ETJ) to obtain city building permits, inspections, and approvals, and pay related fees, but has authority to require a landowner to plat its property.

Collin Cnty. v. City of McKinney, 553 S.W.3d 79 (Tex. App.—Dallas 2018, no pet.)

In 2002, the City of McKinney, a home-rule municipality, and Collin County entered into an agreement pursuant to H.B. 1445 (85th Legislature). The agreement stated that H.B. 1445 required the City and County to identify which governmental entity was authorized "to regulate subdivision plats and approve related permits" in the City's ETJ. The agreement granted the City exclusive jurisdiction to regulate subdivision plats and approve related permits for property in the City's ETJ and authorized the City Secretary to accept plat applications, collect plat application fees, and respond to applicants with the approval or denial of the plat application for tracts of land located in the City's ETJ. Custer Storage Center, LLC developed land it owned within the City's ETJ, acquiring building permits from the County, but not from the City. When the City became aware of Custer's construction project, it instructed Custer to obtain City building permits. After Custer failed to do so, the City sued seeking declaratory relief and a permanent injunction. In response, Custer sought a declaratory judgment that, among other things, the City lacked authority to require development permits for property in its ETJ and Custer was not required to obtain plat approval from the City. Custer also sought a permanent injunction enjoining the City from taking any action to require Custer to obtain plat and building permit approval.

The trial court concluded that the City's and County's respective authority to enforce platting and building permit requirements for property in the City's ETJ is determined based on whether a property is subdivided. The trial court further found that (1) the agreement is valid and enforceable and the County ceded all platting, inspection, and building code authority in the ETJ to the City as to properties that are subdivided, but did not do so as to properties that are not subdivided; (2) Custer was not required to obtain plat approval or building permits from the City because its property was not subdivided; and (3) Custer legally developed its property pursuant to the permits issued by the County and those permits were lawful, valid, and within the statutory authority granted to the County. The County appealed.

Based on the Texas Supreme Court's opinion in *Town of Lakewood Village v. Bizios*, 493 S.W.3d 527 (Tex. 2016) (the court found the holding that Sections 214.212 and 214.216 of the Local Government Code do not authorize municipalities to enforce building codes within its ETJ or elsewhere beyond its corporate limits to apply to all municipalities, not just general law), opinions from other courts of appeals, and relevant provisions of the Local

Government Code, the court concluded that every municipality, including a home-rule municipality, requires legislative authorization to enforce building codes beyond its corporate limits. The court did not find any legislative authorization giving the City the power it sought to exercise, and the City did not cite any in its brief. Therefore, according to the court, the City lacks authority to require a landowner developing property in its ETJ to obtain City building permits, inspections and approvals, and pay related fees. For the same reasons, the court also found that Custer was not required to obtain building permits, inspections and approvals from, and pay related fees to the City.

However, the court concluded that the trial court erred by granting Custer's request for a declaratory judgment that it was not required to obtain plat approval from the City. The governing body of a municipality may adopt rules governing plats and subdivisions of land within the municipality's jurisdiction and may extend these rules to its ETJ. See, Sections 212.002 – 212.003 of the Local Government Code. The City did so. According to the City's subdivision regulations, adopted pursuant to Chapter 212 of the Local Government Code, Custer was required to obtain a plat before commencing that construction. The trial court's ruling made the obligation to plat contingent upon whether a property was subdivided. However, neither the City's ordinances nor Chapter 212 of the includes that requirement.

VI. Health and Safety Code

A. Dogs

An ordinance of a home-rule municipality governing dangerous dogs did not conflict with Section 822.0421(a) of the Health and Safety Code.

Washer v. City of Borger, 2018 Tex. App. LEXIS 5929 (Tex. App.—Amarillo July 31, 2018, no pet.)

The Legislature clearly intended to give local governments broad discretion in regulating dangerous dogs. Section 822.0747 expressly contemplates a county or municipality placing additional requirements or restrictions on dangerous dogs, so long as the requirements or restrictions (1) are not specific to one breed or several breeds of dogs, and (2) are more stringent than restrictions provided by state law.

Ordinance Section 2.06.004 provides for the taking of sworn statements in addition to interviewing individuals, examining the animal, and reviewing other relevant information. While it is more specific as to what may be involved in an investigation, that does not make it inconsistent with Section 822.0421(a) of the Health and Safety Code.

Commentary: *Washer* is an endorsement of the authority of local governments to supplement state law pertaining to dangerous dogs. The challenge for local governments is creating supplemental rules that promote public confidence in the process. City attorneys and municipal judges face similar challenges. Consider another case involving a dog hearing in a different city in the Panhandle. *City of Hereford v. Frausto*, 2018 Tex. App. LEXIS 476 (Tex. App.—Amarillo Jan. 16, 2018, no pet.) stems from a Texas Whistleblower Act lawsuit filed by Javier Frausto, a former animal control employee. The court of appeals affirmed the trial court's denial of the City of Herford's plea to jurisdiction. Notably, the court of appeals also refused to dismiss the former animal control employee's suit against the City because a question of fact existed regarding whether the former animal control employee's belief about the city attorney violating the law was held in good faith. It is undisputed that an incident report alleging a dog attack was filed by Frausto with the municipal court and that the municipal judge set the matter for a hearing as mandated by Section 822.0423 of the Health and Safety Code. Subsequently, however, the city attorney cancelled the hearing. Frausto believed this to be unlawful and reported it to the chief of police. Several weeks later, Frausto was fired by the City.

B. Opioids

Section 483.102 of the Health and Safety Code authorizes prescription of an opioid antagonist to law enforcement agencies in a position to assist persons experiencing an opioid overdose.

Tex. Atty. Gen. Op. KP-0168 (10/4/17)

Opioids are natural or synthetic substances that are also referred to as narcotics, and physicians often prescribe opioids for pain relief and other medical uses. When used incorrectly, opioids can have serious side effects, and an opioid overdose can cause respiratory depression and death. In 2015, an estimated 33,091 deaths occurred in the United States from overdose on prescription and illicit opioids. During the 2017 legislative session, the Legislature found "that deaths resulting from the use of opioids and other controlled substances constitute a public health crisis."

Section 483.101(2) of the Health and Safety Code defines an "opioid antagonist" as any drug that binds to opioid receptors and blocks or otherwise inhibits the effects of opioids acting on those receptors. The opinion notes that such antagonists were recognized by the Legislature in 2015 in passing S.B. 1462, which permitted prescribing and dispensing an opioid antagonist to both persons at risk of experiencing an overdose and to individuals in a position to assist those experiencing an overdose. The question presented is whether law enforcement agencies are "persons in a position to assist" a person at risk of experiencing an opioid-related overdose within the meaning of the statute.

According to the opinion, experiences of law enforcement agencies outside of Texas leave no question about the ability of law enforcement agencies to assist a person experiencing an opioid overdose. For example, between 2010 and 2015, one municipal police department alone administered the opioid antagonist naloxone 419 times and rescued 402 individuals from opioid overdose. As of December 2016, over 1,200 law enforcement departments nationwide carried naloxone in an effort to prevent opioid-related deaths. As first responders, law enforcement officers have been and will continue to regularly be in a position to assist persons experiencing an opioid-related drug overdose.

VII. Land Use

So long as the occupants to whom Tarr rents his single-family residence use the home for a residential purpose, no matter how short-lived, neither their on-property use nor Tarr's off-property use violates the restrictive covenants in the Timberwood deeds.

Tarr v. Timberwood Park Owners Ass'n, 2018 Tex. LEXIS 442 (Tex. May 25, 2018)

In a dispute between a property owner and a homeowners' association, Justice Brown writing for a unanimous Texas Supreme Court held that the trial court erred by entering summary judgment for the association because the owner did not violate the restrictive covenants by entering into short-term vacation rental agreements. Tarr's tract contained a single-family residence. He was not violating the single-family-residence restriction contained in the property's restrictive covenant. The restrictive covenant containing a single-family residence restriction merely limited the structure that could legally be erected upon the tract, not the activities that might occur in the structure. The covenant did not require occupancy by an owner nor did it prohibit leasing the structure as a vacation home or a short-term rental.

Commentary: Short-term rentals have emerged as a divisive issue that potentially puts property ownership rights at odds with neighbors and neighborhood associations. Will *Tarr* prove to be a big win for the likes of VRBO and HomeAway? We suspect that municipalities with ordinances regulating short-term rentals were keeping tabs on this case. We similarly suspect the Texas Legislature was also.

Court Processes Clinic
January 25, 2019 – Laredo

Presented by Judge Robby Chapman, Director of Clerk Education, and Ned Minevitz, TxDOT Grant Administrator & Program Attorney, TMCEC

Be Prepared
Has your court looked at the non-appearance process, community service parameters, or charging documents following significant legislative changes in recent years? More changes are on the horizon as the 86th Legislature kicks off, so it's a good time to review the law! This clinic will cover select fundamental court processes, highlighting areas affected by recent legislative changes.

There is no registration fee for this clinic! Space is available on a first-come basis. Preference will be given to those clerks and judges that register prior to January 4, 2019. Register online at http://register.tmcec.com.

Teen Court Seminar - Georgetwon
April 1 - 2, 2019

TMCEC's Teen Court Planning Seminar will be held at the Georgetown Municipal Court and the Comfort Suites in Georgetown, Texas. This program, funded by the Texas Department of Transportation, is free of charge to municipal court employees. Travel and meals will be reimbursed based on state and federal guidelines. This seminar is primarily geared toward municipal courts seeking to establish a teen court and those with newly established teen courts. Participants will receive hands-on training in how to effectively manage a teen court as well as observe real teen court proceedings at the Georgetown Municipal Court. Participation is limited to 20, so register today at http://www.tmcec.com/registration/ or by calling 512.320.8274!

Motivational Interviewing Workshop - Dallas
April 3, 2019

TMCEC is excited to announce a free one day workshop on Motivational Interviewing, Screening, and Brief Intervention (MISBI). Registration is open to all municipal court employees in Texas. Travel, meals, and one night hotel stay will be provided at no charge (subject to TMCEC, state, and federal guidelines). The workshop will be held on April 3, 2019 at the Omni Park West in Dallas.
Registration: http://www.tmcec.com/mtsi/motivational-interviewing/.

MISBI is a counseling approach to effect behavioral and attitudinal change in individuals. Municipal court employees often communicate with juvenile defendants on a daily basis. MISBI is an innovative method of talking to these defendants which seeks to change their mindset and attitude with the end goal of preventing re-offending. Come see why municipal courts across Texas have implemented this unique approach to communication into their everyday operations! Questions? Contact Ned Minevitz at ned@tmcec.com or 512.320.8274.

Procedural Justice

One day clinics offered in conjunction with the local chapters of the Texas Court Clerks Association

10:00 a.m. – 3:00 p.m.

For Judges, Court Administrators, & Court Security Personnel

Course Description:

Procedural Justice is a concept that addresses practical ways to address the public's perception of the court system. This program looks at how the four key elements of voice, neutrality, respect, and understanding can be effectively communicated in municipal courts, while maintaining the court's authority. This program will count for 4 hours of continuing education (3 hours of CLE, and 2 hours of ethics).

These clinics will be held in various locations across Texas in conjunction with the local chapters of the Texas Court Clerks Association. There is no registration fee. Registration will begin at 9:00 a.m. Breakfast tacos and lunch will be provided. However, hotel rooms will not be provided. We encourage judges and clerks to attend as a team. When attending as a team, court security personnel may also join in on the training, as often court users are first met at the door by a court security officer.

Registration may be completed at the TMCEC website (register.tmcec.com) or by mailing, faxing, or emailing this form to TMCEC at 2210 Hancock Drive, Austin, Texas 78756. Fax: 512.435.6118. Questions or to email registration form: tmcec@tmcec.com. Or, call TMCEC at 800.252.3718.

Register Me Now, please!

Name:_____ **Court:** _____

Telephone Number: _____

Email: _____

Clinic Location (City): _____

Date	Location	Time
January 11, 2019	Allen R. Baca Senior Center 301 W. Bagdad Ave, Bldg B, **Round Rock**, TX 78664	10:00 a.m. - 3:00 p.m.
February 28, 2019	McAllen Doubletree Hotel 1800 S. 2nd Street, **McAllen**, TX 78503	10:00 a.m. - 3:00 p.m.
April 23, 2019	Jim Nall Training Center 100 S. Church St., **White Oak**, TX 75693	10:00 a.m. - 3:00 p.m.
May 17, 2019	Seguin Events Complex 950 S. Austin St., **Seguin**, TX 78155	10:00 a.m. - 3:00 p.m.
July 25, 2019	Midland Municipal Court 201 E. Texas Ave., **Midland**, TX 79701	10:00 a.m. - 3:00 p.m.

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

Who: This 8-hour course is open to court security officers who serve in Texas municipal courts.

Where: TMCEC's Online Learning Center (OLC) - online.tmcec.com

When: Beginning **January 3, 2019**, this course will begin on the first day of every month and end on the last day of the month. The January course begins on January 3rd due to the New Year's Holiday.

How: Register by going to **register.tmcec.com**. Your TMCEC registration login and password are required. If you do not have a username and password, complete a registration form and email it to 10999@tmcec.com or mail or fax it to TMCEC. The registration form is available on the TMCEC home page: www.tmcec.com. Upon registration, you will receive a confirmation email with an enrollment key. Go to the OLC and click on *Courses*. The title of the course is TMCEC Court Security 10999. You will be prompted to enroll. Click on *Enroll* and enter the enrollment key. Registration is open for all courses in FY 19 (January through August). A TCOLE PID is required in order for TMCEC to report your credit to TCOLE.

There is no cost to take this course.

Why: Completion of this course satisfies the mandate in S.B. 42 (85th Legislature) that all court security officers be certified. This platform is perfect for cities and courts unable to send their bailiffs to live training. The course can be completed at the participant's own pace. Registration is open at any time, however, regardless of the date of registration, the course must be completed by the last day of the month in which the participant registers in order to receive credit and certification.

TEXAS MUNICIPAL COURTS EDUCATION CENTER
FY19 REGISTRATION FORM:
Regional Judges & Clerks Seminars, Court Administrators, Bailiffs & Warrant Officers, Traffic Safety, Level III Assessment Clinic, and Juvenile Case Managers

Conference Date: _____ Conference Site: _____

Check one:

- ☐ Non-Attorney Judge ($100)
- ☐ Attorney Judge not-seeking CLE credit ($100)
- ☐ Attorney Judge seeking CLE credit ($200)
- ☐ Regional Clerks ($100)

- ☐ Traffic Safety Conference - Judges & Clerks ($100)
- ☐ Level III Assessment Clinic ($150)
- ☐ Court Administrators Seminar ($150)
- ☐ Bailiff/Warrant Officer ($150)
- ☐ Juvenile Case Manager ($150)

By choosing TMCEC as your MCLE provider, attorney-judges help TMCA pay for expenses not covered by the Court of Criminal Appeals grant. Your voluntary support is appreciated. The CLE fee will be deposited into the grantee's private fund account to cover expenses unallowable under grant guidelines, such as staff compensation, membership services, and building fund.

Name *(please print legibly)*: Last Name: _____ First Name: _____ MI: _____

Names you prefer to be called (if different): _____ Female/Male: _____

Position held: _____ Date appointed/hired/elected: _____ Are you also a mayor?: _____

Emergency contact (Please include name and contact number): _____

HOUSING INFORMATION - Note: $50 single room fee each night

TMCEC will make all hotel reservations from the information you provide on this form. **TMCEC will pay for a double occupancy room for two nights with another seminar participant at all regional judges and clerks seminars.** To share with a specific seminar participant, you must indicate that person's name on this form. If you do not wish to share, please add $50 a night for a single room. I request

☐ a private room ($50 per night : ____ # of nights x $50 = $_____). TMCEC can only guarantee a private room; type of room (queen, king, or two double beds*) is dependent on hotels availability. Special Request: _____

☐ a room shared with a seminar participant. Room will have two double beds. TMCEC will assign roommate **or** you may request roommate by entering seminar participant's name here: _____

☐ I do not need a room at the seminar.

Hotel Arrival Date (this **must** be filled out in order to reserve a room): _____

*If you bring a companion with you to stay in the hotel, the hotel reserves the right to charge an additional fee.

Municipal Court of: _____ Email Address: _____

Court Mailing Address: _____ City: _____ Zip: _____

Office Telephone #: _____ Court #: _____ Fax: _____

Primary City Served: _____ Other Cities Served: _____

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

Judge's Signature: _____ Date: _____

TCOLE PID: _____ BAILIFF DOB FOR TCOLE PID # _____

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

_____ _____

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

PAYMENT INFORMATION:

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

☐ Check Enclosed *(Make checks payable to TMCEC)*

☐ Credit Card

Credit Card Payment:

Amount to Charge: *Credit Card Number* *Expiration Date*

Credit card type: $_____ _____ _____

☐ *MasterCard*

☐ *Visa* *Name as it appears on card (print clearly):* _____

Authorized signature: _____

Receipts are automatically sent to registrant upon payment. To have an additional receipt emailed to your finance department list email address here:

_____

Please return completed form with payment to TMCEC at 2210 Hancock Drive, Austin, TX 78756, or fax to 512.435.6118.

2018 - 2019 TMCEC Academic Schedule At-A-Glance

Seminar	Date(s)	City	Hotel Information
Procedural Justice Clinic	January 11, 2019	Round Rock	Allen R. Baca Senior Center 301 W. Bagdad Ave., Bldg. 2. Grand Room Round Rock, TX 78664
Regional Clerks Seminar	January 14-16, 2019	Galveston	San Luis Resort 5222 Seawall Blvd., Galveston, TX 77551
One Day Clinic - Laredo	January 25, 2019	Laredo	La Posada 1000 Zaragoza St., Laredo TX
Level III Assessment Clinic	January 28-31, 2019	Austin	Crowne Plaza 6121 N IH-35, Austin, Texas 78752
Regional Judges Seminar	February 3-5, 2019	Galveston	San Luis Resort 5222 Seawall Blvd., Galveston, TX 77551
Regional Judges & Clerks Seminar	February 13-15, 2019	Houston	Omni at Westside 13210 Katy Fwy., Houston, TX 77079
New Judges & Clerks Orientation	February 22, 2019	Austin	TMCEC 2210 Hancock Drive, Austin, TX 78756
Procedural Justice Clinic	February 28, 2019	McAllen	Doubletree Hotel 1800 S. 2nd St., McAllen, TX 78503
Regional Clerks Seminar	March 4-6, 2019	Addison	Crowne Plaza 14315 Midway Road, Addison, TX 75001
Regional Judges Seminar	March 6-8, 2019	Addison	Crowne Plaza 14315 Midway Road, Addison, TX 75001
Traffic Safety Conference	March 25-27, 2019	Houston	Omni at Westside 13210 Katy Fwy., Houston, TX 77079
Teen Court Conference	April 1-2, 2019	Georgetown	Comfort Inn & Suites 11 Waters Edge Circle, Georgetown, TX 78626
Prosecutors Conference	April 1-3, 2019	Dallas	Omni Park West 1590 Lyndon B Johnson Fwy., Dallas, TX 75234
Motivational Interviewing (MTSI)	April 3, 2019	Dallas	Omni Park West 1590 Lyndon B Johnson Fwy., Dallas, TX 75234
Regional Judges & Clerks Seminar	April 8-10, 2019	Lubbock	Overton Hotel 2322 Mac Davis Lane, Lubbock, TX 79401
Procedural Justice Clinic	April 23, 2019	White Oak	Jim Nall Training Center 100 S. Church St., White Oak, TX 78155
Fines, Fees, Indigence Clinic	April 26, 2019	Brenham	Barnhill Center 111 W Main St., Brenham, TX 77833
Regional Clerks Seminar	April 29-May 1, 2019	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd., S. Padre Island, TX 78597
Regional Attorney Judges Seminar	May 5-7, 2019	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd., S. Padre Island, TX 78597
Regional Non-Attorney Judges Seminar	May 7-9, 2019	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd., S. Padre Island, TX 78597
New Judges & Clerks Orientation	May 17, 2019	Austin	TMCEC 2210 Hancock Drive, Austin, TX 78756
Procedural Justice Clinic	May 17, 2019	Seguin	Seguin Events Complex 950 S. Austin St., Seguin, TX 78155
Bailiffs & Warrant Officers Conference	May 20-22, 2019	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Judges & Clerks: Fines & Fees	May 28-30, 2018	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Regional Judges & Clerks Seminar	June 3-5, 2019	Abilene	MCM Elegante Suites 4250 Ridgemont Drive, Abilene, TX 79606
Juvenile Case Manager Conference	June 10-12, 2019	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Court Administrators & Prosecutors Conference	June 17-19, 2019	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
New Judges & Clerks Seminar	July 8-12, 2019	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Procedural Justice Clinic	July 25, 2019	Midland	Midland Municipal Court 201 E. Texas Ave., Midland, TX 79701
Impaired Driving Symposium	July 25-26, 2019	Austin	Doubletree by Hilton 6505 IH-35 North, Austin, TX 78752
Legislative Update	August 13, 2019	Lubbock	Overton Hotel 2322 Mac Davis Lane, Lubbock, TX 79401
Legislative Update	August 16, 2019	Dallas	Omni Park West 1590 Lyndon B Johnson Fwy., Dallas, TX 75234
Legislative Update	August 20, 2019	Houston	Omni at Westside 13210 Katy Fwy., Houston, TX 77079

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

Register Online: register.tmcec.com

C3 (Councils, Courts, and Cities)

Public safety and quality of life are enhanced through the enforcement of traffic laws, local ordinances, and other state laws. The public increasingly depends on city officials and employees to understand key issues pertaining to these laws and their adjudication in court.

C3 (Councils, Courts, and Cities) is a public information and education campaign created by the Texas Municipal Courts Education Center that aims to help fill the information gap between city halls and municipal courts in Texas.

The purpose of C3 is to highlight issues and increase awareness and understanding of municipal courts in Texas for mayors, city council members, city attorneys, and other local officials.

The Brief

The Brief is a periodic briefing for Texas mayors, city council members, and other local officials highlighting issues and increasing awareness and understanding of municipal courts in the Lone Star State:

November 2018 - *The Official Launch of C3 (Councils, Courts, and Cities)*
October 2018 - *Recent Studies Provide Insights into Public Perception of Texas Courts*
August 2018 - *Where Loyalty Lies: City Hall and Municipal Court*
June 2018 - *Discharging the Judgment: Fines and Costs*
April 2018 - *What Does City Hall Have to Do with Court Security?*
January 2018 - *Judgment and Sentence: Fines and Costs*
November 2017 - *TML Annual Conference Recap: The Effects of Ferguson and the Future of Fines and Court Costs in Texas*
September 2017 - *Legislative Recap: Three Big Issues and the Road Ahead for Municipal Courts*

Join Our Mailing List
Want to know about C3 related happenings and receive the most recent issue of *The Brief* in your inbox? Just send an email to tmcec@tmcec.com. In the subject line type “Add me to C3.”

Follow us on Twitter: @C3ofTexas

THE BRIEF

Information for Texas Municipalities about Texas Municipal Courts

TML Annual Conference Recap

Between City Hall and Municipal Court: How City Officials Can Promote Public Safety and Confidence in the Legal System
&
The Official Launch of C3 (Councils, Courts, and Cities)

On October 11, 2018, Ryan Kellus Turner, TMCEC General Counsel and Director of Education, addressed mayors, city council members, and other local officials from cities of all sizes at the Texas Municipal League Annual Conference. Here is a synopsis of his presentation.

City Hall: Promoting Public Safety and Confidence in the Legal System

Continuing the conversation he began in Houston at the 2017 TML Annual Conference, Turner explained how, in Texas, mayors, city council members, and other local officials play an important role in helping municipal courts balance different interests. Procedural fairness must be balanced with upholding the rule of law. Compassion must be balanced with compliance. Judicial independence must be balanced with judicial accountability.

Gallup data suggests that although Americans are divided on priorities for the criminal justice system, across the ideological spectrum there are shifting views when it comes to punishment. The number of people who believe that the system is not "tough enough" is at a 13-year low. National confidence in law enforcement has returned to where it was prior to 2013 when it began to decline.

The national focus seems to be shifting from retributive justice (the perceived fairness of punishment) to procedural justice (the perceived fairness of court procedures and interpersonal treatment). Procedural fairness (the opportunity to be heard by an unbiased decision maker who treats people with dignity and who explains and honors defendants' rights) has been shown to be the primary factor in a person's willingness to accept a court decision. Other benefits include increased compliance with court orders, fewer violations, and increased governmental cost savings.

When it comes to feelings of safety, Gallup reports Americans of different racial and socioeconomic backgrounds generally do not share the same sense of safety. Americans living in lower-income households

feel as safe as people in some developing countries, such as a Nicaragua. An international measure of public safety used by Gallup involves asking respondents whether they feel safe walking in their community.

Texas has the 13th highest number of pedestrian deaths in the United States. Road infrastructure problems (e.g., lack of sidewalks, traffic signals, street lights, and crosswalks) combined with dangerous driver behaviors increase the hazard posed to pedestrians. Most pedestrians are killed by automobiles. In Texas in 2017, a person was killed in a traffic-related fatality every 2 hours and 21 minutes and a person was injured every 2 minutes and 4 seconds. The economic loss related to these fatalities and injuries is nearly $38.5 million. There have been 52,231 traffic-related fatalities in Texas since 2003. In the the last decade there has also been a 37 percent statewide decline in the number of traffic citations.

The public depends on city hall to promote public safety and confidence in the legal system. This not only entails promoting the enforcement of laws by police but also necessitates having fair and neutral municipal courts.

To view the presentation outline including links to all works cited, please visit http://www.tmcec.com/c3/tml2018/.

C3 (Councils, Courts, and Cities)

The presentation in Fort Worth was the official launch of C3 (Councils, Courts, and Cities), a public information and education campaign created by the Texas Municipal Courts Education Center that aims to help fill the information gap between city halls and municipal courts in Texas.

The purpose of C3 is to highlight issues and increase awareness and understanding of municipal courts in Texas for mayors, city council members, city attorneys, and other local officials. Public safety and quality of life are enhanced through the enforcement of traffic laws, local ordinances, and other state laws. The public increasingly depends on city officials and employees to understand key issues pertaining to these laws and their adjudication in court.

Part of C3 is *The Brief* (which you are reading right now). *The Brief* is a periodic briefing for Texas mayors, city council members, and other local officials.

This is the eighth issue of *The Brief*. Check out past issues online. Visit www.tmcec.com/c3.

Want to know about C3 related happenings and receive the most recent issue of *The Brief* in your email inbox? Just send an email to tmcec@tmcec.com. In the subject line, type: "Add me to C3."

Also, follow @C3ofTexas on Twitter.

The Brief is a periodic briefing for Texas mayors, city council members, and other local officials highlighting issues and increasing awareness and understanding of municipal courts in the Lone Star State. For more information visit: www.tmcec.com/c3.

Municipal Courts Celebrate National Night Out and Municipal Court Week

This year, 150 municipal courts reported celebrating National Night Out (October 2, 2018) and 114 reported celebrating Municipal Courts Week (November 5-9, 2018). Every court celebrates these events in their own unique way. Examples of innovative activities in 2018 include a "Story Hour" for 3-5 year olds reading TMCEC's *Be Careful, Lulu*! and *Safe, Not Sorry* traffic safety children's books (Bay City Municipal Court), traffic bingo and "ring around the two liter" with impairment simulation goggles (Hempstead Municipal Court), visiting a high school to talk about the dangers and consequences of underage drinking (Quitman Municipal Court), and using TMCEC's State v. Young mock trial guide to conduct a texting while driving mock trial with 8th graders (Victoria Municipal Court). For a complete list of activities, please visit http://www.tmcec.com/mtsi/municipal-courts-week/ and http://www.tmcec.com/mtsi/national-night-out/. To be added to the list of participating courts or to send pictures or activities to TMCEC, please contact Ned Minevitz at Ned@tmcec.com.

The following courts confirmed their participation in National Night Out:

- Alamo Heights
- Allen
- Alton
- Arlington
- Austin
- Azle
- Balch Springs
- Balcones Heights
- Ballinger
- Bartonville
- Bay City
- Baytown
- Beeville
- Big Sandy
- Big Spring
- Brady
- Bremond
- Calvert
- Cameron
- Camp Wood
- Cedar Hill
- Cedar Park
- Charlotte
- City of Penitas
- Clute
- Coffee City
- College Station
- Collinsville
- Columbus
- Commerce
- Conroe
- Converse
- Corpus Christi
- Crowell
- Crystal City
- Dayton
- Decatur
- Denton
- Dilley
- Double Oak
- Eagle Pass
- Edgecliff Village
- Elmendorf
- Florence
- Floresville
- Forney
- Freer
- Friona
- Gainesville
- Garden Ridge
- Gatesville
- George West
- Gonzales
- Granite Shoals
- Greenville
- Groves
- Groveton
- Gun Barrel City
- Haslet Municipal Court
- Hollywood Park
- Houston#13
- Hutchins
- Ingleside
- Irving
- Italy
- Jacinto City
- Jarrell
- Josephine
- Joshua
- Justin
- Keene
- La Coste
- La Porte
- Lancaster
- Lexington
- Linden
- Llano
- Lockhart
- Lometa
- Lone Oak
- Lone Star
- Luling
- Mabank
- Madisonville
- Manor
- Marquez
- Mathis
- Melissa
- Mesquite
- Mexia
- Milford
- Mission
- Montgomery
- Moody
- Mustang Ridge
- Nacogdoches
- Natalia
- Navasota
- Nixon
- Nolanville
- Oakwood
- Palmer
- Palmview
- Parker
- Pearsall
- Penitas
- Pleasanton
- Port Neches
- Poteet
- Pottsboro
- Rancho Viejo
- Richland
- Richmond
- Robinson
- Rollingwood
- Rosenberg
- Sabinal
- San Benito
- San Saba
- Sansom Park
- Sealy
- Shepherd
- Silsbee
- Socorro
- South Houston
- Sullivan City
- Sunnyvale
- Teague
- Texas City
- The Colony
- Tyler
- Uvalde
- Van Alstyne
- Van Horn
- Van
- Venus
- Victoria
- Vidor
- Von Ormy
- Waskom
- West Columbia
- West Lake Hills
- West Tawakoni
- Whitney
- Wills Point
- Windcrest
- Winnsboro
- Woodcreek
- Woodsboro
- Wylie
- Yoakum

Save a Life™
Texas Department of Transportation

The following courts confirmed their participation in Municipal Court Week:

- Allen
- Alvin
- Anna
- Arlington
- Austin
- Azle
- Balch Springs
- Balcones Heights
- Bay City
- Baytown
- Beeville
- Bells
- Big Spring
- Brownsville
- Carrollton
- Cedar Hill
- Charlotte
- Clute
- Coffee City
- College Station
- Collinsville
- Columbus
- Combes
- Conroe
- Copperas Cove
- Corpus Christi
- Crowell
- Cuero
- Dallas
- Dayton
- Denison
- Denton
- Eagle Pass
- Edgewood
- Edinburg
- Edna
- El Paso
- Floresville
- Forney
- Fort Worth
- Freer
- Granbury
- Grand Prairie
- Granite Shoals
- Grapevine
- Haltom City
- Helotes
- Hempstead
- Hollywood Park
- Houston
- Houston#13
- Huntington
- Hutchins
- Ingleside
- Irving
- Ivanhoe
- Jarrell
- Keene
- Killeen
- La Porte
- Lancaster
- Liberty
- Linden
- Llano
- Lockhart
- Lometa
- Lone Star
- Lubbock
- Luling
- Madisonville
- Manor
- Marble Falls
- Melissa
- Mesquite
- Mexia
- Milford
- Nacogdoches
- Navasota
- New Braunfels
- Nolanville
- Palmview
- Pearsall
- Pharr
- Pottsboro
- Quitman
- Raymondville
- Richland
- River Oaks
- Round Rock
- Rowlett
- Saginaw
- San Antonio
- San Benito
- San Elizario
- Sansom Park
- Sealy
- Silsbee
- Socorro
- South Houston
- Texas City
- Troy
- Tye
- Universal City
- Valley Mills
- Van Alstyne
- Van Horn
- Van
- Victoria
- Watauga
- West Lake Hills
- West Tawakoni
- Wills Point
- Wilmer
- Windcrest
- Wylie

Send TMCEC, Please!

Please send us a one or two paragraph summary of all the great activities that were conducted in your city or court during Municipal Court Week. We keep a list on our webpage (https://www.tmcec.com/mtsi/municipal-court-week/) to inspire other courts. We do the same for National Night Out (https://www.tmcec.com/mtsi/national-night-out/). Please email Ned Minevitz (ned@tmcec.com) with a summary. We are very appreciative of the many courts who participate! Thank you.

TRAFFIC SAFETY CONFERENCE

PRESENTED BY THE TEXAS MUNICIPAL COURTS EDUCATION CENTER

The 2019 Municipal Traffic Safety Initiatives Conference will be held in Houston on March 25-27, 2019 at the Omni Houston Westside Hotel. The deadline to register is February 27, 2019. Come see why other judges, court administrators, clerks, and prosecutors choose this conference for their continuing education!

(See page 44 for registration form or go to https://register.tmcec.com/)

TMCEC is proud to present a three-day Municipal Traffic Safety Initiatives Conference with funding from the Texas Department of Transportation (TxDOT). Municipal judges, clerks, prosecutors, and juvenile case managers are invited to attend. This is a unique conference featuring traffic safety awards and an opportunity to collaborate with other cities, vendors, program partners, and traffic safety specialists. Municipal courts that make traffic safety a local priority truly make a difference. For conference veterans and newcomers alike, this conference aims to be a call to action while providing the tools necessary for implementation.

HOUSTON, TX - MARCH 25-27, 2019

- New Innovative Topics
- Renowned Speakers
- Interactive Exhibitors
- Fun Atmosphere and Awards
- Free CLE

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TMCEC MISSION STATEMENT

To provide high quality judicial education, technical assistance, and the necessary resource materials to assist municipal court judges, court support personnel, and prosecutors in obtaining and maintaining professional competence.

Texas Municipal Courts Education Center

2019 MTSI TRAFFIC SAFETY AWARDS APPLY TODAY!

If your court engages in traffic safety outreach and impaired driving prevention, TMCEC encourages you to apply for a 2019 MTSI Award!

NEW CATEGORY THIS YEAR: New Applicant Courts! An option for courts that have never applied for an award or whose most recent application was 2013 or earlier.

Hard copy applications will be mailed to all courts in the coming weeks. You can also apply today at http://www.tmcec.com/mtsi/mtsi-awards/.

Questions? Contact Ned Minevitz at ned@tmcec.com or 512.320.8274.

GOOD LUCK!

Funded by a grant from the Texas Department of Transportation