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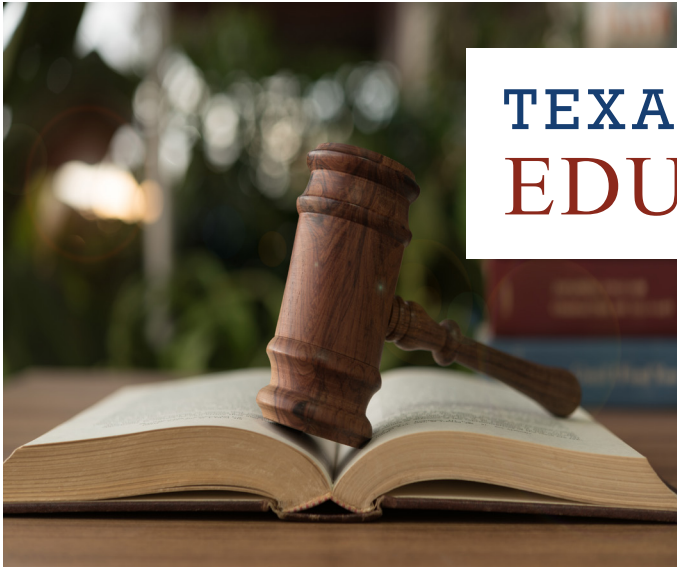
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AY 24 TMCEC Academic Schedule At-A-Glance

| Seminar | Date(s) | City | Venue |
|---|----------------------|-----------------|--|
| East Texas Regional Clerks Seminar | October 16-18, 2023 | Tyler | Holiday Inn Tyler Conference Center |
| East Texas Regional Judges Seminar | October 18-20, 2023 | Tyler | Holiday Inn Tyler Conference Center |
| Central Texas Regional Clerks Seminar | November 13-15, 2023 | Austin | Austin Southpark Hotel |
| Central Texas Regional Judges Seminar | November 13-15, 2023 | Austin | Austin Southpark Hotel |
| New Clerks Seminar | December 4-8, 2023 | Austin | DoubleTree by Hilton |
| New Judges Seminar | December 4-8, 2023 | Austin | DoubleTree by Hilton |
| South Central Regional Clerks Seminar | January 3-5, 2024 | San Antonio | Westin San Antonio North |
| South Central Regional Judges Seminar | January 3-5, 2024 | San Antonio | Westin San Antonio North |
| Clerks Level III Assessment Clinic | January 23-26, 2024 | Pflugerville | Courtyard by Marriott Austin Pflugerville + Pflugerville Conference Center |
| Gulf Coast Regional Clerks Seminar | January 29-31, 2024 | Galveston | Moody Gardens Hotel |
| Gulf Coast Regional Judges Seminar | January 29-31, 2024 | Galveston | Moody Gardens Hotel |
| Houston Metro Regional Clerks Seminar | February 14-16, 2024 | Houston | Hyatt Regency Houston Intercontinental Airport |
| Houston Metro Regional Judges Seminar | February 14-16, 2024 | Houston | Hyatt Regency Houston Intercontinental Airport |
| Prosecutors Seminar | February 21-23, 2024 | Austin | Holiday Inn Austin Town Lake |
| Teen Court Workshop | February 26-27, 2024 | Georgetown | Sheraton Georgetown |
| C3 Fines and Fees Forum | March 5, 2024 | Waco | AC Hotel by Marriott Waco Downtown |
| North Texas Regional Clerks Seminar | March 25-27, 2024 | Dallas | DoubleTree by Hilton Dallas Near the Galleria |
| North Texas Regional Judges Seminar | March 25-27, 2024 | Dallas | DoubleTree by Hilton Dallas Near the Galleria |
| Municipal Traffic Safety Initiatives Conference | April 3-5, 2024 | San Antonio | Holiday Inn Riverwalk |
| Panhandle Regional Clerks Seminar | April 23-25, 2024 | Lubbock | Overton Hotel and Conference Center |
| Panhandle Regional Judges Seminar | April 23-25, 2024 | Lubbock | Overton Hotel and Conference Center |
| South Texas Regional Clerks Seminar | May 8-10, 2024 | S. Padre Island | Holiday Inn Resort South Padre Island - Beach Front |
| South Texas Regional Judges Seminar | May 8-10, 2024 | S. Padre Island | Holiday Inn Resort South Padre Island - Beach Front |
| Court Security Conference | May 21-22, 2024 | Austin | Austin Marriott South |
| Court Administrators Seminar | May 29-31, 2024 | Houston | Omni Houston |
| Prosecutors Seminar | May 29-31, 2024 | Houston | Omni Houston |
| Juvenile Case Managers Seminar | June 10-12, 2024 | Austin | Austin Marriott South |
| West Texas Regional Clerks Seminar | June 24-26, 2024 | Odessa | Odessa Marriott Hotel + Conference Center |
| West Texas Regional Judges Seminar | June 24-26, 2024 | Odessa | Odessa Marriott Hotel + Conference Center |
| New Clerks Seminar | July 8-12, 2024 | Austin | DoubleTree by Hilton |
| New Judges Seminar | July 8-12, 2024 | Austin | DoubleTree by Hilton |
| Mental Health Conference | August 1-2, 2024 | Fort Worth | Marriott Hotel at Champions Circle |

Registration opens on September 15, 2023. To register, go to register.tmcec.com.
For the most up-to-date information, visit www.tmcec.com/calendar.



Ryan Kellus Turner
TMCEC Executive Director

The Status of Abortion-Related Crimes in Texas Post *Dobbs*

In *Dobbs v. Jackson Women’s Health Organization*,¹ the U.S. Supreme Court held that abortion is not a protected right under the Fourteenth Amendment. One year after the *Dobbs* decision, it is not surprising that there are emerging abortion-related legal issues spawned by the decision. However, one of the more surprising issues here in Texas, which is more in the realm of legislative law, are general questions about penal laws that for half a century were widely assumed to be “dead on the books.” Meanwhile, there are also questions about how more recent abortion-related criminal laws dovetail with other criminal offenses “on the books” outside the penal code.

To understand the historic nature of the *Dobbs* decision requires an understanding of U.S. Supreme Court precedent. In *Roe v. Wade* (1973), the Court held that the Fourteenth Amendment provided a fundamental right to privacy that, although not absolute, protected a woman’s right to abort her fetus.² In *Planned Parenthood v. Casey* (1992), a plurality opinion, the Court affirmed the central

holding in *Roe* that: (1) women had the right to have an abortion prior to viability and to do so without undue interference from the State; (2) the State could restrict the abortion procedure post-viability, so long as the law contained exceptions for pregnancies which endangered the woman’s life or health; and (3) the State had legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.³ *Dobbs* overruled both *Roe v. Wade* and *Planned Parenthood v. Casey*.

Dobbs is not a criminal case, yet the word “crime” appears 26 times throughout the decision. *Roe*, similarly, was not a criminal case. However, it began in Dallas County and involved the constitutionality of a criminal abortion statute in the Penal Code. The overruling of *Roe* and *Casey* changes the legal landscape related to abortion and criminal law in Texas.

Stare decisis, a Latin term that means “let the decision stand” or “to stand by the things decided” is a fundamental maxim in the American legal

system. The doctrine of stare decisis ensures certainty and consistency in the application of the law. It is the principle which obligates for precedent. It is the reason that law students, lawyers, and judges study case law.

In *Dobbs*, the Supreme Court concluded that stare decisis does not compel continued acceptance of precedent because *Roe* usurped power to address a profound, important moral and social question that unequivocally belongs to the people and their elected representatives. Dissenting members of the Court stated that accepting such an understanding of stare decisis could spell the end of any precedent with which a bare majority of the present Court disagrees.

In a concurring opinion, Justice Kavanaugh acknowledged that the interests on both sides of the abortion issue are “extraordinarily weighty” but wrote separately to emphasize that the Constitution

In overruling *Roe* and rescinding its constitutional protections, *Dobbs* again sets the stage for each state to regulate abortion.

is neither pro-life nor pro-choice and that nine unelected members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-

choice abortion policy for all 330 million people in the United States. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process. Accordingly, abortion is an issue for the states.

The December 2022 issue of *The Recorder* featured a comprehensive summary of the *Dobbs* decision and its majority, concurring, and dissenting opinions.⁴ During AY 23, *Dobbs* was discussed as part of the TMCEC Case Law & Attorney General Opinion Update at seminars throughout the state. The focus of the presentation was limited in scope to the decision’s underpinnings. Because of the decision’s potential implications on magistrate duties, TMCEC promised in December to write this article to provide readers with more information about abortion-related crimes after *Dobbs*.

Before and After *Roe*

For more than a century prior to *Roe*, Texas law criminalized numerous acts relating to abortion. Although they were never repealed by the Texas Legislature, under *Roe*, five criminal statutes relating to abortion could not be enforced because each was facially unconstitutional under the Due Process Clause of the Fourteenth Amendment.⁵ State laws hence were subject to federal constitutional protections.

After *Roe*, state legislatures, including Texas, enacted laws restricting or regulating abortion in ways that comported with *Roe* and did not rely on criminal prosecution for enforcement.

In overruling *Roe* and rescinding its federal constitutional protections, *Dobbs* again sets the stage for each state to regulate abortion. (This begs a question. In Texas, was the stage already set?)

Triggered in Texas

Abortion-related laws in Texas are a complicated patchwork. In 2021, the 87th Legislature passed H.B. 1280, creating Chapter 170A (Performance of Abortion) in the Health & Safety Code. It contains a variety of criminal, civil, and regulatory enforcement measures, including a new felony for performing an abortion. The bill contained a trigger law provision meaning that the new criminal offense became effective 30 days after the reversal of *Roe* became final (i.e., August 25, 2022). Now that *Dobbs* has reversed *Roe*, abortion in Texas is illegal in most cases except to save the life of the mother.

Section 170A.002 of the Health and Safety Code prohibits a person from knowingly performing, inducing, or attempting an abortion at any time after fertilization. A violation of Section 170A.002 is a second-degree felony except that the offense is a first degree felony if “an unborn child dies as a result of the offense.”⁶ While Section 170A.002 also authorizes the imposition of a fine of not less than \$100,000, this fine, contained in Section 170A.005, is a civil penalty, not a criminal punishment. (However, as described below, there are also abortion-related criminal offenses punishable by the imposition of a fine.)

Key issues pertaining to an offense under Section 170A.002:

1. The definition of “abortion” encompasses surgical and non-surgical means such as the use of a substance (i.e., drug or medicine) intended “to cause the death of an unborn child of a woman known to be pregnant.”⁷
2. It contains exceptions for physicians who perform an abortion to save the life of a pregnant female, to prevent severe injury, and for any medical treatment that results in the “unintentional injury or death of the unborn child.”⁸



3. Chapter 170A is not to be construed to impose criminal, civil, or administrative liability upon a pregnant female upon whom an abortion is performed, induced, or attempted.⁹

Enforcement of Abortion Law Is Not Limited to Criminal Law

While the focus of this article is limited to abortion-related substantive criminal laws of interest to magistrates, it is important to emphasize that “illegal” does not necessarily entail criminal enforcement. Prior to *Dobbs*, to avoid direct legal challenges under *Roe*, legislators passed into law S.B. 8 (The Texas Heartbeat Act¹⁰), which gives private citizens the power to enforce abortion prohibitions “by enabling them to sue anyone who provides or ‘aids or abets’ an abortion after six weeks and if successful collect a \$10,000 reward, described by critics as a ‘bounty.’”¹¹

Back to the Future?

Since *Dobbs*, questions have emerged regarding Texas’s prior abortion-related crimes struck down by *Roe*. Specifically, former Articles 1191, 1192, 1193, 1194, and 1196 of the Penal Code of 1925.¹² These are the previously referenced five criminal statutes that were never repealed by the Texas Legislature.

Notably, while they were not repealed, they were relocated from the Penal Code to the Texas Revised Civil Statutes.

Prior to *Dobbs*, it was believed that these laws were repealed. And for good reason, in 2004 in *McCorvey v. Hill*, the Fifth Circuit Court of Appeals stated, “The Texas statutes that criminalized abortion (former Penal Code Articles 1191, 1192, 1193, 1194 and 1196) and were at issue in *Roe* have, at least, been repealed by implication.”¹³

It is not surprising that decades after the *Roe* decision, the statutes did not even appear in Vernon’s statutes. However, what surprised many in the wake of the *Dobbs* decision is that all five criminal statutes were restored to the state’s website containing current Texas statutes. While acknowledging *McCorvey v. Hill*, the statutes online state “the legislature finds that the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother’s life is in danger, have not been repealed by the legislature, either expressly or by implication.”¹⁴ Although not reflected in statutory changes, both H.B. 1280 and S.B. 8 (The Texas Heartbeat Act) enacted in 2021, both contained legislative findings stating that the abortion crimes were never repealed.

While the Texas Code Construction Act has historically been considered a law for statutory interpretation and statutory revision imbued with canons of statutory construction used by judges and lawyers, S.B. 8 also contained an amendment to the Code Construction Act that only applies to abortion statutes.¹⁵ Section 311.036(a) of the Government Code pertains to construing repeals: “A statute that regulates or prohibits abortion may not be construed to repeal any other statute that regulates or prohibits abortion, either wholly or partly, unless

the repealing statute explicitly states that it is repealing the other statute.”

Other Abortion-Related Crimes

After *Roe* struck down Texas’s criminal abortion laws contained in the Penal Code, the legislature enacted a legal menagerie of administrative regulations, civil sanctions, and criminal offenses aimed at individuals who perform or facilitate elective abortions.

Magistrates should be aware that most, but not all, abortion-related criminal offenses are in the Family Code and in the Health & Safety Code. Here are some examples:

Family Code Sections:

Sec. 33.002 (Parental Notice). A physician who performs an abortion on a minor without parental notification commits a fine-only offense punishable by a fine not to exceed \$10,000.¹⁶

Sec. 151.002 (Rights of a Living Child after an Abortion of Premature Birth). Failure of a physician to “provide appropriate medical treatment to a child born alive after an abortion or an attempted abortion” is a third degree felony.¹⁷

Health & Safety Code Sections:

Sec. 171.018 (Informed Consent). A physician who performs an abortion on a woman without voluntary and informed consent commits a fine-only offense punishable by a fine not to exceed \$10,000.

Sec.171.065 (Abortion-Inducing Drugs). A person, other than a pregnant woman or physician, who violates the provisions of the subchapter governing abortion-inducing drugs commits a state jail felony.

Sec. 171.103 (Partial-Abortion). A physician or



other person who performs a partial-birth abortion commits a state jail felony.

Sec. 171.153 (Dismemberment Abortions).

A person, other than a pregnant woman or a physician (or employee or agent operating under the supervision of a physician) who performs a dismemberment abortion commits a state jail felony.

Sec. 245.011 (Physician Reporting Requirements).

A physician who performs an abortion at an abortion facility who fails to complete and submit a monthly report to the Department of State Health Services on a state proscribed form commits a Class A misdemeanor.

Sec. 245.014 (Operating Abortion Facility without a License). A person who operates an abortion facility without an appropriate license commits a Class A misdemeanor. Each day of a continuing violation constitutes a separate offense.

In the wake of *Dobbs*, and because the legislature has not amended or repealed them, criminal law practitioners in Texas are wondering how abortion-related criminal offenses in the Family Code, Health & Safety Code, and other statutes interact with the provisions in Chapter 170A. Do these more specific, pre-existing laws apply even though they carry lower criminal penalties than those contained in Chapter 170A? Because abortion-related offenses are seldom alleged, it may be a long time until questions surrounding this area of criminal law are answered. In the absence of legislative action, irreconcilable conflicts will have to be resolved through the courts. The first step in that process: the presentation of a probable cause affidavit to a magistrate by law enforcement.

Conclusion

Long before *Roe v. Wade*, the national debate regarding abortion in the United States began in the 18th century.¹⁸ *Dobbs v. Jackson Women's Health Organization* may not be the end but rather a historic inflection point in the long-running debate.

Regardless of differing beliefs about abortion, people with differing opinions can agree that *Dobbs* illustrates the prospective danger of depending on case law, rather than constitutional and statutory enactments as a source of individual rights.

One year after *Dobbs*, there are broader questions in Texas regarding abortion-related statutory enactments. Will triggering laws have unanticipated consequences on enforcing laws? Are statutory laws declared unconstitutional by appellate courts really "dead on the books" if a legislative body never repeals them (or are they more like zombies in the event precedent is reversed)? The answer to these questions are presently unknown.

¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

² *Roe v. Wade*, 410 U.S. 113.

³ *Planned Parenthood v. Casey*, 505 U.S. 833.

⁴ Case Law and Attorney General Opinion Update, *The Recorder*, December 2022, at 15.

⁵ See, Tex. Att'y Gen. Op. No. JH-369 (1974), noting that only Penal Code Art. 1195, criminalizing abortion during natural birth, was still enforceable after *Roe*.

⁶ Tex. Health & Safety Code Ann. § 170A.004.

⁷ Tex. Health & Safety Code Ann. § 170A.001(1), citing Tex. Health & Safety Code Ann. § 245.002.

⁸ Tex. Health & Safety Code Ann. § 170A.002.

⁹ Tex. Health & Safety Code Ann. §.170A.003.

¹⁰ Wikipedia, the Free Encyclopedia, Texas Heartbeat Act, https://en.wikipedia.org/wiki/Texas_Heartbeat_Act (last visited July 21, 2023).

¹¹ Brendan Pierson, Texas abortion foes ask court to toss lawsuit over 'bounty' law, Reuters (September 8, 2022, 3:30 PM), <https://www.reuters.com/legal/government/texas-abortion-foes-ask-court-toss-lawsuit-over-bounty-law-2022-09-08/>.

¹² Texas State Law Library, Texas Historical Statutes Project, ¹⁹²⁵ Penal Code of the State of Texas, at pp 297-298. <https://www.sll.texas.gov/assets/pdf/historical-statutes/1925/1925-3-penal-code-of-the-state-of-texas.pdf>.

¹³ *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004).

¹⁴ Texas Constitution and Statutes, Vernon's Civil Statutes, https://statutes.capitol.texas.gov/Docs/CV/htm/CV.71.6-1_2.htm#4512.5 (last visited July 21, 2023).

¹⁵ Tex. Gov't Code Ann. § 311.036. Subsection (b) states "A statute may not be construed to restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state unless the statute explicitly states that political subdivisions are prohibited from regulating or prohibiting abortion in the manner described by the statute." Subsection (c) states "Every statute that regulates or prohibits abortion is severable in each of its applications to every person and circumstance. If any statute that regulates or prohibits abortion is found by any court to be unconstitutional, either on its face or as applied, then all applications of that statute that do not violate the United States Constitution and Texas Constitution shall be severed from the unconstitutional applications and shall remain enforceable, notwithstanding any other law, and the statute shall be interpreted as if containing language limiting the statute's application to the persons, group of persons, or circumstances for which the statute's application will not violate the United States Constitution and Texas Constitution."

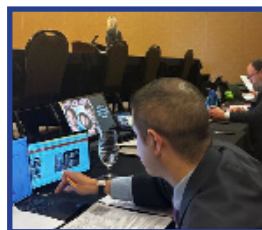
¹⁶ Tex. Fam. Code Ann. § 33.002(g).

¹⁷ Tex. Fam. Code Ann. § 151.002(g).

¹⁸ Treva B. Lindsey, Abortion has been common in the US since the 18th century – and debate over it started soon after, *The Conversation* (May 5, 2022, 10:05AM), <https://theconversation.com/abortion-has-been-common-in-the-us-since-the-18th-century-and-debate-over-it-started-soon-after-182496>.

Thank you!

As Academic Year 2023 comes to a close on August 31, we want to express our gratitude. We thank the Court of Criminal Appeals, the TMCEC Board of Directors, our faculty, and all of the attendees who have made this year a resounding success.





Benjamin Gibbs
Program Attorney and Deputy Counsel, TMCEC

Marijuana, Hemp, CBD, and Compassionate Use in Texas

The last few legislative changes have brought a sea change in Texas marijuana law. For years, the rule was simple: parts, products, salts, and derivatives of the plant *Cannabis sativa* L. (except for the mature stalks and certain products made from them) were controlled substances. Anything used to (broadly) consume or store the product could be considered drug paraphernalia.¹ In 2019, everything changed. The changes will likely continue for several sessions to come.

Cities are seeing a rise in CBD product sales, as well as sales of products advertised as containing “Legal THC.” In addition, changes to the Texas Compassionate Use law have seen an uptick in prescribed cannabis for a wider variety of disorders than was previously legal.

The current law differentiates between hemp and marijuana/marihuana, based upon the concentration of a single chemical. Marijuana has a further sub-classification of “low-THC cannabis” under the Compassionate Use Act. The legality of each is different, and enforcement must be approached differently.

Hemp and Marijuana

Marijuana comes from a plant in the hemp family. The hemp family, as it is currently scientifically defined, includes about 170 species. The family includes several kinds of hackberry tree, brewers’ hops (from which beer is brewed), the thorny elm, and cannabis. The genus *Cannabis* has been divided into three species in the past. Current thinking, at least as relevant to Texas law, has only one species, *Cannabis sativa*, and two subspecies, *indica* and *ruderalis*. For the purposes of Texas law, reflecting the current federal law, these are treated as the same plant.

It may be helpful to think of this in terms of a more familiar species with a lot of variation: *Canis lupus familiaris*, the common dog. A chihuahua and a Bull Mastiff are the same species, even if they have very few physical characteristics in common. In the same way, industrial hemp cultivated for rope and cloth, *indica* plants cultivated to refine hashish, and decorative hemp plants found in gardens across the world are the same species.

Since 2019, the Controlled Substances Act, Chapter 481 of the Health and Safety Code, differentiates between hemp and marijuana. Both hemp and marijuana are parts of or derived from the Cannabis sativa plant, but marijuana contains a concentration of more than 0.3% of Delta-9 tetrahydrocannabinol (Delta-9 THC) by dry weight.²

Hemp is legal, and not a controlled substance. Hemp is any preparation, derivative, salt, etc., of Cannabis sativa L. that contain less than 0.3% Delta-9 THC by dry weight. Anyone, without regard to medical status, prescription, or age may possess, carry, and use hemp and hemp products, including CBD products or extracts. This is true whether the product or preparation is a leaf, a gummy, or a tube of lip balm.

Delta 9 and Delta 8 THC

There are more than 100 compounds which have been identified, isolated, and synthesized in preparations of Cannabis sativa L. Different breeds of Cannabis sativa plants may have different concentrations of each chemical. Many chemicals can be synthesized or distilled from the hemp plant, including other formulations of tetrahydrocannabinol (THC).

THC is a chemical that contains 21 carbon atoms, 30 hydrogen atoms, and 2 oxygen atoms. These atoms may be arranged in several configurations, and may have different effects based upon the arrangements. Delta-9 THC is a psychoactive substance found in hemp. The “delta” in Delta-9 THC describes one of those arrangements, called an “isomer.” As the name implies, there are other isomers. One common isomer is called Delta-8 THC. Delta-8 THC contains the same number of atoms as Delta-9 THC, but in a slightly different configuration.

Before there was a commercial reason to synthesize Delta-8 THC, it was relatively uncommon to do so. Delta-8 THC naturally occurs in cannabis plants, but only in low concentrations. It was first made illegal with the passage of the Marihuana Tax Act in 1937. With the federal Farm Act of 2018 differentiating hemp and cannabis solely upon the basis of content of Delta-9 THC, producers found a commercial reason to synthesize and distill preparations of Delta-8 THC.

Products containing concentrations of Delta-8 THC are legal to manufacture, possess, and sell in Texas. These products fall under the umbrella of “hemp,” as long as they contain less than 0.3% Delta-9 THC by dry weight.

Products advertising “Legal THC” likely contain a high level of Delta-8 THC. Delta-8 THC is also a psychoactive substance. The effects of use of Delta-8 THC are similar to those of Delta-9, albeit less potent.



Hemp, CBD, and “Smokable Hemp Preparations”

“CBD products” are related to but not the same as marijuana. CBD products typically contain concentrations of Cannabidiol, otherwise known as CBD, but not more than 0.3% of Delta-9 THC. A preparation with 100% CBD that contains less

than 0.3% Delta-9 THC is hemp under the law and is legal for any person to possess. There are no age restrictions on possession of hemp products under the Texas Controlled Substances Act.

Under Section 122.301(b) of the Agriculture Code, a state agency may not authorize a person to manufacture a product containing hemp for smoking. Smoking is defined as “burning or igniting the substance and inhaling the smoke or heating the substance and inhaling the resulting vapor or aerosol. This is reflected in the Texas Administrative Code, which contains a rule that the manufacture, possession, distribution, or retail sale of consumable hemp products for smoking is prohibited.⁴

Although this prohibition conforms with statutes, is it constitutional? Does it violate the rights of the smokable hemp manufacturers?

On June 24, 2022, the Supreme Court of Texas interpreted this question. In *Tex. Dep’t of State Health Servs. v. Crown Distrib. LLC*, the Court upheld the department’s ban on smokable hemp products and the Health and Safety Code statute allowing and requiring the department to prohibit smokable hemp preparations.⁵

Prohibited Municipal Regulation of Hemp Products

Seeing the explosion in availability of hemp and “legal THC” products, many cities have felt the need to regulate or control the production, sale, and possession of such materials. The Agriculture Code contains an express provision prohibiting a municipality from enacting, adopting, or enforcing a rule, ordinance, resolution, or other regulation that prohibits the cultivation, handling, transportation, or sale of hemp as authorized by [Chapter 122].⁶ By



its plain language, a city may not prohibit the sale of hemp.

This statute is captioned “Local regulation prohibited.”⁷ However, the language of the statute does not prohibit reasonable time, place, and manner restrictions or regulations, as would be appropriate for municipal regulation of any other product. The caption is not the operative portion of the statute and should not be construed as such. There does not appear to be any case law interpreting this statute as of the time of this writing. Municipalities should be cautious: although the plain language of the statute does not prohibit regulation of the sale of hemp products, it may be that a court would interpret the caption to show a legislative intent that is broader than the actual language.

Compassionate Use

Texas also has a compassionate use program. Texas’s compassionate use law allows only low-THC cannabis, which may contain not more than 1% of THC by dry weight.⁸ Note that this definition does not make a distinction between Delta-8 and Delta-9 THC, instead basing the measurement on all THC isomers.

Chapter 487 of the Health and Safety Code describes the requirements for a dispensary. Chapter 169 of the Occupations Code describes the operation

of the compassionate use program. Under a previous iteration of the program, a prescription for low-THC cannabis (formerly allowing a lower concentration of THC) was only available for intractable epilepsy. Under the current law, the list of uses has been expanded to include epilepsy, a seizure disorder, multiple sclerosis, spasticity, amyotrophic lateral sclerosis, autism, cancer, an incurable neurodegenerative disease, post-traumatic stress disorder, or a medical program approved for a particular class of research program.⁹ In that chapter, a “medical use” of low-THC cannabis is defined as the ingestion by means of administration other than by smoking (emphasis added) of a prescribed amount of low-THC cannabis by a person to whom low-THC cannabis has been prescribed.¹⁰ Smoking means burning or igniting the substance and inhaling the smoke. *Id.* Under that law, medical use does not include smoking, and smokable preparations of low-THC cannabis cannot be prescribed.

Probable Cause

One issue that has arisen regularly since the 2019 amendments to the Controlled Substances Act is probable cause. Before those changes, the law was well-settled that the smell of marijuana constituted probable cause to search in a small, enclosed space.¹¹ Particularized suspicion was not required when the odor of marijuana was detected inside, for example, a car.¹² As a result, the odor alone was sufficient to constitute probable cause to search a defendant's person, vehicle, or objects within the vehicle.¹³

In *Cortez v. State*, the Fifth Court of Appeals found that, post-2019, the smell of burning cannabis is still sufficient probable cause to search.¹⁴ The *Cortez* court weighed the current state of the law,

the fact that no legal preparations for smokable hemp products are legal, and the fact that there has existed a strong presumption at law that the smell of burning *Cannabis sativa L.* indicates the presence of marijuana. That case is currently pending before the Court of Criminal Appeals.¹⁵

Depending on the outcome of this case, or cases like it, the bar may be raised for finding probable cause in burning marijuana cases. However, as the law currently stands, it appears that the odor of burning marijuana in a small, enclosed space, may constitute probable cause to search.

For consumption of marijuana through other means, such as ingestion of gummies or drops, there may be no way to determine whether a given preparation is marijuana or hemp. Food products containing hemp, marijuana, or neither, may be indistinguishable without chemical testing.

Enforcement in Municipal Court

Possession of Drug Paraphernalia

Possession of drug paraphernalia remains a Class C misdemeanor.¹⁶ The elements of the offense have not changed, although the definition of a controlled substance has, in this one instance. A person commits an offense if the person knowingly or intentionally uses or possesses with intent to use



drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of Chapter 481, or to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of that chapter.¹⁷ Once the offense is filed in a municipal court, the burden of proof will fall to the State to prove whether a given object is intended for use with marijuana (a controlled substance) or hemp (a legal substance). This will necessarily be a very fact-intensive inquiry.

The current state of the law, in light of *Crown Distributing* and *Chavez*, suggests that some classic paraphernalia like ashtrays, lighters, rolling papers, and vape rigs, may still be drug paraphernalia under the statute. Because hemp cannot be legally prepared in a manner which allows it to be smoked or vaped, it may be possible for the state to meet the burden of proving that a given item is drug paraphernalia beyond a reasonable doubt. At least, it may prove sufficient to survive a directed verdict, depending upon the evidence adduced.

Compassionate Use under Chapter 169 of the Occupations Code applies to the offense of possession of drug paraphernalia.¹⁸ Notably, though, this is phrased as inapplicability, not as an exception that must be included in a complaint and proved beyond a reasonable doubt at trial.¹⁹ As phrased, a prescription under Chapter 169 of the Occupations Code is an affirmative defense to possession of drug paraphernalia, to be pled and proved by the defendant.

Public Intoxication

Public intoxication also remains unchanged, perhaps more than possession of drug paraphernalia. A person commits an offense if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another.²⁰ Although intoxication may be by introduction of “a controlled substance, a drug, [or] a dangerous drug” into the body, it can also be by the introduction of “any other substance,” legal or illegal.²¹ Delta-8 THC is an intoxicant. Some users have reported intoxicating effects when using CBD. If a person is rendered a danger to self or others while in a public place by their introduction to the body, that person may still be prosecuted for public intoxication.

Although compassionate use is not excepted from this offense by name, if the substance in question was administered for therapeutic purposes as part of the person’s professional medical treatment by a licensed physician, this does also create a defense to prosecution.²² This is phrased as a defense to prosecution, so, again, the burden would fall to the defendant to raise the defense and prove it.



There is no provision prohibiting the use of hemp products by minors. However, there is an applicable offense that may exist in certain circumstances.

An individual who is younger than 21 years of age commits an offense if the individual possesses an e-cigarette.²³ An e-cigarette means an electronic cigarette or any other device that simulates smoking by using a mechanical heating element, battery, or electronic circuit to deliver nicotine or other substances to the individual inhaling from the device, or a consumable liquid solution or other material aerosolized or vaporized during the use of such a device.²⁴ The term includes a device so described, regardless of whether it is manufactured, distributed, or sold as an e-cigarette, or under another product name, and a component, part, or accessory for the device. *Id.* Under this definition, even if a smokable or vaporizable hemp product were approved, the device for consuming it would still fall under this definition of an e-cigarette.

This does not, of course, criminalize possession of any other form of hemp, but is applicable in the narrow circumstance described.

Conclusion

The current state of cannabis and marijuana enforcement has changed, but there remains a part to be played by municipal courts. In future legislative sessions, we may see further, sweeping changes to enforcement in municipal courts. Watch this space.

¹ Tex. Health & Safety Code Ann. § 481.002 (17).

² Tex. Health and Safety Code Ann. § 481.002 (26); Tex. Agric. Code Ann. § 121.001.

³ Tex. Health & Safety Code Ann. § 443.001 (11).

⁴ 25 Tex. Admin. Code § 300.104.

⁵ *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648 (Tex. 2022).

⁶ Tex. Agric. Code Ann. § 122.002.

⁷ *Id.*

⁸ See, Chapter 169 of the Health and Safety Code.

⁹ Tex. Occ. Code Ann. § 169.003(3).

¹⁰ Tex. Occ. Code Ann. § 169.001.

¹¹ *Parker v. State*, 206 S.W.3d 593, 597 n.11 (Tex. Crim. App. 2006).

¹² *Jordan v. State*, 394 S.W.3d 58, 64 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd).

¹³ *Id.*

¹⁴ *Cortez v. State*, No. 05-21-00664-CR, 2022 Tex. App. LEXIS 9270, at *19 (Tex. App.—Dallas Dec. 20, 2022, pet. filed).

¹⁵ *Chavez v. Texas*, PD-0107-23, PD-0108-23.

¹⁶ Tex. Health & Safety Code Ann. § 481.125.

¹⁷ *Id.*

¹⁸ Tex. Health & Safety Code Ann. § 481.111 (e).

¹⁹ *Baumgart v State*, 512 S.W.3d 335, 343 (Tex. Crim. App., 2017).

²⁰ Tex. Penal Code Ann. § 49.02.

²¹ Tex. Penal Code Ann. § 49.01 (2).

²² Tex. Penal Code Ann. § 49.02 (b).

²³ Tex. Health & Safety Code Ann. § 161.252 (a).

²⁴ Tex. Health & Safety Code Ann. § 161.081 (1-a).

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