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Case Law and Attorney General Opinion Update

Ryan Kellus Turner
General Counsel and Director of Education
TMCEC

Regan Metteauer
Program Attorney
TMCEC

The following decisions and opinions were issued between the dates of October 1, 2016 and October 1, 2017. Acknowledgment: Thank you Judge David Newell and Courtney Corbello. Your insight and assistance helped us bring this paper to fruition.

I. Constitutional Issues
A. 1st Amendment

North Carolina statute criminalizing registered sex offenders from accessing a "commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site" is unconstitutional because it is overbroad and impermissibly restricts lawful speech in violation of the 1st Amendment.

Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

In an 8-0 decision, the Court in an opinion written by Justice Kennedy, joined by Justices Ginsburg, Breyer, Sotomayor, and Kegan, reversed the Supreme Court of North Carolina's judgment upholding the North Carolina law and remanded the case. Justice Gorsuch did not participate.

The internet is a place. It is the modern day public square. All persons have a 1st Amendment right to access places where they can hear and be heard. The scope of the North Carolina law bars access to what many consider principal sources for knowing current events, seeking employment, and the opportunity to hear and be heard in the modern public square. While fleshing out the law as it pertains to the internet is a relatively new endeavor, it is well established that, as a general rule, government may not suppress lawful speech as the means to suppress unlawful speech.

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Texas Municipal Courts Education Center

2210 Hancock Drive
Austin, Texas 78756
512.320.8274 or 800.252.3718
Fax: 512.435.6118
www.tmcec.com

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AROUND THE STATE

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TMCEC wishes to express its appreciation to the many agencies and organizations that support our effort to provide the highest possible quality of judicial education to Texas municipal courts. Below are a wide range of groups that have helped us in the last year.

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We also appreciate the hundreds of judges and clerks who responded to our surveys in the past year. Your responses help us make sure that we are meeting your needs.

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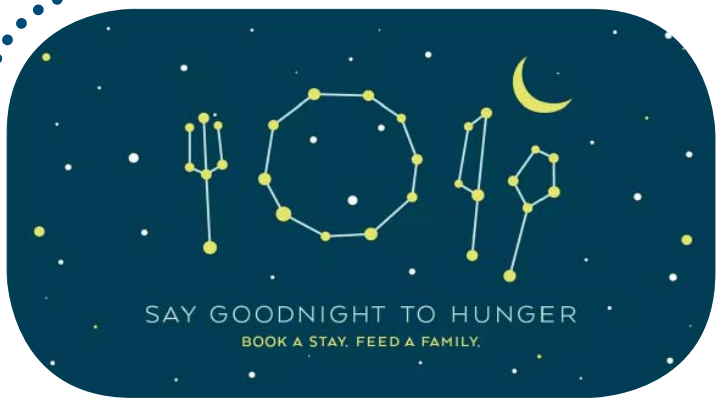

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The TMCEC Staff

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Justice Alito, concurring (joined by Chief Justice Roberts and Justice Thomas), could not join the opinion of the Court because of "undisciplined dicta." *Packingham* at 1738. "The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks. And this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers. I am troubled by the implications of the Court's unnecessary rhetoric." *Id*. (internal citations omitted).

Commentary: This case seems light years from *City of Ontario v. Quon*, 560 U.S. 746 (2010) where some court watcher pondered whether members of the Court were tech-savvy enough to understand the mechanics of text messages transmitted from a police department owned pager. While conceding that the internet is new and protean, and that what is here may be gone tomorrow, in *Packingham* the Court seems hardly reluctant in classifying social media platforms owned by private corporations, Facebook, Twitter, and LinkedIn as "the modern public square."

Municipal court readers may particularly find interesting the words Packingham typed on Facebook that found their way to the Supreme Court: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. . . Praise be to GOD, WOW! Thanks JESUS!" *Id.* at 1734.

Section 36.06 of the Penal Code (Obstruction or Retaliation) does not implicate 1st Amendment protections and is not unconstitutionally overbroad.

Ex parte Eribarne, 2017 Tex. App. LEXIS 6616 (Tex. App.—Beaumont July 19, 2017, no pet.)

Because the statute punishes conduct rather than the content of speech alone and bears a rational relationship to the State's legitimate and compelling interest in protecting public servants from harm, the court rejects Eribarne's argument that the court must apply the strict scrutiny standard when analyzing his issue. The court, therefore, presumes that the statute is valid, and that the Legislature did not act arbitrarily or unreasonably in enacting the statute.

B. 4th Amendment
1. Exceptions to the Warrant Requirement

a. Community Caretaking Exception

The police officer was justified in making a traffic stop after seeing a car stopped at a stop light, smelling alcohol coming from the car, seeing an unconscious passenger, and getting no verbal response from the driver.

Byram v. State, 510 S.W.3d 918 (Tex. Crim. App. 2017)

The court of appeals reversed and remanded the judgment of the trial court. The only reported fact exhibited by Byram's passenger was that she appeared to be passed out, and it was not until after the police officer effectuated his stop that he learned that the passenger had vomited, and even that would not have been sufficient to apply the community caretaking exception. The SUV was in a populated area and near several hospitals. This weighed against applying the community caretaking exception. The passenger was not alone and there was no evidence that Byram's passenger presented a danger to herself or others. Because of the absence of articulable facts which could give rise to reasonable suspicion that Byram was engaged in an alcohol-related offense, the officer's stopping him violated Byram's 4th Amendment rights.

Justice Walker dissented because the majority did not view the evidence and all its reasonable inferences in the light most favorable to the trial court's denial of Byram's motion to suppress and its analysis of the community-caretaking exception did not objectively review what the police officer observed.

In a unanimous opinion written by Judge Yeary, the Court of Criminal Appeals reversed the court of appeals and reinstated the judgment of the trial court. The trial court did not err by denying Byram's motion to suppress because the officer was reasonably engaged in a community-caretaking function when he stopped the SUV as there was an incapacitated woman located in the passenger seat of an unconcerned driver's vehicle in the middle of a bar district on the Fourth of July. Considering the totality of the circumstances, a reasonable person would believe the passenger of the vehicle was in need of help. The traffic stop was therefore constitutional.

b. Suspicious Place

Under the totality of the circumstances, the trial court did not err in determining there was probable cause to arrest the defendant at her home for DWI. Her home was a "suspicious place" for purposes of Article 14.03 of the Code of Criminal Procedure.

Cook v. State, 509 S.W.3d 591 (Tex. App.—Fort Worth 2016, no pet.)

Officers had reasonable suspicion to detain Cook to further investigate whether probable cause existed to arrest her for driving while intoxicated where a citizen informant had made a 911 call, the officers witnessed Cook's condition, and Cook made statements to them when she answered her door and voluntarily spoke to them. Cook's warrantless arrest was valid because probable cause to arrest her arose after she failed field sobriety tests and an officer interviewed the 911 callers and other civilian witnesses. Her home was a "suspicious place" for purposes of Article 14.03 because the 911 calls began at 9:46 p.m., a caller stated the person had pulled into a garage at 9:49 p.m., the detective's dashcam showed he knocked on her door at 9:57 p.m., and Cook answered about a minute later.

Trooper Martinez had reasonable suspicion to detain Gonzalez despite the fact that neither he nor witnesses saw Gonzalez driving the vehicle.

Gonzalez v. State, 2017 Tex. App. LEXIS 5199 (Tex. App.—El Paso June 7, 2017, no pet.)

The court found that Trooper Martinez was in possession of specific articulable facts at the time he detained Gonzalez from which he could rationally infer that he was the driver of the truck. Martinez himself observed the truck nose down in the ditch, and the witnesses told him what they had observed. Martinez then found Gonzalez walking in the area and wearing the clothes identified by the witnesses. The detaining officer need not be personally aware of every fact that objectively supports a reasonable suspicion to detain.

Additionally, Martinez detained Gonzalez in furtherance of investigating the crash scene. Law enforcement officers have the authority to investigate car crashes. Once a peace officer is dispatched to a crash scene, he has a duty to investigate and determine if the crash caused injury or property damage over $1,000 (Section 550.062, Transportation Code). This duty provides an independent basis to deem the investigation of the crash reasonable and supports the legality of an investigative detention at its inception. Additional information obtained while conducting the crash investigation, can justify further detention, which is what happened in this case.

The court also found that Gonzalez' warrantless arrest was valid under Article 14.03(a)(1) because under the totality of the circumstances, Gonzalez was found in a "suspicious place" and the facts provided probable cause for Trooper Martinez to believe he had been drinking and driving.

c. Search Incident to Arrest

The court of appeals erred in holding that a search incident to arrest could not be justified by discovery of a different offense after arrest.

State v. Sanchez, 2017 Tex. Crim. App. LEXIS 944 (Tex. Crim. App. Sep. 27, 2017)

Presiding Judge Keller delivered the opinion for a unanimous court. As long as there was probable cause to arrest for the newly-discovered offense, and the search occurred close in time to the formal arrest, an officer may conduct a search incident to arrest on the basis of an offense discovered after formal arrest for a different crime.

d. "Citizen's Arrest"

Even without observing Morris' act of taking items from the house and placing them into his car, what the homeowner and neighbor observed was sufficient to establish probable cause that the home was being burglarized and to justify a citizen's arrest.

Morris v. State, 2017 Tex. App. LEXIS 1367 (Tex. App.—Fort Worth Feb. 16, 2017, no pet.) (mem. op., not designated for publication)

Texas law extends to its citizens the right to arrest a criminal suspect. However, a citizen's right to do so is not unfettered. Article 14.01(a) of the Code of Criminal Procedure provides that an individual may, like a peace officer, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace. The court reasoned that the question is not whether they directly observed each element of the offense of burglary of a habitation, but whether they observed enough to establish probable cause that the crime was being committed.

From his own home, Placke, a neighbor, observed suspicious activity involving a vehicle parked at Ard's home. At about the same time, Ard arrived home to find an unfamiliar and unexpected vehicle in his driveway. The two then noticed that items belonging to Ard, including his clothing and a firearm, were inside the unfamiliar vehicle. Both men then observed footprints, indicating that someone had entered the back of Ard's pickup truck and opened the toolbox in the back of the truck. Finally, they noticed that the lights were on inside Ard's home, that the back door was open, and that the window blinds had been moved. They also observed a shadow moving from inside the home. This is sufficient evidence to establish probable cause that someone had entered Ard's house with the intent to commit a theft and thus, to justify a citizens' arrest.

2. Search Warrants
a. Probable Cause

Officers had probable cause, based on collective knowledge acquired at the scene of the collision and afterward at the impound lot, to search Gamero's vehicle.

Gamero v. State, 2017 Tex. App. LEXIS 6667 (Tex. App.—El Paso July 19, 2017, no pet.)

Here, one set of officers saw contraband in Gamero's car at the crash scene and arranged transport of the vehicle to a police impound lot. A canine officer was asked to run a dog sniff in the impound lot and after a positive alert by the canine, found more contraband and informed a detective of his findings. The detective moved the vehicle, searched it, and seized the contraband. Gamero argued that the seizing officer did not himself have probable cause to conduct a warrantless search of the vehicle.

The court disagreed, finding that while the detective ultimately seized the complained-of evidence, the collective knowledge of the detective and the canine officer—who both had the right to be standing at the police impound lot at the time of the dog sniff—amounted to probable cause to perform a warrantless search of Gamero's vehicle. The court cited to *Woodward v. State*, 668 S.W.2d 337, 344 (Tex. Crim. App. 1984, op. on reh'g) holding that "the sum of the information known to the cooperating agencies or officers at the time of an arrest or search by any of the officers involved is to be considered in determining whether there was sufficient probable cause."

The trial court did not err in denying Martinez' pretrial motion to suppress evidence found in his cell phone because probable cause existed to search his cell phone where it was fairly probable, though not certain, that Martinez and his cohorts communicated via cell phone in preparation for and in furtherance of the crime.

Martinez v. State, 2017 Tex. App. LEXIS 879 (Tex. App.—Corpus Christi-Edinburg February 2, 2017, no pet.)

The court was persuaded by the following: the affidavit for a search warrant contained allegations that two individuals, both of whom were present for the robbery, positively identified the defendant as an active participant in the robbery; one of the individuals knew Martinez' phone number, implying that a point of communication had been previously established between the two; and Martinez was in possession of a cell phone at the time of his arrest.

The magistrate reasonably could have inferred from statements in a police officer's affidavit that Luckenbach was driving the wrong way down a one-way street, had glassy eyes, gave off a strong odor of alcohol on his breath, refused to perform field sobriety tests at the scene when requested to do so, and declined an opportunity to provide a breath sample.

Luckenbach v. State, 523 S.W.3d 849 (Tex. App.—Houston [14th Dist] 2016, no pet.)

b. Blood Draws

The warrantless search of Martinez' blood sample violated the 4th Amendment where the State did not just seek his medical records, but also obtained his blood sample and then conducted its own analysis of the sample.

State v. Martinez, 2017 Tex. App. LEXIS 6491 (Tex. App.—Corpus Christi-Edinburg July 13, 2017, no pet.)

The court found *State v. Hardy*, 963 S.W.2d 516 (Tex. Crim. App. 1997) and *State v. Huse*, 491 S.W.3d 833 (Tex. Crim. App. 2016) inapplicable. In those cases, the State only sought medical records. Martinez' blood was never analyzed by hospital staff for medical purposes, and his medical records contained no information concerning his blood alcohol content. The subsequent acquisition of Martinez' blood sample and later testing by law enforcement constituted a search by the State implicating 4th Amendment protections.

Exigent circumstances existed for a warrantless blood draw where, among other factors, hospital staff were about to introduce intravenous saline or other medication, particularly narcotic medication, which would likely compromise the blood sample by impeding the ability to determine the rate of dissipation.

State v. Garcia, 2017 Tex. App. LEXIS 1635 (Tex. App.—El Paso Feb. 24, 2017, pet. granted) (not designated for publication)

Comparing this case to both *Cole v. State*, 490 S.W.3d 918 (Tex. Crim. App. 2016) and *Weems v. State*, 493 S.W.3d 574 (Tex. Crim. App. 2016), the court found the facts of this case more akin to *Cole*. Garcia's crash resulted in three deaths, several cars on fire, and the necessity of numerous officers on the scene. While his intoxication was induced by alcohol and cocaine metabolites rather than by methamphetamines, the concern persisted that medical treatment, such as the administration of narcotic medicines, could affect the integrity of a blood sample.

In rejecting a facial challenge to Section 724.012 of the Transportation Code (Taking of Specimen), the State met its burden to show that exigent circumstances made obtaining a search warrant for Cosino's blood draw impractical. Accordingly, the trial court did not err by denying his motion to suppress.

Cosino v. State, 503 S.W.3d 592 (Tex. App.—Waco 2016, pet. ref'd)

The court of appeals found that the trooper was the sole trooper on duty in the county, he did not arrive on the scene until almost an hour after the crash and long after Cosino was taken to the hospital. The trooper had to clear the highway and investigate the crash before leaving the scene, Cosino's refusal and the mandatory blood draw occurred two and a half hours after the collision, and the trooper testified that if he had had to get a warrant it would have taken another hour to an hour and a half and valuable evidence would have been lost.

In a case in which the State relied heavily on blood draw evidence, the trial court committed harmful error in denying Colura's motion to

suppress the results of a warrantless blood draw. Colura refused to submit to a blood draw. The record contained no explanation for the failure to obtain a search warrant or that delay would have jeopardized the ability to obtain evidence of intoxication.

Colura v. State, 510 S.W.3d 218 (Tex. App.—Houston [1st Dist.] 2016, no pet.)

c. Particularity

The failure to serve a search warrant with the incorporated attachments does not require the suppression of evidence absent a showing of prejudice.

Ballard v. State, 2017 Tex. App. LEXIS 6899 (Tex. App.—Houston [1st Dist.] July 25, 2017, no pet.)

The search warrant in this case described the property to be searched by identifying its street address and referencing a more specific description in "Attachment A." The section of the warrant about the person or property to be seized stated: "Please See Attachment B." The supporting attachments specifically identified the place to be searched and the property to be seized. Ballard was not provided a copy of the warrant's attachments prior to the execution of the search. The officers did not have copies of the attachments with them at the time the search began. Upon completion of the search, he was given a copy of the warrant with its attachments. He also was given an inventory of the property seized during the search. Because Ballard was not provided with copies of the attachments prior to the search of his residence, he argued that the warrant did not satisfy the particularity requirement. The court disagreed, finding that Ballard did not suggest that the officers' search revealed evidence that would not have been covered by the warrant, and thus, did not demonstrate harm.

3. Reasonable Suspicion

The court of appeals erred in failing to address the State's alternative argument that the stop was justified by reasonable suspicion that Bernard was driving while intoxicated.

State v. Bernard, 512 S.W.3d 351 (Tex. Crim. App. 2017)

At approximately 2:30 a.m., Deputy Tracy Watson observed a vehicle, driven by Bernard, "swerving from lane to lane and even going into the center lane." Watson initiated a traffic stop. Bernard was ultimately arrested without a warrant and charged with misdemeanor driving while intoxicated. The officers obtained and executed a search warrant for a blood draw.

In a pre-trial motion to suppress, Bernard argued that his stop and subsequent arrest without a warrant and without probable cause violated his constitutional rights. The trial court granted the motion, finding that (1) Watson stopped Bernard without reasonable suspicion of driving while intoxicated; and (2) Bernard was not driving in an unsafe manner and there was no reasonable suspicion of a traffic offense under Section 545.060(a) of the Transportation Code (Driving on Roadway Laned for Traffic) at the time he was stopped.

The State appealed. In its first point of error, the State presented two arguments in support of the traffic stop: (1) there was reasonable suspicion that Bernard violated Section 545.060(a); and (2) there was reasonable suspicion that Bernard was driving while intoxicated. The court of appeals addressed only the first of these arguments and held that the traffic stop was not supported by reasonable suspicion and that Bernard had violated Section 545.060(a) of the Transportation Code.

The Court found that if the stop was supported by reasonable suspicion that Bernard was driving while intoxicated, as the State contends, the disposition of the case may change. A court of appeals must issue a written opinion "that addresses every issue raised and necessary to final disposition of the appeal" under Rule 47.1 of the Texas Rules of Appellate Procedure. The Court vacated and remanded.

Commentary: Though vacated, the court of appeals opinion is very interesting, most notably in its decline

to follow *Leming v. State*, 493 S.W.3d 552, 559 (Tex. Crim. App. 2016) because it is a plurality. In *Leming*, the court found that it is an offense to change marked lanes when it is unsafe to do so; but it is also an independent offense to fail to remain entirely within a marked lane of traffic so long as it remains practical to do so, regardless of whether the deviation from the marked lane is, under the particular circumstances, unsafe. See, Ryan Kellus Turner and Regan Metteauer, "Case Law and Attorney General Opinion 2016" *The Recorder* (December 2016) at 28. The court instead considers itself bound to follow *Hernandez v. State*, 983 S.W.2d 867, 870 (Tex. App.—Austin 1998, pet. ref'd) and *Atkinson v. State*, 848 S.W.2d 813, 815 (Tex. App.—Houston [14th Dist.] 1993, no pet.) absent a contrary decision from a higher court or this court sitting en banc that is on point. *Leming* rejected the *Atkinson/Hernandez* analysis relied on by the trial court in this case. That analysis requires the State to prove both prongs of Section 545.060: (1) failing to drive as nearly as practical entirely within a single lane and (2) moving from the lane when not safe to do so. Interestingly, the concurring judges in *Leming* agreed with the plurality's analysis of the failure-to-maintain-a-lane statute.

An anonymous caller's tip was supported by sufficient indicia of reliability to provide the officer with reasonable suspicion that Pate was driving while intoxicated.

Pate v. State, 518 S.W.3d 911 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd)

Specifically, the caller made a contemporaneous report that he was almost sideswiped by another vehicle and that when he approached Pate she admitted that she was a "little tipsy or intoxicated or something to that nature." This type of detailed information indicates that the caller had firsthand knowledge of Pate's impaired and dangerous driving. The caller also provided a detailed description of the vehicle, including the full license plate number, along with the location of the vehicle. Based on that information, the officer was dispatched to the location (Whataburger) where he found Pate in the drive-thru line.

4. Probable Cause

A police officer had probable cause to arrest a customer for theft from a store for concealing items in her purse even though she had not yet exited the store and claimed she was going to pay for the items she had taken.

State v. Ford, 2017 Tex. Crim. App. LEXIS 879 (Tex. Crim. App. Sep. 20, 2017)

Theft occurs when a person "unlawfully appropriates property with intent to deprive the owner of the property." "Appropriate" means, among other things, "to acquire or otherwise exercise control over property other than real property." The majority found the following to support a conclusion that Ford exercised control over the items in her purse with the requisite intent to deprive: (1) a store employee reported that Ford was concealing store items in her purse; (2) Ford admitted to the officer that she placed some store items in her purse; (3) the store cart Ford was using contained other items from the store that were not in her purse; and (4) Ford's purse was covered by a jacket.

Here, the fact that some items were visible in the cart while others were concealed in Ford's purse caused the arresting officer to infer that she intended to pay for some items while concealing others. According to the majority, the question is not whether the employee might subsequently be a credible witness in court for the purpose of proving beyond a reasonable doubt that appellee committed a crime; the question is whether the officer could rely upon the employee's report as one of several factors for determining probable cause. The answer to that question is "yes," because citizen informants who identify themselves "are considered inherently reliable." Further, although a suspect's innocent explanation is relevant information to be considered in a probable cause determination, numerous courts have held that a police officer is generally not required to credit an accused's innocent explanation when probable cause to arrest is otherwise apparent.

Judge Walker dissented finding that whether Officer Rogers had probable cause to arrest Ford is of no

consequence unless he had reasonable suspicion to stop her in the first place. The court of appeals erred by misapplying the standard of review in its discussion of reasonable suspicion. Had it correctly done so, it would have upheld the trial court's ruling on that basis.

5. Exclusionary Rule

A search of a residence was executed in objective, good faith reliance on the affidavit and warrant that referred to a dog sniff conducted before *Florida v. Jardines* (dog sniff is an unconstitutional search when invading the curtilage of a home without a warrant) was decided.

McClintock v. State, 2017 Tex. Crim. App. LEXIS 291 (Tex. Crim. App. Mar. 22, 2017)

It is plain enough from the language of Article 38.23(b) of the Code of Criminal Procedure (exclusionary rule) that, before its good-faith exception to Subsection (a)'s exclusionary rule may apply, there must be (1) objective good-faith reliance upon (2) a warrant (3) issued by a neutral magistrate that is (4) based upon probable cause. Article 38.23(b) does not expressly address, much less plainly resolve, the following complicated questions: In deciding whether a warrant is "based on probable cause" for purposes of implementing Article 38.23(b), is it necessary for a court that is reviewing the magistrate's determination categorically to strike any information in the warrant affidavit that was itself illegally obtained? Does it matter whether the prior illegality was itself subject to a claim that the officer acted in good faith? To fill the statutory gap, the Court's approach, at least when confronting the language of Article 38.23(a), has been to assume that the Legislature intended to incorporate any exception to the federal exclusionary rule from the 4th Amendment case law that they have found to be "consistent with" the statutory language, even if not expressly spelled out there.

Writing for the majority, Judge Yeary concluded that the language in Article 38.23(b) is broad enough to accommodate the 5th Circuit's reasoning in *U.S. v. Massi*, 761 F.3d 512, 528 (5th Cir. 2014) and *U.S. v. Holley*, 831 F.3d 322, 326-27 (5th Cir. 2016) that the good faith exception applies where a search warrant, though later found to be based on an illegality, was obtained by law enforcement in good faith and under an objectively reasonable belief that it was valid and relied upon appropriately obtained evidence. The Court held that the good-faith exception of Article 38.23(b) will apply when the prior law enforcement conduct that uncovered evidence used in the affidavit for the warrant was close enough to the line of validity that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct. At the time the officers in this case used the trained canine to sniff for drugs at the door of McClintock's apartment, the constitutionality of that conduct remained "close enough to the line of validity" for the majority to conclude that an objectively reasonable officer preparing a warrant affidavit would have believed that the information supporting the warrant application was not tainted by unconstitutional conduct.

Judge Alcala dissented, arguing that the Court had held, in its first opinion on this matter, that there was no probable cause to support the search warrant that was issued in this case. Without probable cause, the good faith exception did not apply and the evidence should have been suppressed.

Article 38.23(a) of the Code of Criminal Procedure (the exclusionary rule) did not apply to a school principal where the record showed the principal was a private person and the defendant, a substitute teacher, failed to show the principal violated any law when he took possession of the defendant's cell phone.

State v. Ruiz, 2017 Tex. App. LEXIS 6928 (Tex. App.—San Antonio July 26, 2017, no pet.)

The only alleged violation of the law in the defendant's motion to suppress was a violation of the 4th Amendment, which only applies to searches and seizures by agents of the government; it does not extend to the conduct of private persons who are not acting as government agents. The principal was

lawfully in his office and took the phone with the intent to turn it over to the police.

6. Reasonable Expectation of Privacy

A college student retained an expectation in privacy in her dorm room even after university officials entered her dorm room pursuant to a routine inspection and found drugs. The resident advisor lacked actual and apparent authority to consent to a warrantless entry and search by law enforcement.

State v. Rodriguez, 521 S.W.3d 1 (Tex. Crim. App. 2017)

In a 7-1 decision (Judge Keasler not participating), Judge Newell writing for the majority held that the 4th Amendment required suppression of drug evidence found in a warrantless search of Rodriguez' dorm room after officers were led to the room by a resident advisor (R.A.) who had searched the room pursuant to the housing agreement. The prior search did not extinguish Rodriguez' legitimate expectation of privacy. The Court refused to extend the private-party-search doctrine to a residence. The dorm room was Rodriguez' residence.

While some searches in educational settings fall under the "special needs" exception, it is limited to when the search warrant and probable cause requirement are impracticable; it does not allow law enforcement to search a university student's dorm room without a warrant based upon reasonable suspicion, and the special needs doctrine cannot be used to justify the collection of evidence for criminal law enforcement purposes.

Law enforcement could not claim the evidence fell within the plain view exception because law enforcement did not have a right to enter the dorm room. Furthermore, neither the R.A. nor a school administrator had actual or apparent authority to consent to the search.

Presiding Judge Keller dissented, relying on *Medlock v. Trustees. of Indiana University*, 738 F.3d 867 (7th Cir. 2013), and asserted that the search did not violate the 4th Amendment. A valid health-inspection search of a dorm room was conducted by the R.A. of a private university. The inspection of the dorm room uncovered contraband—illegal drugs. A university official called the university police, who came and seized the contraband. The student handbook of the university provides that duly authorized personnel of the university reserve the right to enter student rooms "at any time" for certain purposes, including "inspection for health, safety, or violation of University regulations." The university handbook makes it clear the possession of drugs is a violation of university regulations and that the University does not tolerate drugs on campus.

Commentary: Does it matter that Howard Payne University is a private university? How much weight should be given to the terms of a student handbook? Even if Howard Payne University could condition occupancy of its private dorm rooms upon a student's waiver of protection from unreasonable searches and seizures by law enforcement, there was no proof of such a condition before the trial court. Private college students signing a housing contract authorizing administrative searches do not contractually waive all 4th Amendment protections from unreasonable search and seizure. In this case, law enforcement testified that they could have obtained a search warrant before searching the dorm room. The lesson here is that they should have.

There is a reasonable expectation of privacy in the content of a text message.

Love v. State, 2016 Tex. Crim. App. LEXIS 1445 (Tex. Crim. App. December 7, 2016)

Judge Yeary in a 6-3 decision held that Love's capital murder conviction and death sentence were improper because his text messages could not be obtained without a probable cause-based warrant. Text messages are analogous to regular mail and email communications. Accordingly, Love had a reasonable expectation of privacy in the contents of the text messages. The State was consequently prohibited from compelling the telephone company to turn over Love's content-based communications without first obtaining a search warrant. Because there was no warrant and no showing of probable cause, the statutory good faith exception (Article 38.23(b), Code of Criminal Procedure) was not

triggered and the statutory exclusionary rule applied. While independent, circumstantial evidence existed suggesting that Love was involved in the crime, the strongest evidence of guilt were the improperly admitted text messages. The judgment was reversed and remanded for a new trial.

Presiding Judge Keller, joined by Judge Hervey, dissented on the basis that Love had not preserved a complaint as to the content of the text messages. Judge Meyers dissented without written opinion.

A law enforcement officer's scanning of the magnetic stripe on the back of a gift card is not a search within the meaning of the 4th Amendment.

United States v. Turner, 839 F.3d 429 (5th Cir. 2016)

Officers scanned the magnetic stripe of 100 seized gift cards believed to be stolen.

The court joins other federal courts in concluding that society does not recognize as reasonable an expectation of privacy in the information encoded in a gift card's magnetic stripe. The few lines of characters encoded in a gift card are infinitesimally smaller than the "immense storage capacity" of cell phones or computers. The vast gulf in storage capacity between gift cards and cell phones reflects their different purposes. A primary purpose of modern cell phones, and certainly of computers, is to store personal information. Whereas, the purpose of a gift card is to buy something. Additionally, the stored information on gift cards is intended to be read by third parties.

7. Civil Rights Violation (42 U.S.C. Section 1983)

Manuel stated a 4th Amendment claim when he sought relief not merely for his arrest, but also for his pretrial detention because the judge's determination of probable cause was based solely on fabricated evidence.

Manuel v. City of Joliet, 137 S. Ct. 911 (2017)

During a traffic stop, police officers in Joliet, Illinois searched Elijah Manuel and found a vitamin bottle containing pills. Suspecting the pills to be illegal drugs, the officers conducted a field test, which came back negative for any controlled substance. However, they arrested Manuel and took him to the police station. Despite subsequent negative tests at the police station and the jail, Manuel spent a total of 48 days in pretrial detention. He brought a 42 U. S. C. Section 1983 lawsuit against Joliet and several of its police officers alleging his arrest and detention violated the 4th Amendment. The trial court dismissed his claim, one of the bases being that pretrial detention following the start of legal process (here, the judge's probable-cause determination) could not give rise to a 4th Amendment claim. The 7th Circuit affirmed.

Justice Kagan, writing for the majority, disagreed, finding it settled precedent that pretrial detention can violate the 4th Amendment not only when it precedes, but also when it follows, the start of legal process. The 4th Amendment prohibits government officials from detaining a person absent probable cause. And where legal process has gone forward, but has done nothing to satisfy the probable-cause requirement, it cannot extinguish a detainee's 4th Amendment claim, which was the case here.

Justice Thomas filed a dissenting opinion, finding that it did not matter when Manuel's 4th Amendment claim arose because the two-year statute of limitations had already run when using either the date of arrest or the date of first appearance.

Justice Alito filed a dissenting opinion joined by Justice Thomas, finding that the Court did not answer the question they agreed to decide, whether malicious prosecution claims should be brought under the 4th Amendment. Justice Alito would hold that the 4th Amendment cannot house any such claim; if a malicious prosecution claim may be brought under the Constitution, it must find some other home, presumably the Due Process Clause.

The first inquiry in any Section 1983 suit is "to isolate the precise constitutional violation with which the defendant is charged. In this case, Manuel charges that he was seized without probable cause in violation of the 4th Amendment. In order to flesh out the elements of this constitutional tort, the Court must look for "tort analogies." Manuel says

that the appropriate analog is the tort of malicious prosecution, so we should look to the elements of that tort. The dissenters find a severe mismatch between the elements of malicious prosecution and the 4th Amendment.

Further, if the Court means that new 4th Amendment claims continue to accrue as long as pretrial detention lasts—the Court stretches the concept of a seizure much too far.

Justice Alito also finds that the Court is mistaken in saying that its decision "follows from settled precedent" and has done harm by dramatically expanding 4th Amendment liability under Section 1983 in a way that does violence to the text of the 4th Amendment.

C. Double Jeopardy

The jury's original verdict proposed punishment that would constitute a void sentence, and therefore a new punishment hearing does not subject Rogers to double jeopardy.

Ex parte Rogers, 2017 Tex. App. LEXIS 2608 (Tex. App.—Houston [1st Dist.] Mar. 28, 2017, no pet.) (mem. op., not designated for publication)

A jury imposed a sentence of no fine and no jail time for Rogers, convicted of misdemeanor drug possession. The State filed a motion for a new punishment hearing, arguing that the jury was not free to disregard the statutory range of punishment, and that the trial court could take corrective action by holding a new punishment hearing. Rogers filed a habeas corpus petition, arguing that a second punishment hearing would subject him to double jeopardy.

Rogers was convicted of a Class B misdemeanor, which is punishable by (1) a fine not to exceed $2,000; (2) confinement in jail for a term not to exceed 180 days; or (3) both such fine and confinement. Rogers argued that his original sentence of a zero fine and zero time of confinement is within the statutory range because the statute only gives a maximum and not a minimum fine or time of confinement.

The court disagreed, finding that this construction of Section 12.22 of the Penal Code ignores its plain language. Although the statute does not give a minimum amount for a fine or time of confinement, it does state that this offense is punishable by a fine or confinement or both. Because Rogers' original sentence failed to provide the statutory minimum punishment for a Class B misdemeanor—a fine of some nonzero amount or confinement—the sentence was void. Because there was no punishment, there could be no violation of double jeopardy.

Charging Gonzalez with three counts of driving while intoxicated with a child passenger under Section 49.045 of the Penal Code because there were three children in her vehicle violated the prohibition against double jeopardy.

Gonzalez v. State, 516 S.W.3d 18 (Tex. App.—Corpus Christi 2016, no pet.)

The allowable unit of prosecution was each incident of driving, not each child present in the vehicle, because driving was the gravamen of the offense, while the presence of a child was a circumstance, not an act.

D. 6th Amendment
1. Impartial Jury

Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the 6th Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement.

Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017)

At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. Rule 606(b) of the Federal Rules of Evidence provides that a juror may testify about whether: (a) extraneous prejudicial information was improperly brought to the jury's attention; (b) an outside influence was improperly brought to bear on any juror; or (c) a mistake was made in entering the verdict on the verdict form. Some version of the no-impeachment rule is followed in every state.

In this case, following the discharge of the jury, two jurors told defense counsel that during deliberations a certain juror had expressed anti-Hispanic bias toward the defendant and the defendant's alibi witness. The defense counsel, with the trial court's supervision, obtained affidavits from the two jurors describing a number of biased statements. The trial court denied the defendant's motion for new trial based on Colorado's no-impeachment rule.

After canvasing federal and state case law, Justice Kennedy, writing for the majority, stated that while there is sanctity in the jury and the Court generally will not interfere with it, there is an exception in the "gravest and most important cases." The no-impeachment rule implicates the desire to prevent jurors from testifying about their deliberation after the verdict was entered, that rule is set aside where there is racial animus apparent in a juror. Justice Kennedy clarified that the exception demanded racial animus so overt as to call into question the juror's ability to make a fair and impartial judgment about the defendant. Because the juror's statements in this case were egregious and clearly reliant on racial bias, the exception applied.

Justice Thomas filed a dissenting opinion, finding the majority incorrectly interpreted the 6th Amendment and that it is for the Legislature to create an exception to the no-impeachment rule.

Justice Alito filed a dissenting opinion joined by Chief Justice Roberts and Justice Thomas. Justice Alito argued that, while racial bias is important to prevent, it should be treated no differently than other forms of impartiality by a juror for the purposes of the 6th Amendment.

Commentary: Rule 606(b) of the Texas Rules of Evidence is similar to the Colorado rule at issue in this case in that it limits juror testimony about their deliberations to "outside influences."

2. Confrontation Clause

The trial court did not violate Balderas' 6th Amendment right to confrontation by appointing an interpreter for a Spanish-speaking witness who could speak English where the trial judge's finding of "an inherent language barrier," and her determination that the jury would get a more accurate view of the witness' testimony if allowed through a translator, signaled that an interpreter was necessary to further this interest.

Balderas v. State, 517 S.W.3d 756 (Tex. Crim. App. 2016)

Balderas filed a "Motion to Compel Witness to Provide Cross-Examination Testimony in the English Language," asserting that the witness at issue would use the interpreter as a shield to cover up her deception and that the use of an interpreter violated his right to confrontation. The trial court held a hearing on this motion outside the jury's presence. During the hearing, the prosecutor acknowledged that the witness could speak English but also stated that she would be "more comfortable" testifying in Spanish. The trial court denied the motion and appointed an interpreter.

Judge Keasler, writing for the majority, found that courts have generally regarded the use of an interpreter for a material witness who has difficulty communicating in English as a requirement of the Confrontation Clause, rather than an encroachment on face-to-face confrontation, because the use of an interpreter enables a defendant to conduct a meaningful cross-examination. In cases such as this one, in which the trial court appointed an interpreter for a witness, appellate courts have not imposed a requirement that the record affirmatively establish that the witness' English skills were so poor that, without the interpreter, the defendant would have been deprived of the ability to conduct an effective cross-examination; the Court refuses to impose such a requirement and defers to the trial court's wide discretion on this matter.

The trial court violated the Confrontation Clause by limiting the defendant's cross-examination of the victim's mother concerning bias.

Jones v. State, 2017 Tex. App. LEXIS 7199 (Tex. App.—Houston [1st Dist.] August 1, 2017, no pet.)

A defendant's constitutional right to confrontation is violated when appropriate cross-examination

is limited. The trial court has no discretion to so drastically curtail the defendant's cross-examination as to leave him unable to show why the witness might have been biased or otherwise lacked the level of impartiality expected of a witness. However, the proponent of the evidence must establish some causal connection or logical relationship between the source of bias and the witness' vulnerable relationship or potential bias or prejudice for the State, or testimony at trial.

3. Assistance of Counsel

The court did not clearly abuse its discretion by denying a motion for continuance to hire counsel.

United States v. Smith, 839 F.3d 456 (5th Cir. 2016)

Here, Smith moved to continue his revocation hearing on the morning of the proceeding; his stated reason was a desire to retain private counsel because he was unsatisfied with his court-appointed public defender; the defendant had not yet retained new counsel; the Government, by contrast, was ready to proceed with three witnesses present to testify, including the victim, who had to be subpoenaed.

4. Public Trial

Cameron's 6th Amendment right to a public trial was violated where the public was not permitted inside the courtroom during voir dire.

Cameron v. State, 2017 Tex. App. LEXIS 6387 (Tex. App.—San Antonio July 12, 2017, no pet.)

The 6th Amendment guarantees the right to a public trial in all criminal prosecutions. The right extends to the jury selection phase of trial, including voir dire of prospective jurors.

II. Substantive Law
A. Penal Code

1. Unlawful Interception of Communication

For purposes of Section 16.02 of the Penal Code, a high school basketball coach had a reasonable expectation of privacy in the team's locker room.

Long v. State, 2017 Tex. Crim. App. LEXIS 589 (Tex. Crim. App. June 28, 2017)

Lelon "Skip" Townsend is a self-described intense basketball coach who preaches discipline and accountability. In 2011, he was hired to coach the Argyle High School girls' basketball team. The following school year, reports of Townsend berating and belittling players in practice began surfacing. Long, a middle school principle in Saginaw and a member of the Argyle School Board, grew increasingly concerned when parents began contacting her to complain of Townsend's treatment of their children. Long's daughter had also been a member of the basketball team before quitting after the first regular season game.

In February 2012, the Argyle High School girls' basketball team traveled to Sanger to play the Sanger High School girls' basketball team for the district title. Long's daughter attended the game as a spectator and, with the assistance of a Sanger student, accessed the visiting locker room before halftime for the purpose of secretly videotaping Townsend. Long's daughter taped an iPhone to the inside of a locker and set it to record. The iPhone captured an audio and video recording of Townsend's half-time speech and an audio recording of Townsend's post-game speech.

In March 2012, Long showed the recordings, which were on her computer at work, to an assistant principal. She subsequently mailed the recordings to the other members of the Argyle School Board. The recordings were distributed at a school board meeting to consider Townsend's probationary contract. The Superintendent of the Argyle Independent School District turned over the recordings to the police. A detective with the Sanger Police Department traced the recordings to Long and her daughter.

Section 16.02 of the Penal Code (Unlawful Interception, Use of Disclosure of Wire, Oral, or Electronic Communications) states that a person commits a felony offense if the person intentionally "procures another person" to intercept an oral communication. An "oral communication" is defined by statute as a communication "uttered by a person exhibiting an expectation that the communication

is not subject to interception under circumstances justifying that expectation." The Texas wiretap statute is substantially similar to its federal counterpart. The federal statutory definition of "oral communication" is almost identical to the Texas statutory definition.

Long was convicted of violating Section 16.02. In a matter of first impression, the court of appeals reversed the conviction, finding that no violation of the wiretap statute occurred because Townsend did not have a reasonable expectation of privacy under the circumstances and because the recordings were not "oral communications" covered by the wiretap statute.

In a 6-3 decision, Judge Newell, writing for the majority, reversed the court of appeals and affirmed the judgment of the trial court. The definition of "oral communication" found in Article 18.20 of the Code of Criminal Procedure incorporated the reasonable expectation of privacy test as set out by the Supreme Court in *Katz v. U.S.*, 389 U.S. 347 (1967) and *Berger v. New York*, 388 U.S. 41 (1967). The evidence was sufficient to support Long's conviction under Section 16.02. The court of appeals erred by reversing Long's conviction. The jury could have found that Long's daughter intercepted an oral communication, as Townsend had a subjective expectation of privacy when communicating in the locker room. Furthermore, Long encouraged the interception of the oral communication and shared copies of it with the school board.

Judge Richardson, joined by Judges Alcala and Walker, issued a dissenting opinion. Even if a person has a subjective expectation of privacy in the words they utter to another, if the circumstances surrounding the uttering of that communication do not justify that subjective expectation (i.e., society is not willing to recognize that subjective expectation of privacy as objectively reasonable), then the communication is not protected from "interception" by Section 16.02. Coaches are teachers. As a coach, Townsend's speeches were a critique of players' performance at the game, and instructions in regard to commitment to the team and improvement. To the extent that Townsend even had a subjective expectation of privacy, nothing about what he said would support a finding that he was justified in having such an expectation of privacy. Considering the totality of the circumstances in this case, and because Coach Townsend had a legitimate expectation of privacy in such communications, the decision of the court of appeals should be affirmed.

Commentary: This is a somewhat peculiar case where a substantive criminal law issue about a relatively obscure crime, Unlawful Interception, Use or Disclosure of Wire, Oral, or Electronic Communications seemingly "jumps the fence" and has all the makings of a 21st Century, main stream, cutting edge, search and seizure decision. For better or worse, *Long* may further fuel the flames of our emerging camera culture and have a surprising application and implications in the future. To be clear, however, the matter before the Court in *Long* was not the reasonableness of a particular search under the 4th Amendment. Given a school district's interest in providing a safe and effective educational environment for students, the opinion acknowledges that a school district can create surveillance protocols to monitor communications between adults and students including notice that communications in otherwise restricted areas are subject to electronic interception. Such notice would render any subjective expectation of privacy objectively unreasonable under the electronic eavesdropping statute.

2. Burglary

A person can commit burglary of a habitation even if the person lives with the victim.

Morgan v. State, 501 S.W.3d 84 (Tex. Crim. App. 2016)

Judge Richardson, joined by eight other members of the Court of Criminal Appeals opined that the evidence was sufficient to support Morgan's burglary of a habitation under Section 30.02(a)(1) of the Penal Code. Accordingly, the court of appeals erred by reversing the conviction where Morgan's girlfriend was the "owner" of the apartment because she held a greater right to possession than Morgan, as only her name was on the lease and she paid the rent. She gave Morgan a key to the apartment, but status

as her roommate did not give him equal ownership rights. At the time of the commission of the offense, Morgan did not have her effective consent to enter the apartment, as the girlfriend testified that she and Morgan had been arguing, Morgan was angry, and the girlfriend had locked him out of the apartment using the deadbolt. The judgment was reversed and the case remanded. Judge Hervey concurred without a written opinion.

3. Tampering with a Government Record

Firearms qualifications forms kept by a police department are considered "governmental records" under Section 37.10 of the Penal Code (Tampering with Governmental Record).

Chambers v. State, 523 S.W.3d 681 (Tex. App.—Corpus Christi-Edinburg 2017)

Chambers, a police chief convicted of tampering with government records (here, falsified training records of reserve peace officers), argued on appeal that the firearms qualifications forms at issue here are not "governmental records" because they are not legally required to be kept. The court disagreed, finding that whether the documents at issue here were in fact required to be kept by law is not an essential element of the offense. Under Subsection 37.01(2)(A) of the Penal Code, a "governmental record" may be "anything belonging to, received by, or kept by government for information."

4. Online Harassment

Subsection 33.07(a)(1) of the Penal Code (the online harassment statute that prohibits using another person's name or persona to create an account on a social-network site with the intent to harm the victim) is not unconstitutionally overbroad or vague.

Ex parte Maddison, 518 S.W.3d 630 (Tex. App.—Waco 2017, no pet.)

The court reversed the trial court, finding that the statute was content neutral, and the purpose and justification for the statute was not content based. Because Subsection 33.07(a)(1) promoted a substantial governmental interest, the State's interest would be achieved less effectively without the law, and the means chosen were not substantially broader than necessary to satisfy the State's interest. Further, the statute was not unconstitutionally vague as it provided a person of ordinary intelligence fair notice of what the statute prohibited.

Chief Justice Gray dissented, finding the statute content based because "you must look to the content of the speech, or into the mind of the speaker (intent), to determine if the statute is violated." That error then leads to the improper level of scrutiny and the inverse placement of the burden of proof to prove the statute's constitutionality.

Commentary: The Dallas and Houston (14th Dist.) courts of appeals have also upheld this statute. See, *Ex parte Bradshaw*, 501 S.W.3d 665 (Tex. App.—Dallas 2015, pet. ref'd); *State v. Stubbs*, 502 S.W.3d 218 (Tex. App.—Houston [14th Dist.] 2016 pet. ref'd). The Court of Criminal Appeals refused petitions for discretionary review in both cases. No petition was filed in this case.

5. Theft

The evidence was insufficient to support Johnson's conviction of theft.

Johnson v. State, 513 S.W.3d 190 (Tex. App.—Fort Worth 2016, pet. granted)

Johnson worked for his wife at the funeral home she owned and operated. The court described the business practices of the funeral home as "abominable," which included delaying cremation for over a year and giving customers ashes of their loved ones when the bodies had not in fact been cremated. Because of a lack of activity around the funeral home and concern that the Johnson Family Mortuary had abandoned the property based on its failure to pay, the property owner went to the property, and after encountering a bad odor, called the police. The police found many bodies that had not been embalmed or refrigerated and that were in various stages of decomposition as well as ashes.

The theft counts in this case are based on the handling of four bodies; the complainants are the family members, including a family member's business, who contributed money for the services the funeral home was to have provided. If theft occurs in connection with a contract, there must be proof that the defendant intended not to perform under the contract when he or she accepted the money for the performance or goods and, consequently, that the appropriation was the result of a false pretext, or fraud, and that the person intended to deprive the owner of the property when the property was taken.

On the first count, the court found insufficient evidence to support theft because Johnson was an employee of the funeral home, and therefore, the cashier's check he received from a customer was payable only to the funeral home and of no significant value except to the funeral home, and the obligation to perform the cremation contract with the customer was the funeral home's obligation.

On the second count, the court found insufficient evidence because Johnson's pattern of behavior did not indicate an intent not to cremate the bodies at the time he received payment for those services on behalf of the funeral home, but rather that he repeatedly delayed sending the bodies for cremation.
Justice Livingston dissented, and would hold that Johnson appropriated the cashier's check and the underlying money the cashier's check represented, as charged in count one in the indictment. Johnson cites no authority supporting the proposition that he did not exercise control over the cashier's check or the money it represented merely because the check was not made out to him (and neither does the majority cite such authority). Instead, Justice Livingston would hold that when Johnson exercised control over the cashier's check, he also exercised control over the money it represented, either on the mortuary's behalf or his own behalf, especially considering the facts that show his primary management of the mortuary's business and the personal benefits he accrued from the mortuary's income.

On the second count, deferring to the jury's resolution of competing inferences concerning Johnson's intent, the jury could have inferred his intent to deceive customers of the mortuary from the moment he entered contracts with them by the facts presented at trial and the majority fails to apply the deferential standard of review properly, but instead reweighs the evidence.

Commentary: The Court of Criminal Appeals granted PDR on May 3, 2017.

6. Criminal Trespass

A city's unwritten building-use policy provided the city manager with valid authority to restrict Wilson from a community center and supported a criminal trespass conviction.

Wilson v. State, 504 S.W.3d 337 (Tex. App.—Beaumont 2016, no pet.)

While a clear and written building-use policy might have given Wilson guidelines regarding the conduct expected of him while using the facilities at the community center, Wilson's remedy for his complaints about the city's unwritten policy is a civil matter that Wilson should seek to remedy by lobbying city council. The elements of the criminal-trespass statute (Section 30.05 of the Penal Code) do not include a requirement that the State prove that the owner or occupier of the premises gave Wilson prior notice about the types of conduct that could result in his losing his right to enter the premises where the trespass occurred. The trespass statute requires only that the State prove that Wilson was warned by someone with the authority to do so that he could no longer enter the owner's property.

Justice McKeithen dissented, finding that the city's unwritten policy vesting unfettered discretion in the city manager regarding who may be on the city's public premises is unconstitutionally vague.

7. Assault Family Violence

There was no error in describing the offense in the judgment as "assault-family member" in lieu of the title of the offense in the Penal Code, i.e., "assault."

Hernandez v. State, 2017 Tex. App. LEXIS 7612 (Tex. App.—Houston [1st Dist.] August 10, 2017, no pet.)

Justice Keyes, in a concurring opinion, found that designating a first assault conviction as "assault-family violence" is not only allowed but also serves an important function in the law. This designation gives the defendant notice of the full nature of the crime and the potential consequences. It also serves as proof of a conviction involving family violence to enhance later charges or in child custody proceedings. The best practice to meet the requirements of Article 42.01 of the Code of Criminal Procedure is to give an accurate description of the offense.

Cellmates in a jail are not members of the same household under the assault family violence statute (Section 22.02, Penal Code).

Davis v. State, 2017 Tex. App. LEXIS 5090 (Tex. App.—Corpus Christi-Edinburg June 1, 2017, no pet.)

The definition of "household" for purposes of assault family violence is found in Section 71.005 of the Family Code: a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other. Applying a plain meaning analysis, the court finds that a jail is not intended or designed for occupancy as a dwelling or home. Rather, the primary purpose of a correctional facility is to insure the public safety. Inmates in a correctional facility are not free to come and go as they please and are subjected to a regimented daily schedule for meals and recreation. There is a clear distinction between a dwelling, where related and non-related individuals may choose to reside, and a jail, where an individual is confined involuntarily for penal purposes.

B. Transportation Code
1. Red Light Cameras

In a suit regarding a red light camera enforcement ordinance, the trial court erred by denying city officials' plea to jurisdiction because the petitioner did not seek an administrative adjudication hearing to contest the imposition of a civil penalty.

City of Willis v. Garcia, 523 S.W.3d 729 (Tex. App.—Beaumont 2017, pet. filed)

Despite alleged failure of the city to conduct a required traffic engineering study, ultra vires and constitutional challenges created no exemption from exhausting such remedies. The city established the system pursuant to legislative authority. Petitioner sought more than equitable relief, and the constitutional claims were not exempt from administrative exhaustion.

2. Driving on Improved Shoulder

A violation of Section 545.058(a) of the Transportation Code occurs when the driver proceeds beyond or crosses over the line, not merely by crossing onto or touching it.

State v. Cortez, 512 S.W.3d 915 (Tex. App.—Amarillo 2017, pet. granted)

A trooper stopped Cortez' vehicle because he had driven onto the white line delineating the roadway from the improved shoulder, the "fog line." Based on video evidence and the Trooper's testimony, the trial court found no basis for the traffic stop and granted Cortez' motion to suppress.

The court agreed with the trial court, pointing out that the statutes at issue (Sections 541.302 and 545.058) say nothing of a "fog line" or "solid white line." Instead those provisions speak of driving on an "improved shoulder," "shoulder," "paved shoulder," or a "portion of a highway" "adjacent to the roadway . . . designed and ordinarily used for parking . . . [while] distinguished from the roadway by different design, construction, or marking . . . [and] not intended for normal vehicular travel." Noting that no one can explain why the four inch line painted on the roadway identifies the boundary between the lane of traffic and its adjacent shoulder, the court agrees with that proposition for the purposes of this opinion.

Applying logic, the court concludes that if the areas lie on either side of the line then the line must be crossed over before one area has been left and another entered, analogizing this with state and country boundaries. Applying case law, the court finds that the State cites no authority indicating the "fog line" need only be touched to give rise to a violation; to the contrary, each opinion the court

discovered on a violation of the statute at issue involved crossing the line, not simply touching it. Both the plain words in and intent of Section 545.058(a) encompass the act of driving on the improved shoulder under certain circumstances. A "momentary touch of some fraction of a 'fog line' or boundary hardly connotes driving upon either the boundary or the area on the other side of the boundary." The court also concluded that it could not uphold the stop based on an objectively reasonable mistake of law by the officer as to what Section 545.060 required.

Commentary: You know you are in for an interesting read when the opinion begins with the following quote from John Lennon: "Strange days indeed - most peculiar, mama." Stay tuned! The Court of Criminal Appeals granted PDR on May 3, 2017.

III. Procedural Law
A. Bail

Harris County has a consistent and systematic policy and practice of imposing secured "money bail" as de facto orders of pretrial detention in misdemeanor cases.

ODonnell v. Harris County, 2017 U.S. Dist. LEXIS 65445 (S.D. Tex. Apr. 28, 2017)

The trial court found the de facto detention orders effectively operated only against indigent defendants who were released if they could pay at least a bondsman's premium, but who otherwise remained in jail if they could not. The de facto detention orders violate federal due process required for pretrial detention orders. There is no sufficient basis for Harris County to conclude that releasing misdemeanor defendants on secured financial conditions is a more effective way to assure a defendant's appearance or obedience than to release such defendants on unsecured or nonfinancial conditions. ODonnell's motion for preliminary injunction was granted in part.

Commentary: Harris County appealed. Oral arguments before the 5th Circuit Court of Appeals were heard October 2, 2017. One of the issues that we are eager to see addressed is the trial court's express assertion under *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) that inability to pay a bail bondsman or post bail constitutes an automatic order of detention without due process and in violation of equal protection and that the matter of willful non-payment, which governs fines and costs, should also apply to bail. This is a novel and provocative assertion of *Bearden*. See, Ned Minevitz, "Broadening *Bearden*: Pre-Trial Justice and Why Bail Practices may be in Store for Major Changes," *The Recorder* (August 2016).

Article I, Section 11b of the Texas Constitution, allowing magistrates and judges to deny bail to defendants who violate conditions of release in family violence cases does not violate due process.

Ex parte Shires, 508 S.W.3d 856 (Tex. App.—Fort Worth 2016, no pet.)

The Texas Constitution allows magistrates and judges to deny bail when a person charged with domestic violence violates a condition of release. Article I, Section 11b provides: Any person who is accused in this state of a felony or an offense involving family violence, who is released on bail pending trial, and whose bail is subsequently revoked or forfeited for a violation of a condition of release may be denied bail pending trial if a judge or magistrate in this state determines by a preponderance of the evidence at a subsequent hearing that the person violated a condition of release related to the safety of a victim of the alleged offense or to the safety of the community (emphasis added).

Shires argued that Section 11b is unconstitutional on its face because its failure to require such findings by clear and convincing evidence violates principles of substantive due process. Shires also argued that Section 11b is unconstitutional as it was applied to him because the trial court's failure to make such findings by clear and convincing evidence violated his rights to procedural due process. This appears to be an issue of first impression as it does not appear that the Court of Criminal Appeals, this court, or any courts of appeals has addressed these or similar arguments regarding section 11b.

Justice Sudderth, writing for the majority, opined that Shires failed to meet his burden to show that Section 11b was unconstitutional on its face. The court of appeals declined to extend federal case law interpreting a federal statute to Section 11b. Shire failed to meet his burden to show that Section 11b was unconstitutional as applied to him because the trial court complied with Section 11b's requirements to conduct a hearing and it did not abuse its discretion by finding by a preponderance of the evidence that Shires had operated a motor vehicle without an ignition interlock device installed in violation of a condition of bond and that the conditions of bond were related to the safety of the community.

Justice Dauphinot, dissenting, asserted that the majority should remand the case with clear instructions and questioned whether the court of appeals had provided sufficient guidance to the trial bench in the past to explain what the law requires. The court of appeals should set out clearly what is required of the State, of the defense, and of the trial court. It is the court of appeals' obligation to provide clarity and this instance did not meet the obligation.

Commentary: This case is worth reading if for no other reason than the dissent's effective use of Judge Cochran's concurring opinion in refusing petition for discretionary review in *Ex parte Benefield*, 403 S.W.3d 240, 241-43 (Tex. Crim. App. 2013). In *Benefield*, Judge Cochran lays out the historical framework for bail in the United States and in Texas but also raises several constitutional concerns about judicial review of the pretrial-bond and pretrial-release processes and whether such processes have perhaps gone astray of their original statutory purposes. In light of the Harris County bail bond lawsuit (See, *ODonnell*, supra) and the recent defeat of bail reform during the 85th Texas Legislature, Judge Cochran's words are a resonating reminder to Texas magistrates and judges that the stakes are high when it comes to pre-trial bail because an accused person and society each have a strong interest in liberty.

Chapter 17 of the Code of Criminal Procedure, establishing the eligibility requirements for sureties on a bail bond, does not prohibit a reserve deputy sheriff from acting as a surety on a bail bond in the county where the deputy serves or prohibits a sheriff from accepting such a bond, assuming a surety satisfies these requirements.

Tex. Atty. Gen. Op. KP-0132 (2/6/17)

However, the opinion notes that the Texas Supreme Court previously cautioned against law enforcement officers using official authority to enforce personal rights, holding in an 1879 opinion that public policy forbids a sheriff from enforcing a writ of execution for his own benefit. See, *Erwin v. Bowman*, 51 Tex. 513, 518 (1879). By analogy, a reserve deputy sheriff who acts as surety for an accused who fails to appear could run afoul of precedent if that deputy then used his official authority to re-arrest the accused. See, Article 17.08, Section 6 of the Code of Criminal Procedure (sheriff or other peace officer must re-arrest accused in the event he or she fails to appear before the court named in the bond).

B. Disqualification

A judge was disqualified from hearing a case where she "acted as counsel" by signing a jury waiver form.

Metts v. State, 510 S.W.3d 1 (Tex. Crim. App. 2016)

Judge Yeary wrote for the majority, explaining that the Texas Constitution and the Code of Criminal Procedure both require the disqualification of a judge who has previously participated as counsel for the State in a pending matter. The judge's involvement must have risen to a level of active participation and not a mere "perfunctory act." Though the involvement of the judge here appears to have been limited to the brief hearing described in the record, that hearing was nonetheless an integral step toward the process that resulted in Metts' deferred adjudication community supervision. A judge need not have an "in-depth" knowledge of the facts before being disqualified, as the State suggested. The decision whether or not to sign a jury waiver consent form is necessarily a function of prosecutorial discretion. For these reasons, the judge was constitutionally and statutorily disqualified from presiding over the case.

Presiding Judge Keller dissented without written opinion. Judge Johnson dissented without written opinion.

The trial judge was disqualified from acting on the ground that he sua sponte obtained personal knowledge about contested facts and used that personal knowledge in ruling on a motion to suppress.

State v. Haworth, 2017 Tex. App. LEXIS 4049 (Tex. App.—Corpus Christi-Edinburg May 4, 2017, no pet.)

Sergeant Slusser witnessed Haworth's vehicle make a u-turn when the vehicle's turn lane was allegedly controlled by a red light, initiated a traffic stop, conducted field sobriety tests, and arrested Haworth on suspicion of driving while intoxicated. Haworth moved to suppress, among other things, all evidence seized by law enforcement officers or others in connection with his detention and arrest. Haworth argued that Slusser could not have seen the turn signal because his view was obstructed by a tree, and he pointed to the dash-cam video as evidence in support of his argument.

At the hearing on the motion, the judge made the following comments prior to granting the motion:

> "I had a chance, not only to review the video, but I had a chance to go out there and inspect the location myself. I do that. And it seemed—I'm not going to use the word that I want to use, but it seemed pretty 'impossible' to be able to see from where he was parked. And I know where he was parked because there's only one way to come out from the driving area to where he was witnessing that u-turn. And it must be no less than from here to Ramon Garcia's office, through trees."

According to the court, given the facts of this case, the trial judge's action in basing his ruling not on the evidence, but, at least in part, on his personal knowledge of contested facts, was error requiring disqualification. Without the basic protection of an impartial judge, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment can be regarded as fundamentally fair. Having concluded that the trial judge was disqualified, the actions taken by the judge were void.

Though the trial judge was the prosecuting attorney on Mumphrey's previously dismissed charge, his right to due process was not violated.

Mumphrey v. State, 509 S.W.3d 565 (Tex. App.—Texarkana 2016, no pet.)

The court found that there was no clear showing of bias, as Mumphrey pled true to the enhancement allegation on punishment, the jury assessed his sentence, and the trial judge merely sentenced him in accordance with the jury's decision.

Mumphrey also argued that the judge's comments after sentencing violated due process. The court disagreed, finding that the comments came after the jury's determination of punishment and after the jury was dismissed. Given that the jury gave him the maximum sentence in this case, the trial court simply reminded Mumphrey how lucky he was not to have faced the higher punishment range of 25 to 99 years or life, which the jury could have considered had Mumphrey's record showed a conviction for intoxication manslaughter instead of the state jail felony of criminally negligent homicide. Though the comments could be loosely interpreted as lamenting the fact that a greater sentence could not be imposed, the court does not assume the worst and presume error.

C. Pretrial Hearings

A trial court has the discretion to hold a pretrial evidentiary hearing on a defendant's motion to quash and dismiss.

State v. Hill, 499 S.W.3d 853 (Tex. Crim. App. 2016)

The State argued that the defendant was not entitled to such a hearing because he failed to provide evidence to establish a constitutional violation. Writing for a unanimous court, Judge Richardson cited Article 28.01 of the Code of Criminal Procedure, which specifically gives trial courts broad discretion to hold pretrial hearings on preliminary

matters including, "pleadings of the defendant," exceptions to the form or substance of the indictment, or "discovery."

Though only Subsection (6) of Article 28.01 expressly allows for "oral testimony" at a hearing to resolve a defendant's motion to suppress, and there is no other express allowance in Article 28.01 for oral testimony at a pretrial hearing to resolve any other preliminary matter raised by the defendant, the Court found that drawing a negative implication—that oral testimony might not be permitted at a pretrial hearing to resolve any matter other than a motion to suppress—from the express directive in Article 28.01(6) would be a misapplication of the rules of statutory construction.

D. Discovery

A trial court may not issue an order requiring the state to provide copies of discovery obtained under the Michael Morton Act to a defendant. A defendant is entitled to view the documents, but they must remain in defense counsel's possession.

Powell v. Hocker, 516 S.W.3d 488 (Tex. Crim. App. 2017)

The State sought extraordinary relief via a writ of mandamus. In a unanimous opinion written by Judge Yeary, the Court of Criminal Appeals conditionally granted relief. The Court of Criminal Appeals was the proper court because under Section 22.221 of the Government Code, the courts of appeals did not have jurisdiction to issue writs of mandamus against statutory county courts. Accordingly, the Court held that the State properly filed its application for writ of mandamus, which sought to compel a county court at law judge to rule in the State's favor in a discovery dispute. The Court found that Powell, a district attorney, satisfied the criteria for obtaining mandamus relief because the trial court lacked authority to permit defense counsel to provide the real party in interest a copy of the discovery materials that were provided by the State per Article 39.14 of the Code of Criminal Procedure. Article 39.14(f) states that any copies should be turned over to counsel, that the defendant can view them, but not obtain copies.

Commentary: Citing *Powell*, in an unpublished decision, the Amarillo Court of Appeals similarly denied a petition requesting a writ of mandamus and declaratory relief directed at a myriad of people including a county court at law judge, a municipal judge, a justice of the peace, assistant district attorneys, assistant city attorneys, and police officers. *In re Odam*, 2017 Tex. App. LEXIS 3597 (Tex. App.—Amarillo Apr. 20, 2017, no pet.).

Notably, after *Powell* was decided, the 85th Regular Session of the Legislature passed into law S.B. 1233 which added judges of statutory county courts and statutory probate judges (as well as associate judges of a district or county court appointed under Chapter 201 of the Family Code) to the list of judges subject to a writ of mandamus by the court of appeals. Municipal judges were not added to the list in Section 22.221.

Who has the authority to issue mandamus to a municipal judge? Generally, county courts have the authority to issue a writ of mandamus to a municipal judge but only to the extent necessary to enforce the county court's jurisdiction; such authority does not extend to potential jurisdiction. *Lozano v. Acevedo*, 659 S.W.2d 919 (Tex. App. – San Antonio 2004, no pet.).

A city was not liable for a Section 1983 civil rights claim based on withheld *Brady* material where the defendant pled guilty and was subsequently found actually innocent.

Alvarez v. City of Brownsville, 860 F.3d 799 (5th Cir. 2017)

Here, the defendant could not prove a constitutional violation. A defendant does not have a constitutional right to impeachment or exculpatory evidence prior to entering a guilty plea. *Brady* material is important in relation to the fairness of a trial, but does not affect whether a plea is voluntary.

Commentary: See also, *Hillman v. Nueces Cty.*, 2017 Tex. App. LEXIS 5219 (Tex. App.—Corpus Christi-Edinburg June 8, 2017, pet. filed) (mem. op., not designated for publication) (the Michael Morton

Act did not waive sovereign immunity for wrongful termination of a government employee claiming he or she was fired for failure to commit an illegal act.).

There was no *Brady* violation where, even assuming the evidence of certain arrests was favorable, Kulow did not meet his burden to show the delayed disclosure resulted in prejudice.

Kulow v. State, 524 S.W.3d 383 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd)

Kulow received the arrest records before the witness testified. He was also allowed to review the file on one of the arrests during the lunch break before finishing cross-examination. Upon returning from the lunch break, he asked to question the witness about his past arrests. The trial court denied the request based on evidentiary grounds. Kulow does not show how the witness' criminal history would have become admissible or would have changed the outcome of the trial had the State disclosed the information earlier.

Without a record showing the items of which Davy sought discovery under Article 39.14(a) of the Code of Criminal Procedure, the court could not find that the trial court abused its discretion by admitting his penitentiary packet as punishment evidence.

Davy v. State, 2017 Tex. App. LEXIS 4122 (Tex. App.—Amarillo May 5, 2017, pet. ref'd)

The court points out that disclosure requirements described in Article 39.14(a) are triggered only after receiving a timely request from the defendant. Also, by its 2013 amendments, the Legislature retained in Article 39.14(a) the concept that discovery applies to items "designated." Here, the appellate record did not contain a copy of Davy's discovery request.

A 911 tape not disclosed until during trial was not a *Brady* violation where the defendant did not show that the evidence was favorable to him or admissible at trial.

Rubio v. State, 2017 Tex. App. LEXIS 1626 (Tex. App.—Corpus Christi-Edinburg Feb. 24, 2017, no pet.)

E. Trials

The defendant was entitled to a jury instruction on voluntariness of his confession where there was evidence the officer threatened him.

Paz v. State, 2017 Tex. App. LEXIS 7349 (Tex. App.—Houston [1st Dist.] August 3, 2017, no pet.)

A jury instruction is required when some evidence regarding the voluntariness of a defendant's statement is presented, even if the judge correctly denied a motion to suppress the statement. The evidence presented must merely be sufficient for a jury to reasonably find that the statement was involuntary.

A trial court has jurisdiction over a juror who appears for jury duty although not actually summoned for jury service.

Almanza v. State, 2017 Tex. App. LEXIS 6455 (Tex. App.—Waco July 12, 2017, no pet.)

The juror's appearance and presentation for jury duty places her within and under the jurisdiction of the trial court for the purpose of serving as a member of the jury. Although she may not be the person actually summoned for jury service, this alone does not disqualify her from being a member of the jury, nor does it violate the defendant's 6th Amendment right to a trial by jury.

The trial court did not abuse its discretion by failing to find that a juror was disabled pursuant to Article 36.29 of the Code of Criminal Procedure because the fact that the juror denied seeing news coverage about the case could not qualify as a mental condition or emotional state as it did not inhibit him from fully and fairly performing the functions of a juror.

Price v. State, 2017 Tex. App. LEXIS 6301 (Tex. App.—Houston [14th Dist.] July 11, 2017, no pet.)

The trial court's decision to allow the jury to correct the verdict form was not error.

Hernandez v. State, 2017 Tex. App. LEXIS 2674 (Tex. App.—Corpus Christi-Edinburg Mar. 30, 2017, pet. ref'd)

Here, the jury foreman informed the trial court that she had signed the wrong form. The trial court allowed the jury to correct the verdict form, before polling each juror individually to confirm that the revised verdict form was true and correct.

F. Evidence

The court of appeals erred by failing to defer to the trial court's implied finding that the deputy was credible and reliable with respect to his training and experience that would enable him to reasonably suspect that Ramirez-Tamayo might have been in possession of illegal drugs.

Ramirez-Tamayo v. State, 2017 Tex. Crim. App. LEXIS 881 (Tex. Crim. App. Sep. 20, 2017)

The Court disagreed with the court of appeals' elevation of the standard of proof by requiring extensive details of an officer's training and experience as a predicate for showing that an officer is capable of reasonably making inferences and deductions based on that training and experience. As long as there is some evidence in the record to support the trial court's implied finding that the officer was reasonably capable of making rational inferences and deductions by drawing on his own experience and training, the State does not have an additional burden to include extensive details about the officer's experience and training, and, under the circumstances of this case, it does not need to strictly establish a predicate that the officer is an expert in narcotics detection.

The Court also disagreed with the court of appeals' assessment that the record was lacking in details to establish exactly what type of training or experience Deputy Simpson had that would allow him to reliably form reasonable suspicion based on the otherwise seemingly innocent facts. The court of appeals should have deferred to the trial court's implied finding that the deputy was credible and that he had adequate training and experience to reliably assess whether the otherwise seemingly innocent circumstances in this case were suspicious of illegal drug possession.

The trial court did not abuse its discretion by refusing to accept Reynolds' stipulation to an element of the charged offense and permitting the State to offer evidence to prove the element.

Reynolds v. State, 2017 Tex. App. LEXIS 6040 (Tex. App.—El Paso June 30, 2017, no pet.)

Relying on U.S. Supreme Court precedent, the court found that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it. The prosecution is entitled to prove its case by evidence of its own choice.

The trial court did not abuse its discretion by denying Murray's motion to suppress or by admitting Facebook evidence.

Murray v. State, 2017 Tex. App. LEXIS 5651 (Tex. App.—San Antonio June 21, 2017, no pet.)

Murray was convicted based on evidence including pictures, private messages, and other electronic data from a Facebook account assigned to him. On appeal, Murray contended: (1) the affidavit supporting the search warrant did not establish probable cause to search his Facebook account because it did not demonstrate the reliability of the informant or source of information; and (2) the evidence the trial court admitted from the Facebook account was not properly authenticated.

First, the court found that from the information the victim provided, the magistrate could reasonably infer that Murray uploaded the pictures to his Facebook account for the purpose of prostituting the victim, and evidence of the crime could be found in Murray's Facebook account.

Second, the State proffered evidence of Murray's Facebook account by way of a "Certificate of Authenticity of Domestic Records of Regularly Conducted Activity" executed by Facebook's Records Custodian, which sufficiently complied with

the requirements of self-authentication outlined in Rule 902(10)(B) of the Texas Rules of Evidence, obviating the State's need to produce extrinsic evidence to authenticate the properly admitted Facebook evidence.

Further, the State is not required to conclusively establish that the defendant authored the messages; rather, the State must present prima facie evidence such that a reasonable jury could find the defendant created the content of the Facebook pages. The courts are mindful of today's electronic world of cyber challenges where passwords can be compromised, computers can be hacked and cell phones can be stolen, raising questions about the origin or source of the information. Because of the wide array of "electronically generated, transmitted and/or stored information, including information found on social networking web sites," the most appropriate method of authenticating electronic evidence to determine authorship will often depend upon the nature of the evidence and the circumstances of the particular case.

The trial court did not err in allowing the State to introduce evidence of TFMPP in Ashby's blood because it was sufficiently relevant and reliable under Rule 702 and the prejudicial value of the evidence was not substantially outweighed by its probative value.

Ashby v. State, 2017 Tex. App. LEXIS 4663 (Tex. App.—Houston [1st Dist.] May 23, 2017, no pet.)

Dr. Chen testified that this technique for blood testing is generally accepted in the scientific community. He further informed the court that the process has been subject to peer review and recently published in the Journal of Applied Toxicology. Asked whether he had followed that same protocol in this instance, Dr. Chen asserted that he followed protocol. This testimony was sufficient to establish the reliability of Dr. Chen's blood analysis and his conclusion that TFMPP was present in Ashby's blood under *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992) (evidence derived from a scientific theory must satisfy three criteria: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question.).

Further, in this case, evidence that TFMPP was present in Ashby's blood sample is relevant because it tends to make it more probable that he was intoxicated by reason of introduction of a controlled substance or some combination of substances.

Justice Jennings dissented, finding that according to the State's own expert, it is not possible to reliably extrapolate whether the TFMPP in the defendant's system was psychoactive at the time of his arrest. Without this knowledge, the fact that the defendant had an unquantified amount of TFMPP in his blood sample was not relevant and the evidence should have been suppressed.

Commentary: 3-Trifluoromethylphenylpiperazine (TFMPP) is a recreational drug of the piperazine chemical class. Usually in combination with its analogue benzylpiperazine, it is sold as an alternative to the illicit drug MDMA (commonly known as ecstasy) under the name "Legal X."

The officer's extraneous-offense evidence was relevant and admissible because it rebutted the defendant's defensive theory that he had no knowledge of the contraband's existence.

Chavira v. State, 2017 Tex. App. LEXIS 4452 (Tex. App.—El Paso May 16, 2017, no pet.)

A photographic lineup was not impermissibly suggestive even though the suspect was wearing clothing matching the description given by the victim.

Fisher v. State, 2017 Tex. App. LEXIS 4314 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. ref'd)

Fisher argued (citing no authority) that because his photograph was the only one in the lineup plainly featuring a red-hooded sweatshirt, which matched the description of clothing provided by the victim, the procedure was impermissibly suggestive. The court disagreed, finding that, aside from clothing, all the photos in the lineup appeared similar in terms of the subjects' ages, skin tones, facial features, and hairstyles. Additionally, two others in the lineup were wearing red clothing items, with one individual wearing a red shirt that appears to be hooded and

another wearing a gray hooded jacket over a red shirt. The court found the clear weight of Texas authority to be to the contrary of Fisher's position. The court also found the victim's identification to be reliable, weighing against any suggestiveness of the photo array.

Witness identification testimony was admissible because it was sufficiently reliable despite the suggestive nature of the showup.

Knott v. State, 513 S.W.3d 779 (Tex. App.—El Paso 2017, pet. ref'd)

Knott argued that the one-person showup the police conducted on the night of the offense rendered it unduly suggestive because when the witness arrived at the location of the showup, Knott was being detained in handcuffs, surrounded by several police officers and police cars with their flashers on. Also, before the witness made his identification, the police focused a spotlight on Knott, sending a message that the police believed he was in fact the perpetrator of the crime.

Applying a five-factor test, the court finds that the offense occurred in a relatively well-lit area, the witness' description of the suspect was highly accurate in several important respects, the witness never wavered from his certainty in his identification, and the showup occurred less than an hour after the offense was committed.

The trial court did not abuse its discretion in determining that the complainant's statements to her sister were excited utterances and admitting the statements into evidence as an exception to the rule against hearsay, even though the car crash that the defendant caused that killed the victim happened the next day.

Pickron v. State, 515 S.W.3d 462 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd)

Pickron argued that the statement occurred before the crime. However, the court points out that the excited-utterance exception to the rule against hearsay relates to statements made about startling events, even if those events are not the charged offense.

A trial court improperly admitted a video recording made by an officer that was a copy of another recording from a surveillance camera at a store, as the store's original surveillance recording was not properly authenticated under Rule 901(a) of the Texas Rules of Evidence.

Fowler v. State, 517 S.W.3d 167 (Tex. App.—Texarkana 2017, pet. granted)

Surveillance video made by the Family Dollar store was not saved in a format that could be copied, so Officer Torrez focused his police-department-issued video camera on the screen displaying the Family Dollar surveillance video and made a video recording of a portion of it. The court noted that the fact that the challenged video recording is a recording of a recording is not the problem which must be addressed. A problem, however, exists because there is no evidence that the original video recording portrayed what the State maintains that it depicts.

While the State authenticated the video exhibit sponsored by Officer Torrez, there was no evidence presented that the video recording copied by Torrez accurately portrayed any relevant information. Torrez adequately demonstrated that the recording he made of the store's surveillance monitor was a duplicate copy of the relevant part of the original surveillance recording. However, there was no evidence presented by the State which purports to precisely describe what Torrez recorded or which sets out the circumstances that existed when the original recording was made.

The admission of evidence that the defendant took ecstasy on the day of the confrontation, and that he had ecstasy pills in his possession that day, ran afoul of Texas Rules of Evidence 401, 403, and 404(b).

Gonzalez v. State, 2017 Tex. App. LEXIS 619 (Tex. App.—El Paso Jan. 25, 2017, pet. granted) (not designated for publication)

Without any indication that he was still under the effects of ecstasy at the time of the incident, or any indication of what those effects might have been, the

evidence failed the relevance test. But even if there was some slight relevance, it would be substantially outweighed by the danger of unfair prejudice The evidence raised concerns of prejudice because using an illicit drug while in school, communicating about it to his girlfriend, and planning to later use the drug with her would place him in a very poor light.

The trial court did not err in admitting Ripstra's Facebook posts as admissions of a party opponent.

Ripstra v. State, 514 S.W.3d 305 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd)

In this case, a mother was charged with deliberately causing ongoing medical problems for her daughter. The State offered the mother's Facebook posts to support its theory that she was abusing her daughter to get attention—seeking affirmation from her friends on Facebook whenever the daughter had health problems. Ripstra argued that her Facebook posts were hearsay. However, Texas Rule of Evidence 801(e)(2) provides that a statement is not hearsay if it is offered against a party and is a party's own statement. The only requirements for admissibility of an admission of a party opponent under Rule 801(e)(2) is that the admission is the opponent's own statement and that it is offered against her. The State offered Ripstra's own statements that she made on Facebook against her.

F. Sentencing

The trial court violated Freeman's constitutional rights by convicting and sentencing him without finding him guilty beyond a reasonable doubt.

Freeman v. State, 2017 Tex. App. LEXIS 4154 (Tex. App.—Austin May 9, 2017, pet. ref'd)

The Due Process Clause of the 14th Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. At the conclusion of the guilt-or-innocence phase of the bench trial, instead of finding Freeman guilty "beyond a reasonable doubt," the trial court purported to find him guilty "by the clearer greater weight and degree of credible testimony." The court could not assume in light of this express statement by the trial court that it used a different standard in finding Freeman guilty than the one that it articulated.

The trial court committed structural error and violated Carson's due process rights by considering alleged, unproven offenses in the State's Rule 404(b) notice in sentencing Carson.

Carson v. State, 515 S.W.3d 372 (Tex. App.—Texarkana 2017, pet. granted in related proceedings)

At the conclusion of the hearing on Carson's motion for new trial, the trial court orally recounted the long list of offenses in the Rule 404(b) notice, one at a time, explaining in great detail if, how, and to what degree each of the allegations affected its decision regarding Carson's sentence. Even though Carson was given no notice that they were being considered and was provided no opportunity to contest any of them, the trial court made it quite clear that several of the alleged—but unproven—felonies listed in the notice "played a huge role in the sentence [the court] gave" Carson. The presence on the bench of a judge who is not impartial deprives a defendant of his basic protections, and because it is a defect that affects the very framework within which the trial proceeds, it infects the entire trial process.

G. Restitution

The trial court's decision to lower monthly restitution payments was not a separate restitution order or condition of probation, and therefore the law in effect at the time of sentencing, not at the time of the modification, governs.

Lombardo v. State, 524 S.W.3d 808 (Tex. App.—Houston [14th Dist.] 2017, no pet.)

Lombardo argued that the modification triggered the current version of the statute, which requires consideration of the victim's financial resources or ability to pay expenses incurred by the victim as a result of the offense. The court disagreed and found no abuse of discretion.

The trial court had statutory authority under Article 42.037(a) of the Code of Criminal Procedure to order Ortegon to pay $300 to the victim even though the jury did not specify restitution as part of his sentence in its punishment verdict.

Ortegon v. State, 510 S.W.3d 181 (Tex. App.—Houston [1st Dist.] 2016, no pet.)

Ortegon argued that the restitution order was void because he elected to have the jury assess his punishment, and the jury did not impose a restitution requirement in its punishment verdict. The court disagreed, noting that restitution "is a victim's statutory right" and serves several purposes beyond punishing the defendant. Article 42.037 clearly authorizes a trial court to order a defendant to make restitution to a victim of the charged offense. The statute does not include any provision limiting its application to situations in which the trial court, as opposed to the jury, assesses the defendant's sentence. Instead, the statute provides that, "[i]n addition to any fine authorized by law, *the court* that sentences the defendant convicted of an offense may order the defendant to make restitution to any victim of the offense . . . ." (emphasis in original). Although Ortegon elected to have the jury assess his punishment, the trial court had statutory authority to impose a restitution order. That statutory authority does not conflict with the statute allowing a defendant to elect to have a jury assess punishment.

H. Mistrial

The State failed to meet its burden of demonstrating that the mistrial was a manifest necessity where the record does not reveal that it was simply impossible to continue with trial and that the trial court entertained every reasonable alternative to a mistrial.

Ex parte Perez, 525 S.W.3d 325 (Tex. App.—Houston [14th Dist.] 2017, no pet.)

After 12 jurors and an alternate were empaneled and sworn, and jeopardy attached, the trial court recessed the trial. The court attempted to recall the jurors four months later with less than one day's notice. It appeared that two of the jurors had moved out of the county, and only five jurors actually showed up. The trial court declared a mistrial over Perez' objection. Perez filed a pretrial application for a writ of habeas corpus, urging that his retrial was barred by double jeopardy, which was denied by the trial court.

The court found that though proceeding with fewer than 12 jurors was not possible in this case based on the record, there was an alternate juror, so the trial could have proceeded with 12cjurors if the remaining jurors—including one who moved outside the county—could have served. The State failed to satisfy its heavy burden of showing manifest necessity for a mistrial when the trial court did not reasonably rule out (1) allowing the out-of-county juror to serve on the jury and (2) continuing the case with reasonable notice to the jurors. Because reasonable, less drastic alternatives were available at the time the trial court declared a mistrial, the record does not support a finding that it was impossible to continue with trial.

There was insufficient evidence to support a finding that the State intentionally provoked a mistrial to avoid an acquittal where the trial court concluded that a witness violated the defendant's 5th Amendment right to remain silent despite cautioning by the prosecution.

State v. Mutei, 2017 Tex. App. LEXIS 1194 (Tex. App.—El Paso Feb. 10, 2017, pet. ref'd) (not designated for publication)

Finding the absence of a bright line rule, the court applies factors from *Ex parte Wheeler*, 203 S.W.3d 317 (Tex. Crim. App. 2006) and finds them to weigh in favor of the State. Notably, the court finds the witness did not violate either the order in limine or Mutei's 5th Amendment rights. When the State's conduct cannot be considered clearly erroneous in the first instance, it logically follows that its conduct was provided in good faith belief, and without the intent to provoke a mistrial.

I. Habeas Corpus

Davis was not confined, restrained, or subject to collateral legal consequences resulting from his

conviction for speeding.

Ex parte Davis, 506 S.W.3d 150 (Tex. App.—Tyler 2016, no pet.)

Davis received a citation for speeding in January 2015. He entered a plea of no contest in the Lufkin Municipal Court. After being found guilty, he filed an appeal bond to have a trial de novo before the county court at law. He pleaded no contest in the county court at law and was found guilty and assessed a fine of $100 in March 2015. Davis promptly filed a notice of appeal. Per Article 4.03 of the Code of Criminal Procedure, because the fine imposed did not exceed $100 and Davis did not challenge the constitutionality of the law on which his conviction was based, the court of appeals dismissed his appeal for want of jurisdiction in April 2016. *Davis v. State*, 2016 Tex. App. LEXIS 4542 (Tex. App.—Tyler Apr. 29, 2016, no pet.) (mem. op., not designated for publication). Davis subsequently filed his application for writ of habeas corpus in district court. He asked the district court to vacate his conviction. After a hearing, his application was denied. Davis appealed the matter to the court of appeals.

A defendant convicted of a misdemeanor offense may attack the validity of the conviction by way of habeas corpus if (1) confined or restrained as a result of a misdemeanor charge or conviction or (2) is no longer confined, but is subject to collateral legal consequences resulting from the conviction. The court of appeals held that Davis did not meet his burden to prove that he was confined or restrained or subject to any collateral legal consequences as a result of his misdemeanor speeding conviction and the district court could have concluded that he failed to prove entitlement to habeas corpus relief. The court of appeals explained that even if Davis had proved that his insurance rates had risen or that he had lost status in the community, and that both were caused by his conviction, such changes do not constitute confinement or restraint as contemplated by Article 11.21 (Constructive Custody) or Article 11.22 (Restraint) of the Code of Criminal Procedure.

In an unpublished opinion, the court of appeals also considered Davis' petition for mandamus, which asserted that the district court had a ministerial duty to grant habeas relief. His requests that the court of appeals issue a writ of mandamus commanding the district court judge to set aside his municipal court conviction was similarly denied. *In re Davis*, 2016 Tex. App. LEXIS 11760 (Tex. App.—Tyler Oct. 31, 2016, no pet.) (mem. op., not designated for publication).

Commentary: Is this a valuable piece to be added to the Class C misdemeanor habeas corpus mosaic? Time will tell. In this case, receiving a citation, owing a fine, raised insurance rates, and diminished social status as a traffic law violator are not adverse consequences that constitute custody or restraint. However, as the court explains, "[a] person who is not confined but is suffering some collateral consequence as a result of his conviction may seek habeas corpus relief." See*, Ex parte Harrington*, 310 S.W.3d 452, 457-58 (Tex. Crim. App. 2010) (adverse consequences to applicant's present and future employment opportunities constitute confinement); *State v. Collazo*, 264 S.W.3d 121, 126-27 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (denial of opportunity to obtain a Texas peace officer license constitutes confinement); *Ex parte Davis*, 748 S.W.2d 555, 557 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd) (denial of entry into the military constitutes confinement or restraint)." *Ex parte Davis* at 152.

J. Expunction

There was no evidence supporting the trial court's implied finding that the petitioner failed to establish the statutory requirements for an expunction. The petitioner conclusively established her entitlement to an expunction of the records related to the charge of disorderly conduct.

In re Expunction of K.G., 504 S.W.3d 911 (Tex. App.—El Paso 2016)

The petitioner showed that she had been released, the charges did not result in a final conviction, and the charges were no longer pending. The petitioner was not placed on community supervision for any of the offenses and one year had lapsed from the date of the arrest for each of the six offenses. Because she established each of the statutory elements, she was

entitled to an expunction, and the trial court did not have discretion to deny the expunction petition.

The trial court erred in granting summary judgment in a suit stemming from an expunged deferred disposition.

D.K.W. v. Source for Publicdata.com, 2017 Tex. App. LEXIS 6057 (Tex. App.—Dallas June 28, 2017, no pet.)

D.K.W. was arrested in November 2009 for providing alcohol to a minor. As a result of a plea bargain, the charge was reduced to disorderly conduct, a Class C misdemeanor. The case was ultimately dismissed as a result of what the court of appeals calls "deferred adjudication" in January 2010. Per Article 45.051(e), D.K.W. sought an expunction under Chapter 55 of the Code of Criminal Procedure. D.K.W. obtained a court order in May 2014 that all of the records relating to her arrest and prosecution had to be destroyed.

Source for PublicData.com is a private business entity that publishes criminal record information on a website. Shadowsoft, Inc. is an owner of PublicData.com. D.K.W. notified PublicData/Shadowsoft of the expunction order, but it did not remove her criminal record information from their website until more than seven months later, after D.K.W. had filed a suit alleging a violation of Chapter 109 of the Texas Business and Commerce Code (which creates a civil cause of action for publishing an expunged criminal record). Because PublicData/Shadowsoft did not establish that they were entitled to judgment as a matter of law, the court of appeals reversed the trial court's judgment and remanded the case for further proceedings.

Commentary: In the age of data mining and increased legislative efforts to protect defendants from the long term effects of Class C misdemeanors, will we see more law suits like this one? What was described by the court as "deferred adjudication" is "deferred disposition." Add this to the list of cases where an appellate court saw no distinction. Nevertheless, there is a difference. See, Ryan Kellus Turner, "Deferred Disposition is not Deferred Adjudication," *The Recorder* (August 2002) at 13.

Under Article 1.14 of the Code of Criminal Procedure, a person may "waive any rights secured him by law," including the right to seek expunction of arrest records and files as a condition in a pretrial diversion agreement, provided the waiver is voluntarily, knowingly, and intelligently made.

Tex. Atty. Gen. Op. KP-0158 (8/8/17)

K. Appeals: Reporter's Record

A missing reporter's record of the punishment phase of trial did not entitle Foster to a new punishment hearing where all that was missing was brief testimony of seven defense witnesses, who all testified to his good character and sought leniency for him; no objections were made to his evidence; and only two witnesses were cross-examined by the State for less than five minutes.

Foster v. State, 2017 Tex. App. LEXIS 7659 (Tex. App.—Dallas August 11, 2017, no pet. h.)

Under *Routier v. State*, 112 S.W.3d 554 (Tex. Crim. App. 2003), to be entitled to a new trial due to a missing record the defendant must show: (1) he timely requested the reporter's record; (2) a significant portion of the record has been lost or destroyed through no fault of his own; (3) the missing portion of the record is necessary to his appeal; and 4) the parties cannot agree on the record. A mere assertion that the missing record could potentially assist on appeal is not sufficient to show that the record is necessary for resolution of the appeal. *Routier* reversed *Kirtley v. State,* 56 S.W.3d 48 (Tex. Crim. App. 2001), in which a bare assertion that the missing record might show ineffective assistance of counsel was sufficient to grant the defendant a new hearing.

Justice Brown dissented, finding the defendant was entitled to a new punishment hearing because there is no record of the punishment phase of the trial, and the record is necessary to resolve his appeal. According to the dissent, the absence of any record constitutes a fundamentally unfair proceeding. Justice Brown distinguished this case from *Routier* where there was a transcript.

The court did not abuse its discretion by denying Coulter a new trial based on an allegedly lost or destroyed portion of the reporter's record.

Coulter v. State, 510 S.W.3d 210 (Tex. App.—Houston [1st Dist.] 2016, no pet.)

Coulter sought video of the courtroom minutes before a child witness testified and the jury entered the room. No such video was made. Coulter argued an incomplete record entitled him to a new trial. The court found that there was no authority requiring the court to create a videotaped copy of the feed from the remote courtroom, Article 38.071 of the Code of Criminal Procedure does not mention the need to videotape the testimony, and the private discussions between the prosecutor and the witness before and as the jury was entering the courtroom—if a part of the record at all—was not a significant portion of the court reporter's notes and records under Texas Rule of Appellate Procedure 34.6(f)(2).

Neither the Texas Rules of Appellate Procedure, nor Chapter 52 of the Government Code, nor a court reporter's ethical duties authorizes a court reporter to charge a district attorney's office when the State is not the appellant for the copy of the reporter's record filed with the trial court clerk pursuant to Texas Rule of Appellate Procedure 34.6(h).

Tex. Atty. Gen. Op. KP-0163 (9/8/17)

IV. Dogs

Under Article I, Section 15 of the Texas Constitution, a dog owner was entitled to a jury trial for his de novo appeal; the county court at law abused its discretion in striking the timely filed jury request and proceeding with a bench trial, which was harmful.

Hayes v. State, 518 S.W.3d. 585 (Tex. App.—Tyler 2017, no pet.)

On appeal from a hearing conducted in a justice court, a county court at law ordered that the seized dogs be destroyed and that the owner pay Henderson County the sum of $2,780. Because of the owner's property interest in the dogs, the court of appeals found that the county court violated the owner's right to a jury trial. The record contained evidence demonstrating that the amount in controversy exceeded $250. Because Subchapter A of Section 822 of the Health and Safety Code (General Provision; Dogs That Attack Persons or Are a Danger to Persons) contains no express language denying or restricting the right to appeal an order to have a dog destroyed, and Section 51.0001 of the Civil Practice and Remedies Code provides a right to appeal a justice court's ruling when the judgment or amount in controversy exceeded $250, the owner was entitled to appeal the justice court's order to the county court at law.

Commentary: The question remains: what if the hearing occurs in a municipal court? Section 51.0001 of the Civil Practice and Remedies Code governs appeals from justice court to either a county or district court.

In an appeal from a dangerous dog determination that began in a municipal court of record, Section 30.00014(a) of the Government Code contemplates appeals in both criminal and civil cases.

Wrencher v. State, 2017 Tex. App. LEXIS 5512 (Tex. App.—Austin June 16, 2017, no pet.)

The State argued that the language of Section 30.00014(a) contemplated only appeals from criminal cases originating in municipal courts of record. In support of its position, the State pointed to language in the first sentence: a "defendant" has the right to appeal from a "conviction" in the municipal court of record. The court of appeals agreed, but was convinced that it also affords a civil defendant an appeal. "A 'defendant' is, of course, a person against whom a civil or criminal action is brought. Section 30.00014(a) recognizes that a defendant has an appeal from 'a judgment *or* a conviction' of a municipal court of record—two classes of judicial decisions. The word, 'conviction' almost universally refers to a judicial decision in a criminal matter, whereas 'judgment' commonly refers to a judicial decision in a civil case."

Commentary: This is an unpublished decision but may set the stage for more case law. Despite what is generally understood about the Municipal Court of Record Act (Chapter 30 of the Government Code), because a "conviction" cannot occur without a judgment and, utilizing principles of code construction, each word is to be given separate and distinct meaning (i.e., the rule against surplusage), this interpretation of Section 30.00014(a) makes sense. However, citing *In re Loban*, 243 S.W.3d 827, 830 (Tex. App.—Fort Worth 2008) for the proposition that the Fort Worth Court of Appeals recognized that Section 30.00014(a) "affords a defendant the right to appeal from the civil decision of the municipal court of record" is a stretch.

Where the State sought to humanely destroy an owner's dogs, and the owner failed to respond to the State's request for admissions, including a request to admit that his dogs had killed a woman, the trial court erred in denying the owner's motion to amend or withdraw his deemed admissions under Texas Rule of Civil Procedure 198.3 and granting the State summary judgment.

Swanson v. State, 2017 Tex. App. LEXIS 3934 (Tex. App.—Austin May 2, 2017, no pet.)

The court of appeals found that there was no showing that the owner acted with bad faith or callous disregard of the rules of civil procedure, or that the State was unduly prejudiced by the owner's delay in filing the response. The order was reversed.

Commentary: In addressing the issue raised, the court of appeals addressed, perhaps unwittingly, a lingering question: do the Texas Rules of Civil Procedure have application to Chapter 822?

V. Misconduct
A. Vexatious Litigants

When a pro se defendant in a criminal matter before a municipal court seeks mandamus relief in a district court it is a "civil action" for purposes of the laws governing vexatious litigants. A civil court may, on its own motion, consider whether a litigant is a vexatious litigant per Section 11.101 of the Civil Practice and Remedies Code.

Cooper v. McNulty, 2016 Tex. App. LEXIS 13911 (Tex. App.—Dallas Dec. 29, 2016), 2016 Tex. App. LEXIS 13910 (Tex. App.—Dallas Dec. 16, 2016), reh'g denied, 2016 Tex. App. LEXIS 11333 (Tex. App.—Dallas Oct. 19, 2016), reh'g denied.

Cooper was convicted of speeding in the Plano Municipal Court. Cooper appealed his conviction to the county court at law and filed an affidavit of indigency in municipal court to secure a free record on appeal. Judge McNulty set the matter for hearing in April 2015 and ordered Cooper to produce (1) his federal tax returns for the years 2013 and 2104, if available; (2) his bank statements for the 12 months preceding April 1, 2015; and (3) evidence of any and all income paid to or received by him for the 12 months preceding months.

Cooper objected to the order and filed a motion to vacate, arguing Judge McNulty exceeded his authority. When Judge McNulty did not rule within a week, Cooper filed a request for a ruling. After he was given written notice that his objections and motions would be addressed at the hearing, Cooper filed a motion asking the judge to sever the two issues and consider only his objections and motion to vacate and to reschedule the indigency hearing. The motion was denied.

On the day of the indigency hearing, Cooper filed a petition for writ of mandamus and writ of prohibition in district court, challenging Judge McNulty's order for him to produce the various financial records. Cooper also filed an affidavit seeking to proceed in district court without paying costs. The district clerk contested the affidavit and, after a hearing, the district court ruled that Cooper could not proceed as a pauper or without paying all applicable costs and fees.

The district court ordered Cooper to pay the filing fees and all other applicable fees and costs of associated with the case. The order further provided that if Cooper did not pay within 10 days of the order, the case would be dismissed for costs without further notice or order and that costs would be ordered to be collected.

Six days later, the district court ordered a hearing to determine whether Cooper and his wife met

the criteria in Chapter 11 of the Civil Practice and Remedies Code to be declared vexatious litigants and, if so, whether a pre-filing order should be issued against them. The court ordered the district clerk to appear at the hearing and provide the court with evidence material to whether the Coopers meet the criteria. Cooper filed objections to the hearing. A hearing on those objections was held. Before the hearing began, Cooper was arrested and handcuffed outside the courtroom on a capias pro fine stemming from the judgment for his speeding conviction. He was subsequently brought before the district court. During the hearing, Cooper argued the trial court did not have authority under the statute to determine whether he was a vexatious litigant. He also argued the case arose from a criminal matter and therefore was not considered a civil litigation as required by the statute. Cooper also objected that the order included his wife, who was not a party to the litigation. At the conclusion of the hearing, the district court ruled Cooper's wife did not have to appear at the hearing but overruled all other objections.

As Cooper exited the courtroom in the custody of Plano police he commented, "This is the way you get treated by the Court for a speeding ticket that you have on appeal." The district judge found him in contempt for disrupting court proceedings and sentenced him to 90 days in county jail. His confinement was later reduced to 14 days.

Six days later, the district court held the vexatious litigant hearing. The district clerk offered, and the trial court admitted, exhibits which comprised records in 20 state, federal, and bankruptcy court cases filed pro se by Cooper since May 14, 2008 and which were determined adversely against him. The court also admitted exhibits which involved Cooper's ongoing litigation against the City of Plano. Cooper testified that he did not know whether he had filed 20 lawsuits in the past seven years. After considering the evidence, the trial court declared Cooper a vexatious litigant and issued a pre-filing order prohibiting him from filing pro se any new litigation in state or federal court until and unless he had written permission from the appropriate local administrative judge. Cooper appealed. The court of appeals found no evidence of judicial bias and held that Cooper had lawfully been held in contempt for disrupting court. The order of the district court was affirmed.

Commentary: This is the same Cooper who successfully argued his case to the Court of Criminal Appeals in 2013. *State v. Cooper*, 420 S.W.3d 829 (Tex. Crim. App. 2013) (holding that the City of Plano's adoption of the International Property Maintenance Code required the State to allege in the complaint that notice had been given pursuant to Section 107 of the IPMC; the accused was entitled to notice of violations of a municipal code before his subsequent violations could be convictions.)

Criminal defendants cannot be classified as vexatious litigants. They have a constitutional right to file motions in criminal proceedings. This unpublished opinion, however, illustrates how a person who is a criminal defendant can also become a civil litigant and be deemed a vexatious litigant. It also illustrates the difficulties that can arise in municipal court when recalcitrant defendants assert indigence while refusing to provide the information necessary to evaluate their assertion.

B. Attorney Misconduct

In a case involving attorney misconduct in a municipal court, the matters in question were not undisputed, and the reasons for the trial court's ruling were not obvious from the record.

Hamlett v. Comm'n for Lawyer Discipline, 2016 Tex. App. LEXIS 11488 (Tex. App.—Amarillo October 24, 2016, no pet.)

As a result of various motions filed against judges and prosecutors in cases in the Red Oak Municipal Court and Waxahachie Municipal Court, Hamlett was accused of professional misconduct.

The Commission for Lawyer Discipline filed a disciplinary action against Hamlett asserting that Hamlett violated Texas Disciplinary Rules of Professional Conduct Rule 3.01 (bringing frivolous claims and contentions), Rule 3.02 (unreasonably

increasing costs or burdens or unreasonably delaying resolution of a case), Rule 3.04(d) (knowingly disobeying or advising a client to disobey court rules or orders), and Rule 8.02(a) (knowingly or recklessly making a false statement concerning the qualifications or integrity of a judge or public legal officer).

Represented by counsel, Hamlett answered with a general denial. The Commission subsequently moved for partial summary judgment, claiming there were no genuine issues of material fact concerning Hamlett's alleged professional misconduct and Disciplinary Rule violations. Hamlett filed a response to the Commission's motion and the motion was denied by the trial court.

The court of appeals could not conclude the record affirmatively showed Hamlett suffered no harm as a result of the trial court's failure to file the requested findings of fact and conclusions of law. Accordingly, the matter was abated and remanded to the district court.

Commentary: Attorneys practicing in municipal courts are obligated to comport their behavior with the Texas Rules of Disciplinary Conduct. Similarly, municipal judges who have knowledge that an attorney has violated the Texas Rules of Disciplinary Conduct is required to take appropriate action and if the violation raises a substantial question about the attorney's honesty, trustworthiness, or fitness is obligated by Canon 3(D)(2) to inform the Office of General Counsel of the State Bar of Texas or take other appropriate action. The phone number for the Office of the General Counsel is 800.932.1900.

Reversible error resulted from the prosecutor's inflammatory use of a racial slur in closing argument even without an objection or motion for mistrial by Hernandez.

Hernandez v. State, 508 S.W.3d 737 (Tex. App.—Fort Worth 2016, pet. granted)

Though Texas courts, including the Court of Criminal Appeals, have found waiver by failure to move for a mistrial in cases like this, the majority finds that position illogical. According to the majority, if the argument is so prejudicial that it has deprived the defendant of a fair trial, the injury is fundamental. An unfair trial, even in a criminal case, does not become fair just because the request for a new trial comes on appeal rather than at trial. The reason for preservation of a complaint is to allow the trial court to assuage the harm—to correct the problem. But when the injury is of such magnitude that the trial court cannot correct it, the majority questions how it can find waiver because the trial court was not given the opportunity to "fix" the unfixable problem.

Basing its decision on the unique nature of the record, the majority held that Hernandez' complaint was adequately preserved, both at trial and in his motion for new trial, and that the harm caused by the prosecutor's inflammatory statement outside the record could not be cured by the vague and perfunctory instruction to disregard.

Justice Walker concurred in the judgment, finding that Hernandez' third issue is framed as an issue of prosecutorial misconduct—an issue that need not be strictly preserved in light of the resulting due process violation of his right to a fair trial.

Justice Sudderth dissented, agreeing with the majority that the prosecutor's behavior was improper, inexcusable, and cannot be condoned, and that the trial judge committed error in permitting it. Nevertheless, because the court is constrained by precedent of the Court of Criminal Appeals requiring preservation of this type of error, Justice Sudderth states she is compelled to dissent.

Commentary: Stay tuned! The Court of Criminal Appeals granted PDR on March 8, 2017.

A court would likely conclude that the American Bar Association's Model Rule of Professional Conduct 8.4(g), if adopted in Texas, would unconstitutionally restrict freedom of speech, free exercise of religion, and freedom of association for members of the State Bar. In addition, a court would likely conclude that it was overbroad and void for vagueness.

Tex. Atty. Gen. Op. KP-0123 (12/20/16)

In August of 2016, the ABA House of Delegates amended Model Rule 8.4 to add Subsection (g), which provides that it is professional misconduct for a lawyer to:

> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The opinion analyzes the language of the amendments along with Comments 3 and 4 relevant to Subsection (g) in light of the 1st Amendment. First, contrary to basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues. Second, Model Rule 8.4(g) could also be applied to restrict an attorney's religious liberty and prohibit an attorney from zealously representing faith-based groups. Third, Model Rule 8.4(g) could be applied to restrict an attorney's freedom to associate with a number of political, social, or religious legal organizations.

The attorney general also finds that because Model Rule 8.4(g) substantially restricts constitutionally permissible speech and the free exercise of religion, a court would likely conclude it is overbroad and therefore unenforceable. Further, Model Rule 8.4(g) lacks clear meaning and is capable of infringing upon multiple constitutionally protected rights, and it is therefore likely to be found vague. Finally, the Texas Disciplinary Rules of Professional Conduct already address issues of attorney discrimination through narrower language that provides better clarification about the conduct prescribed. Model Rule 8.4(g) is therefore unnecessary to protect against prohibited discrimination in this State, and were it to be adopted, a court would likely invalidate it as unconstitutional.

VI. Statutory Construction

Texas courts afford deference to agency interpretations of statutes only when the agency adopts the construction as a formal rule or opinion after formal proceedings; and even then, a state court will defer to that construction only upon finding that ambiguity exists in the statute at issue and that the agency's construction is reasonable and consistent with the statute's plain language.

Tex. Atty. Gen. Op. KP-0115 (10/4/16)

Commentary: Agencies are often called the "fourth branch" of government because they perform functions from all three branches of government. One function of agencies is to interpret their agency's enabling statutes and regulations. This opinion lays out the test for when courts give deference to such interpretations.

VII. Court Costs and Administration

A Colorado law requiring "actual innocence" to reclaim court costs, fees, and restitution after a criminal conviction is vacated on appeal violates due process.

Nelson v. Colorado, 137 S. Ct. 1249 (2017)

In an 8-1 decision, Justice Ginsburg delivered the opinion of the Court and found that the state law violated the defendants' due process rights by retaining funds paid by defendants as fees, court costs, and restitution after the defendants' convictions were invalidated with no possibility of retrial. The presumption of innocence was restored and the statutory remedy of requesting a refund for monies, coupled with shifting the burden upon the defendants to prove innocence did not comport with due process.

In a particularly strongly worded concurring opinion, Justice Alito concurred with the holding only, but he faults the majority for applying the balancing test set out in *Mathews* v. *Eldridge*, 424 U. S. 319, (1976), which he classifies as a modern invention to decide what procedures the government must

observe before depriving persons of novel forms of property such as welfare or Social Security and that such a balancing test should not be applied in matters of state criminal procedure. Doing so may result in "undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." Justice Alito emphasizes the proper framework is provided by *Medina* v. *California*, 505 U. S. 437 (1992). *Medina* applies when assessing the validity of state criminal procedural rules. Justice Alito is equally critical of the Court's failure to adequately delineate between court costs (which are payable to the government) and restitution (which is not).

Justice Thomas dissented because he believes the petitioners failed to establish a *substantive* entitlement to a return of the money they paid pursuant to criminal convictions that were later reversed or vacated.

Commentary: It is hard to read the tea leaves, but this seemingly straightforward decision may prove to be the not-so-obvious precursor to what is next. The majority does not seemingly dispute the general applicability of *Medina* but rather applies *Mathews* because no further criminal process is implicated. Notably, however, meanwhile back in Texas, *Mathews* seems to be pivotal in the trial court's decision in the Harris County bail law suit. See, *ODonnell v. Harris County,* 2017 U.S. Dist. LEXIS 65445 (S.D. Tex. Apr. 28, 2017), supra.

Court costs collected for "abused children's counseling" and "comprehensive rehabilitation" under Section 133.102 of the Local Government Code (Consolidated Fees on Conviction) are facially unconstitutional.

Salinas v. State, 523 S.W.3d 103 (Tex. Crim. App. 2017)

In a 5-3 decision (Judge Keel not participating), Presiding Judge Keller, writing for the majority, opined that Section 133.102 of the Local Government Code was facially unconstitutional to the extent it collected and allocated funds to comprehensive rehabilitation and "abused children's counseling" accounts. Section 133.102, commonly referred to as the Consolidated Court Cost, provides that a person convicted of an offense shall pay as a court cost, in addition to all other costs $133 on conviction of a felony, $83 on conviction of a Class A or B misdemeanor, $40 on conviction of a fine-only misdemeanor, including a city ordinance violation (except pedestrian and motor vehicle parking violations).

The majority opinion found the statute partly unconstitutional on its face under the Separation of Powers clause of the Texas Constitution (Article II, Section 1) because it directed funds to two state programs unrelated to criminal justice purposes. The funds for abused children's counseling no longer went to serve that program but went directly to the State's general fund. The funds for rehabilitation governed by Chapter 111 of the Human Resources Code were for general rehabilitation and had no connection to criminal justice.

The court's holding applied prospectively and also to any defendant who had raised the appropriate claim in a still-pending petition for discretionary review before the date of the opinion.

Judge Yeary, joined by Judge Richardson, dissented because the majority inadequately focused on Salinas' burden to persuade the Court that there is no possible application of the statute that is constitutional, which is required in a facial challenge.

Judge Newell, joined by Judge Richardson, dissented because the majority relied on the possibility that the funds could be used for an illegitimate purpose, which did not make the statute facially invalid. Furthermore, public momentum for addressing the collection and administration of court costs and Texas Supreme Court Chief Justice Hecht's State of the Judiciary remarks to the 85th Legislature convinced him that this is a political issue.

Commentary: While this case received some publicity as a quantifiable win for every criminal defendant in Texas, *Salinas* did not actually result in a reduction in the amount of court costs imposed in criminal cases. Before the figurative ink had dried on the opinion or a mandate issued, a bill, which ultimately became law, redirected the unconstitutional portion

of the consolidated fee to fund indigent defense. Additional recent changes to the Code of Criminal Procedure give criminal court judges more leeway to accommodate defendants who establish their indigence. Yet, it is somewhat ironic that the legacy of *Salinas* is that that the State of Texas is increasingly banking on criminal defendants not being indigent in order to pay for a host of things, including the appointment of counsel for criminal defendants who are indigent.

In *Peraza v. State*, 467 S.W.3d (Tex. Crim. App. 2015), the Court held that the DNA Record Fee court cost is not an unconstitutional tax that violates separation of powers. In assessing the propriety of court costs, it also overruled the *Carson* "incidental and necessary" test and exported from Oklahoma law the "legitimate criminal justice" test as a replacement. *Salinas* is the first time the Court of Criminal Appeals used the test set out in *Peraza* to invalidate a court cost. In light of increased focus on the trend toward escalating court costs in Texas, many may applaud the outcome of this decision. Notably, however, Judge Richardson, who wrote the opinion in *Peraza*, dissented with Judges Yeary and Newell, in part because of the way the majority went about its handling of the facial challenge.

Two years ago, we commented that while it was too soon to say that *Peraza* marked the end of the trend in which court cost issues had become "front and center" arguments in direct criminal appeals, it could possibly be the beginning of the end. That now seems unlikely. *Peraza* provides solid footing for the imposition of state court costs that are reasonably related to the costs of administering the criminal justice system. Last year we pondered, in light of *Peraza*, what court costs in Texas, if any, are not reasonably related to the costs of administering the criminal justice system? *Salinas* identified two. Are there others? Anticipate similar challenges to other court cost statutes. Assuming that Texas policy makers read *Salinas*, will the Texas Legislature be less likely to pile on court costs to pay for things that are not legitimately linked to the criminal justice system?

Requiring London, upon conviction of a crime, to pay $5 for summoning a witness did not violate his 6th Amendment right to compulsory process to secure favorable witnesses or his right to confront adverse witnesses.

London v. State, 2017 Tex. App. LEXIS 5906 (Tex. App.—Houston [1st Dist.] June 27, 2017, no pet.)

London failed to identify any witness he would have called but for the prospect of post-judgment liability and failed to demonstrate how he was denied the opportunity to confront witnesses against him. He challenged the imposition of statutory court costs for witness subpoenas pursuant to Article 102.011(a)(3) of the Code of Criminal Procedure, as applied to him in this case, as a violation of his constitutional rights to compulsory process and confrontation of witnesses because he is indigent. The court found that because these fees are only "assessed on conviction," his opportunity to confront or cross-examine the State's witnesses was not contingent on his post-judgment ability to pay the witness fees. Further, he provided no argument or evidence that he was deprived of his confrontation rights because of the prospect of being assessed a $5 witness fee after the conclusion of trial, if he were convicted.

Finally, by pleading guilty, London assured that the fee would be imposed. Thus, he would have been in no worse position with respect to his exposure to court costs if he had insisted on his right to a trial by jury, at which time he could have taken advantage of his right to compulsory process to secure favorable witnesses and his right to confront adverse witnesses.

Justice Jennings dissented, finding that what makes Article 102.011(a)(3) unconstitutional as applied to the defendant is that it required him, an indigent criminal defendant, to pay for the witnesses that the State subpoenaed to testify against him. In other words, although the defendant had a fundamental constitutional right to physically confront the witnesses who were to testify against him, the only way he was able to secure that right was by bearing the State's costs for it. In effect, he is being penalized for initially setting his case for trial.

Commentary: This case was reversed and remanded by the Court of Criminal Appeals on May 18, 2016. The State had argued that London failed to preserve the challenge in this case by not raising it at

sentencing. The court of appeals agreed. The Court disagreed, pointing out that it has consistently held in the context of court cost challenges that an appellant may not be faulted for failing to object when he or she was simply not given the opportunity to do so, citing *Johnson v. State*, 423 S.W.3d 385, 390-91 (Tex. Crim. App. 2014); *Landers v. State*, 402 S.W.3d 252, 255 (Tex. Crim. App. 2013); and *Wiley v. State*, 410 S.W.3d 313, 321 (Tex. Crim. App. 2013). An appellant may generally challenge the imposition of even mandatory court costs for the first time on direct appeal when those costs are not imposed in open court and the judgment does not contain an itemization of the imposed court costs. *Johnson* at 390-91. See, Ryan Kellus Turner and Regan Metteauer, "Case Law and Attorney General Opinion 2017" *The Recorder* (December 2016) at 43.

Though Subsections 133.102(a)(1), (e)(1), (6) of the Local Government Code are unconstitutional, the court is precluded from applying the *Salinas* holding retroactively to modify Hawkins' consolidated fee.

Hawkins v. State, 2017 Tex. App. LEXIS 3276 (Tex. App.—Fort Worth Apr. 13, 2017, no pet.)

Hawkins argued that the statute's allocation of various minimum percentages of the $133 consolidated fee to "accounts and funds" for "abused children's counseling," "law enforcement officers standards and education," and "comprehensive rehabilitation" is unlawful taxation because those funds allow spending for purposes other than "legitimate criminal justice purposes." The court cites to *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017). The *Salinas* court declared Section 133.102 facially unconstitutional in violation of the Texas Constitution's Separation of Powers Clause to the extent that the statute allocates funds collected by the trial courts to the "comprehensive rehabilitation" account and the "abused children's counseling" account (Subsections 133.102(a)(1), (e)(1), (6) of the Local Government Code), because those accounts do not serve a "legitimate criminal justice purpose." The court sustained Hawkins' point to the extent that it complains of the allocation of funds under those two subsections.

However, the *Salinas* holding has limited retroactive effect. Therefore, the court found it could not modify the trial court's judgment here to reduce the consolidated fee assessed against Hawkins.

As for the "law enforcement officers standards and education" account, the court had already rejected the complaint brought by Hawkins and held again that the statutory allocation of 5.0034% of the consolidated fee to that account provides money to be spent for a "legitimate criminal justice purpose" pertaining to the administration of the criminal justice system in Texas (See, *Ingram v. State*, 503 S.W.3d 745, 749 (Tex. App.—Fort Worth 2016, pet. ref'd).

Commentary: See, *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017), supra.

The trial court erred in assessing $133.00 for "copies/search" and $5.00 for "Criminal-Co. Drug Court Fee" because there is no statutory authorization for those costs.

Sabedra v. State, 2017 Tex. App. LEXIS 2241 (Tex. App.—Waco Mar. 15, 2017, pet. ref'd) (mem. op., not designated for publication)

Only statutorily authorized court costs may be assessed against a criminal defendant. Although there is statutory authorization for a $133.00 felony conviction fee (Section 133.102(a)(1), Local Government Code) and for a $60.00 drug conviction fee (Section 102.0178, Local Government Code), the court did not find statutory authorization for a copies/search fee in the amount of $133.00 or for a criminal county drug court fee in the amount of $5.00.

Because allegations and evidence of more than one offense were presented in a single trial or plea proceeding, the trial court erred in assessing costs in each conviction.

Hurlburt v. State, 506 S.W.3d 199 (Tex. App.—Waco 2016, no pet.)

Article 102.073 was added to the Code of Criminal Procedure in 2015. It provides, in relevant part: (a) In a single criminal action in which a defendant is convicted of two or more offenses or of multiple

counts of the same offense, the court may assess each court cost or fee only once against the defendant. The phrase, "in a single criminal action," is not defined in this provision, and no court has otherwise defined this phrase in the context of court costs. The court then presumes that the Legislature, in using the phrase, "in a single criminal action" in Article 102.073(a), meant the phrase to be interpreted as "allegations and evidence of more than one offense… [which] are presented in a single trial or plea proceeding" as stated in *Ex parte Pharr*, 897 S.W.2d 795 (Tex. Crim. App. 1995).

Unlike the facts in *Pharr* where the trial court concluded each proceeding before the next one began, it is clear that all of Hurlburt's offenses were heard at one time.

Commentary: Before any panic sets in, note that Article 102.073(c) makes the statute inapplicable to a single criminal action alleging only the commission of two or more offenses punishable by fine only. This statute was added by the 84th Legislature (S.B. 740) in direct response to Texas Attorney General Opinion GA-1063. See, commentary, Ryan Kellus Turner and Regan Metteauer, "Case Law and Attorney General Opinion 2015" *The Recorder* (November 2014) at 36. This legislation was in response to part of the opinion addressing assessment of costs in multiple count criminal actions. Although it is possible to have a multiple count criminal action involving a misdemeanor, it is generally believed to exclusively occur in the adjudication of felonies. S.B. 740 was not intended to impact the adjudication of fine-only misdemeanors. However, the language of the bill when introduced (and in subsequent versions) was problematic and alarming to municipal court interests. Consequently, a lot of time and energy went into clarifying its inapplicability to fine-only misdemeanors.

Because the defendant had seen and examined the bill of costs, it was "provided" to him or at least made available to him, and he thus had been supplied with a written bill containing the items of cost as required by Article. 103.001(b), Code of Criminal Procedure. The constitutional challenges to court costs, pertaining to comprehensive rehabilitation (Section 133.102(e)(6), Local Government Code) did not effect a taking under the United States and Texas Constitutions.

Bonds v. State, 503 S.W.3d 622 (Tex. App.—Houston [14th Dist.] 2016, no pet.)

Commentary: When operative terms are not defined by the Legislature, we use the plain meaning of the word. Under the express terms of the 2015 amendment to Article 103.001, municipal and justice courts are exempted from Section (b) which states that a criminal court cost is not payable until a written bill is "provided" to the person charged with the cost. Readers are reminded, however, that the exemption was the result of a hard fought battle down at the Capitol. As originally introduced the amendment to Article 103.001(b) included municipal and justice courts and was prompted by the Court of Criminal Appeals decision in *Johnson v. State,* 423 S.W.3d 385 (Tex. Crim. App. 2014). It will be interesting to see in light of *Bonds* whether there will be efforts to have the legislature provide a definition of "provided."

The constitutional challenges to court costs, pertaining to the emergency radio infrastructure account (Section 133.102(e)(11), Local Government Code) did not effect a "taking" under Article I, Section 7(a) of the Texas Constitution. Rather, the assessment of court costs is a financial obligation and falls outside the scope of the state constitutional prohibition against the taking of property without adequate compensation.

Bowden v. State, 502 S.W.3d 913 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd)

VIII. Public Information

A court construing the plain language of Article 18.0l(b) of the Code of Criminal Procedure would likely conclude that a search warrant affidavit becomes public information when sworn to and filed with the court.

Tex. Atty. Gen. Op. KP-0145 (4/24/17)

Determining the meaning of the term "execute" in a specific statute will depend on its context.

Generally, executing a search warrant contemplates carrying out the search according to the terms of the warrant. Unlike a search warrant, which involves the performance of a specific duty, an affidavit is simply a "declaration of facts written down and sworn to by a declarant." Executing an affidavit can therefore only mean bringing the affidavit into its final, legally enforceable form, such as by swearing to the statements therein and, to the extent required, filing it with the appropriate court or clerk. The opinion also recognizes that legitimate policy reasons exist for making all search warrant affidavits public only after a peace officer executes the underlying search warrant, but declines to disregard plain statutory language.

TMCEC: This opinion points out a possible mistake on the Legislature's part, a mistake promptly fixed in the 85th Legislative Session with H.B. 3237. Effective September 1, 2017, Article 18.01(b) of the Code of Criminal Procedure provides that the search warrant affidavit *becomes* public information *when the search warrant for which the affidavit was presented is* executed.

Pursuant to Section 411.076 of the Government Code, a court may disclose criminal history record information subject to an order of nondisclosure only to criminal justice agencies for criminal justice or regulatory licensing purposes, to the person who is the subject of the order, or to an agency or entity listed in Section 411.0765(b) of the Government Code. Such criminal history record information may not be disclosed to court employees except as necessary for statutorily authorized purposes.

Tex. Atty. Gen. Op. KP-0134 (2/6/17)

IX. Local Government

A district court lacked subject-matter jurisdiction to decide legal challenges brought by river outfitters against city ordinances that banned disposable containers on rivers because the ordinances were penal in nature, and the district court could not enjoin criminal proceedings.

City of New Braunfels v. Stop The Ordinances Please, 520 S.W.3d 208 (Tex. App.—Austin 2017, pet. filed)

The City of New Braunfels appealed a final judgment from the district court striking down as unconstitutional the so-called "Disposable Container Ordinance" (a/k/a "Can Ban") and a portion of the "Cooler and Container Ordinance." Business entities challenging the ordinances sought equitable and declaratory relief, making them subject to the limitation on equity jurisdiction over criminal proceedings. The City argued the district court lacked subject-matter jurisdiction to decide the legal challenges to the ordinances. Despite having previously rejected jurisdictional arguments raised by the City, the court of appeals agreed with the City that there are historical limitations on the power of civil courts to decide challenges to penal laws. Based on the Texas Supreme Court's most recent binding precedent, the court of appeal reversed and rendered judgment dismissing the challenges for want of subject-matter jurisdiction.

The court properly denied the petition for habeas relief because under *Blockburger*'s same-elements test, San Antonio's ordinances prohibiting loitering for the purpose of prostitution and prostitution (Section 43.02, Penal Code) each required proof of a fact that the other did not, and thus, the judicial presumption was that the offenses were different for double-jeopardy purposes and that cumulative punishment could be imposed.

Ex parte Rodriguez, 516 S.W.3d 600 (Tex. App.—San Antonio 2017, pet. ref'd)

X. Juvenile Justice

State law does not require municipal courts to report convictions for drug paraphernalia to the Department of Public Safety. Neither should municipal courts report such convictions as delinquent conduct because juvenile courts have exclusive jurisdiction over cases involving delinquent conduct.

Tex. Atty. Gen. Op. KP-0150 (5/31/17)

Municipal Courts Around the State Committed to Community Engagement

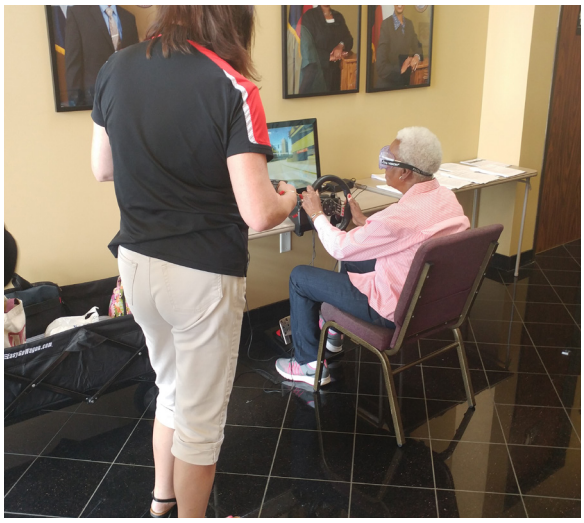
Ned Minevitz, Program Attorney & TxDOT Grant Administrator, TMCEC

Many Texas municipal courts are making great efforts to interact with their communities in a positive, non-adversarial way. Outreach initiatives include providing traffic safety education, community-building events with judges and court staff, school field trips to the courthouse, and much more. As more individuals come into contact with municipal courts than all other levels of the Texas judiciary combined, municipal courts have an enormous effect on how the community views the city as a whole. Thus, casting the court in a positive light and committing to possitive interactions with the community are crucial. The following municipal courts are examples of courts that go beyond simply adjudicating cases and truly make a positive impact within the community.

San Angelo Municipal Court
Located on the outskirts of the city, the San Angelo Municipal Court Community Garden has been providing San Angelo residents with fresh vegetables for over 20 years. Piloted by Judge Allen Gilbert, the garden is primarily tended to by juvenile offenders to discharge their municipal court fines. The three-acre garden annually produces 3,000-5,000 pounds of fresh onions, potatoes, carrots, green beans, squash, and okra. The entirety of this produce is donated to local food banks, soup kitchens, retirement homes, and other organizations.

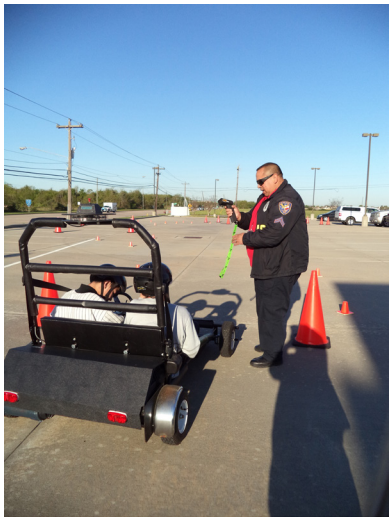
College Station Municipal Court
Each year, the College Station Municipal Court teaches five 40-minute classes to third graders at the *Our City* Junior Achievement Class. Organized by the junior achievement organization, students learn about the various entities making up College Station and study several local businesses to learn how careful city planning allows a city to function optimally. Judge Ed Spillane, Presiding Judge of the College Station Municipal Court, said of the program, "Teaching *Our City* to third graders allows the court to connect with students about the importance of city planning and explain the services that the court provides in a friendly manner."

Prairie View Municipal Court
The first annual "Seasoned Citizens" Traffic Safety Symposium was hosted by the Prairie View Municipal Court on May 26. The purpose of the Symposium was to create awareness to mature drivers of the risks their demographic faces. Symposium presenters covered topics such as distracted driving, road rage, driving under the influence of medications, and properly fitted vehicle equipment and components. Attendees also got to experience a drunk driving simulator, enjoyed brunch and afternoon snacks, and were presented with symposium bags that included promotional gifts. In addition, participants had the opportunity to win gifts in several drawings.



La Porte Municipal Court
To get out in the community, the La Porte Municipal Court staff marched at La Porte Juneteenth Parade. As they marched, they distributed traffic safety materials to spectators such as frisbees marked with the slogan "Distraction Slows Your Reaction" and fans in the shape of stop signs that read "STOP & Think Before You Drink! Designate A Driver!" The court takes an active role in planning La Porte's bi-annual Shattered Dreams presentation. In Shattered Dreams, students re-enact a fatal crash scene to give spectators a taste of the consequences of impaired

and unsafe driving. The court also invites members of the community to drive a SIDNE car, which simulates the experience of drunk driving.



Harlingen Municipal Court

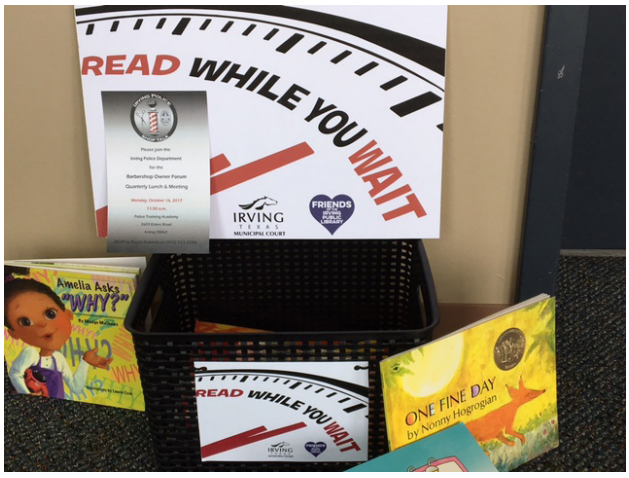
The Harlingen Municipal Court utilizes community partnerships, community outreach events, and social media to increase safety and combat impaired driving on roads in and around Harlingen. At National Night Out, in conjunction with the Harlingen Police Department, the court handed out 800 traffic safety goodie bags filled with items including Don't Monkey Around with Safety books, TxDOT coloring books, drug and alcohol informational brochures, and information on the cost and consequences of a DWI. Court staff also visited the pre-kindergarten class at Harlingen's Lamar Elementary School. They engaged the students in conversations about the importance of wearing a seatbelt.

Rollingwood Municipal Court

The City of Rollingwood and the Rollingwood Municipal Court recently hosted a children's bicycle skills and safety clinic. Kids learned about helmets, starting and stopping, signals, and other ways to stay safe on their bikes. Speaking about the clinic, Rollingwood Municipal Court Presiding Judge Robby Chapman said, "We were thrilled to be able to support this event for our community just as the schools were letting out for the summer. With so many more kids on the road, it is essential that they are aware of fundamental bicycle safety rules. This was a chance for the municipal court to give back to the community, help keep our kids safe, and teach them the law in a fun and interactive way."

Irving Municipal Court

In order to promote reading proficiency among Irving youth and help divert them away from the criminal justice system, the Irving Municipal Court launched the *Read While You Wait* initiative. The court places age and demographically appropriate books into participating Irving barbershops for youth to read while they wait for their haircut. Since the initiative started in July 2017, seven barbershops have already signed on to participate, with six more expected to join the initiative in the coming months. Books are also made available at the courthouse for children to read while they wait.



Is your city's municipal court engaging in community outreach? The Texas Municipal Courts Education Center would like to hear about your initiative! Please send correspondence to Ned Minevitz at Ned@tmcec.com. Your court or city can also order free traffic safety and impaired driving materials. Visit http://www.tmcec.com/mtsi/resources-municipal-courts/ or e-mail Ned@tmcec.com for details.

This article was originally published in *Texas Town & City,* a publication of the Texas Municipal League, November 2017.

Did you know that the Texas Municipal Courts Education Center awards those municipal courts that demonstrate outstanding outreach throughout the year? Visit http://www.tmcec.com/mtsi/mtsi-awards/ for details or see next page of this issue of *The Recorder*.

2018 Municipal Traffic Safety Initiatives Award Applications are Due December 29, 2017!

Purpose:
To recognize those who work in local municipalities and have made outstanding contributions to their community in an effort to increase traffic safety. This competition is a friendly way for municipalities to increase their attention to decreasing impaired driving and underage drinking in their communities.

Eligibility:
Any municipal court in the State of Texas. Entries may be submitted on behalf of the court by the following: Judge, Court Clerk, Deputy Court Clerk, Court Manager, Court Administrator, Bailiff, Marshal, Warrant Officer, City Manager, City Council person, Law Enforcement representative, or Community Member.

Awards:
Nine awards are anticipated: • Two in the high volume courts: serving a population of 150,000 or more; • Three in the medium volume courts: serving populations from 30,001 to 149,999; and • Four in the low volume courts: serving a population 30,000 or below.

For two municipal court representatives, award recipients receive complimentary conference registration, travel to and from the 2018 Municipal Traffic Safety Initiatives (MTSI) Conference including airfare or mileage within state guidelines, two nights' accommodations at the Omni Colonnade in San Antonio, and most meals and refreshments.

Honorable Mention:
If there are a number of applications that are reviewed and deemed outstanding and innovative, at the discretion of TMCEC, honorable mentions may be selected. Honorable mentions will be provided complimentary conference registration for one representative to attend the MTSI Conference.

Deadline:
Entries must be postmarked no later than Friday, December 29, 2017.

Presentation:
Award recipients and honorable mention winners will be notified by February 16, 2018 and honored during the 2018 MTSI Conference (March 26-28, 2018 in San Antonio).

Details:
For complete award details, submission guidelines, and application form, visit www.tmcec.com/mtsi/mtsi-awards/

*Awards program and MTSI Conference are dependent on continued funding

MUNICIPAL TRAFFIC SAFETY INITIATIVES

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Texas Department of Transportation

COURTS AND COMMUNITIES

This year, 156 municipal courts reported celebrating National Night Out (October 3, 2017) and 132 reported celebrating Municipal Courts Week (November 6-10, 2017). Every court celebrates these events in their own unique way. Examples of innovative activities in 2017 include decorating city hall with a superhero theme (Cuero Municipal Court), "Western Wear Wednesday" (Hurst Municipal Court), conducting mock trials with local students (Victoria Municipal Court), and playing bean bag toss with "drunk goggles" (Roman Forest 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.

2017 National Night Out Participating Courts:

- Alice Municipal Court
- Alvin Municipal Court
- Arlington Municipal Court
- Azle Municipal Court
- Balcones Heights Municipal Court
- Ballinger Municipal Court
- Bastrop Municipal Court
- Baytown Municipal Court
- Beeville Municipal Court
- Big Sandy Municipal Court
- Boyd Municipal Court
- Breckenridge Municipal Court
- Brenham Municipal Court
- Brookside Village Municipal Court
- Cedar Hill Municipal Court
- Cedar Park Municipal Court
- China Grove Municipal Court
- City of Piney Point Village Municipal Court
- Clarksville Municipal Court
- Cockrell Hill Municipal Court
- College Station Municipal Court
- Collinsville Municipal Court
- Combes Municipal Court
- Conroe Municipal Court
- Converse Municipal Court
- Coppell Municipal Court
- Corpus Christi Municipal Court
- Crockett Municipal Court
- Crystal City Municipal Court
- Dallas Municipal Court
- Dalworthington Gardens Municipal Court
- Dayton Municipal Court
- Denton Municipal Court
- Duncanville Municipal Court
- Eagle Pass Municipal Court
- Edgecliff Village Municipal Court
- Edinburg Municipal Court
- Elmendorf Municipal Court
- Escobares Municipal Court
- Everman Municipal Court
- Florence Municipal Court
- Flower Mound Municipal Court
- Forest Hill Municipal Court
- Fort Worth Municipal Court
- Freer Municipal Court
- Gainesville Municipal Court
- Garden Ridge Municipal Court
- Gatesville Municipal Court
- George West Municipal Court
- Glen Rose Municipal Court
- Glenn Heights Municipal Court
- Godley Municipal Court
- Granite Shoals Municipal Court
- Groves Municipal Court
- Hamilton Municipal Court
- Harlingen Municipal Court
- Haslet Municipal Court
- Highland Park Municipal Court
- Highland Village Municipal Court
- Hutchins Municipal Court
- Indian Lake Municipal Court
- Ingleside Municipal Court
- Irving Municipal Court
- Italy Municipal Court
- Jacinto City Municipal Court
- Jamaica Beach Municipal Court
- Jarrell Municipal Court
- Johnson City Municipal Court
- Junction Municipal Court
- Justin Municipal Court
- Kaufman Municipal Court
- Kempner Municipal Court
- Kingsville Municipal Court
- La Marque Municipal Court
- La Porte Municipal Court
- La Vernia Municipal Court
- LaCoste Municipal Court
- Laguna Vista Municipal Court
- Lamesa Municipal Court
- Lampasas Municipal Court
- Lancaster Municipal Court
- Liberty Hill Municipal Court
- Linden Municipal Court
- Lometa Municipal Court
- Lone Star Municipal Court
- Lott Municipal Court
- Luling Municipal Court
- Lyford Municipal Court
- Manor Municipal Court
- McKinney Municipal Court
- Mesquite Municipal Court
- Mexia Muncipal Court
- Milford Municipal Court
- Mineola Municipal Court
- Missouri City Municipal Court
- Nash Municipal Court
- Natalia Municipal Court
- Navasota Municipal Court
- Oakwood Municipal Court
- Odessa Municipal Court
- Olmos Park Municipal Court
- Palmer Municipal Court
- Parker Municipal Court
- Penitas Municipal Court
- Pleasanton Municipal Court
- Port Neches Municipal Court
- Prairie View Municipal Court
- Rancho Viejo Municipal Court
- Ranger Municipal Court
- Raymondville Municipal Court
- Richmond Municipal Court
- Richwood Municipal Court
- Riesel Municipal Court
- Rio Grande City Municipal Court
- River Oaks Municipal Court
- Rogers Municipal Court
- Rollingwood Municipal Court
- Roman Forest Municipal Court
- Rosebud Municipal Court
- Sanderson Municipal Court
- Sansom Park Municipal Court
- Schertz Municipal Court
- Sinton Municipal Court
- Snyder Municipal Court
- Socorro Municipal Court
- Somerset Municipal Court
- South Houston Municipal Court
- South Padre Island Municipal Court
- Southlake Municipal Court
- Spring Valley Village Municipal Court
- Sweetwater Municipal Court
- Taft Municipal Court

- Terrell Hills Municipal Court
- The Colony Municipal Court
- Thorndale Municipal Court
- Three Rivers Municipal Court
- Tom Bean Municipal Court
- Tyler Municipal Court
- Uvalde Municipal Court
- Van Horn Municipal Court
- Van Municipal Court
- Venus Municipal Court
- Victoria Municipal Court
- Von Ormy Municipal Court
- Wake Village Municipal Court
- Waskom Municipal Court
- West Columbia Municipal Court
- West Tawakoni Municipal Court
- Windcrest Municipal Court
- Winnsboro Municipal Court
- Woodcreek Municipal Court
- Woodville Municipal Court
- Woodway Municipal Court
- Wylie Municipal Court
- Yoakum Municipal Court

2017 Municipal Courts Week Participating Courts:

- Addison Municipal Court
- Albany Municipal Court
- Alice Municipal Court
- Alvin Municipal Court
- Amarillo Municipal Court
- Andrews Municipal Court
- Anna Municipal Court
- Aransas Pass Municipal Court
- Arlington Municipal Court
- Austin Municipal Court
- Azle Municipal Court
- Balcones Heights Municipal Court
- Bastrop Municipal Court
- Baytown Municipal Court
- Boerne Municipal Court
- Boyd Municipal Court
- Brazoria Municipal Court
- Brenham Municipal Court
- Brookside Village Municipal Court
- Brownsville Municipal Court
- Carrollton Municipal Court
- Cedar Hill Municipal Court
- Charlotte Municipal Court
- China Grove Municipal Court
- Cisco Municipal Court
- Cleburne Municipal Court
- College Station Municipal Court
- Columbus Municipal Court
- Combes Municipal Court
- Conroe Municipal Court
- Coppell Municipal Court
- Corpus Christi Municipal Court
- Crystal City Municipal Court
- Cuero Municipal Court
- Dallas Municipal Court
- Dayton Municipal Court
- Denison Municipal Court
- Denton Municipal Court
- Double Oak Municipal Court
- Dublin Municipal Court
- Duncanville Municipal Court
- El Paso Municipal Court
- Elmendorf Municipal Court
- Fate Municipal Court
- Floresville Municipal Court
- Forest Hill Municipal Court
- Fort Worth Municipal Court
- Fredericksburg Municipal Court
- Freer Municipal Court
- Frisco Municipal Court
- Garland Municipal Court
- George West Municipal Court
- Glenn Heights Municipal Court
- Granbury Municipal Court
- Granite Shoals Municipal Court
- Harlingen Municipal Court
- Hempstead Municipal Court
- Hewitt Municipal Court
- Highland Village Municipal Court
- Houston Municipal Court
- Hurst Municipal Court
- Hutchins Municipal Court
- Ingleside Municipal Court
- Irving Municipal Court
- Jamaica Beach Municipal Court
- Jarrell Municipal Court
- Johnson City Municipal Court
- Kempner Municipal Court
- Killeen Municipal Court
- Kingsville Municipal Court
- La Marque Municipal Court
- La Porte Municipal Court
- La Vernia Municipal Court
- Lacy Lakeview Municipal Court
- Lake Dallas Municipal Court
- Lamesa Municipal Court
- Lampasas Municipal Court
- Leander Municipal Court
- Levelland Municipal Court
- Liberty Hill Municipal Court
- Linden Municipal Court
- Lometa Municipal Court
- Lone Star Municipal Court
- Lott Municipal Court
- Luling Municipal Court
- Lyford Municipal Court
- Manor Municipal Court
- McKinney Municipal Court
- Melissa Municipal Court
- Mesquite Municipal Court
- Midland Municipal Court
- Morton Municipal Court
- Nacogdoches Municipal Court
- Navasota Municipal Court
- Parker Municipal Court
- Pearland Municipal Court
- Pearsall Municipal Court
- Pecos City Municipal Court
- Pharr Municipal Court
- Quitman Municipal Court
- Ranger Municipal Court
- River Oaks Municipal Court
- Rosebud Municipal Court
- Round Rock Municipal Court
- Rowlett Municipal Court
- San Antonio Municipal Court
- Sansom Park Municipal Court
- Schertz Municipal Court
- Sealy Municipal Court
- Seguin Municipal Court
- Socorro Municipal Court
- South Houston Municipal Court
- South Padre Island Municipal Court
- Southlake Municipal Court
- Southside Place Municipal Court
- Spring Valley Village Municipal Court
- Taylor Municipal Court
- The Colony Municipal Court
- Thorndale Municipal Court
- Tom Bean Municipal Court
- Universal City Municipal Court
- Uvalde Municipal Court
- Van Horn Municipal Court
- Van Municipal Court
- Victoria Municipal Court
- Waxahachie Municipal Court
- Wilmer Municipal Court
- Windcrest Municipal Court
- Woodville Municipal Court
- Woodway Municipal Court
- Wylie Municipal Court

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TEXAS MUNICIPAL COURTS EDUCATION CENTER
FY18 REGISTRATION FORM:
Regional Judges & Clerks Seminar, 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:** Municipal judge's signature required to attend Bailiffs/Warrant Officers' program.

Judge's Signature: _____ Date: _____

Bailiff DOB: _____ 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.

2017 - 2018 TMCEC Academic Schedule At-A-Glance

Seminar	Date(s)	City	Hotel Information
New Judges & Clerks Seminar	December 11-15, 2017	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Regional Judges & Clerks Seminar	January 8-10, 2018	San Antonio	Omni at Colonnade 9821 Colonnade Blvd. San Antonio, TX 78230
Regional Clerks Seminar	January 22-24, 2018	Galveston	San Luis Resort 5222 Seawall Blvd. Galveston, TX 77551
Level III Assessment Clinic	January 29-Feb 1, 2018	Austin	Crowne Plaza 6121 North IH-35 Austin, TX 78752
Clerks One Day Clinic	February 8, 2018	McAllen	Doubletree Suites 1800 S 2nd St, McAllen, TX 78503
New Judges & Clerks Orientation	February 2, 2018	Austin	TMCEC 2210 Hancock Drive Austin, TX 78756
Regional Judges & Clerks Seminar	February 11-13, 2018	Houston	Omni at Westside
Regional Judges Seminar	February 18-20, 2018	Galveston	San Luis Resort 5222 Seawall Blvd. Galveston, TX 77551
Regional Clerks Seminar	March 5-7, 2018	Addison	Crowne Plaza 14315 Midway Road, Addison, TX 75001
Regional Judges Seminar	March 7-9, 2018	Addison	Crowne Plaza 14315 Midway Road, Addison, TX 75001
Prosecutors Conference	March 21-23, 2018	Houston	Omni at Westside 13210 Katy Freeway Houston, TX 77079
Traffic Safety Conference	March 26-28, 2018	San Antonio	Omni at Colonnade 9821 Colonnade Blvd. San Antonio, TX 78230
Regional Judges & Clerks Seminar	April 2-4, 2018	Lubbock	Overton Hotel 2322 Mac Davis Ln, Lubbock, TX 79401
Teen Court Planning Seminar	April 23-24, 2018	Georgetown	TBD
Regional Clerks Seminar	April 30-May 2, 2018	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd. S. Padre Island, TX. 78597
Regional Attorney Judges Seminar	May 6-8, 2018	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd. S. Padre Island, TX. 78597
Regional Non-Attorney Judges Seminar	May 8-10, 2018	S. Padre Island	Isla Grand Beach Resort 500 Padre Blvd. S. Padre Island, TX. 78597
Bailiffs & Warrant Officers Conference	May 14-16, 2018	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
New Judges & Clerks Orientation	May 18, 2018	Austin	TMCEC 2210 Hancock Drive Austin, TX 78756
Regional Judges & Clerks Seminar	June 4-6, 2018	El Paso	Wyndham Airport 2027 Airway Blvd, El Paso, TX 79925
Juvenile Case Manager Conference	June 11-13, 2018	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Prosecutors & Court Administrators Conference	June 25-27, 2018	San Antonio	Marriott Northwest 3233 NW Loop 410, San Antonio, TX 78213
New Judges & Clerks Seminar	July 16-20, 2018	Austin	Omni Southpark 4140 Governor's Row, Austin TX 78744
Impaired Driving Symposium	August 2-3, 2018	Horseshoe Bay	Horseshoe Bay Resort 200 Hi Cir N, Horseshoe Bay, TX 78657

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

Note: TMCEC Orientation Date Changed to February 2, 2018 (no longer February 9, 2018)

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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.

DRSR Welcomes BuckleBear to our Traffic Safety Resources!

Driving on the Right Side of the Road, one of TMCEC's TxDOT funded traffic safety grants, would like to welcome BuckleBear, the Injury Prevention lap puppet to its repertoire of traffic safety education materials. Bucklebear is easy to use and entertaining, and is best used to help motivate young children to be safe! The puppet has four complete safety units: passenger safety, auto air bag safety, pedestrian safety, and bike safety (with a section on tricycles). Each of the units has an Audio CD with scripts, instructions, storybooks, posters, and reproducible activities. BuckleBear also has shoes, bike helmet, safety vest, and attached safety belt that makes an audible CLICK when properly engaged.

DRSR will send BuckleBear to schools, courts, or community groups to help teach safety to small children. Contact DRSR at elizabeth@tmcec.com or 512.320.8274 to reserve your time with BuckleBear!