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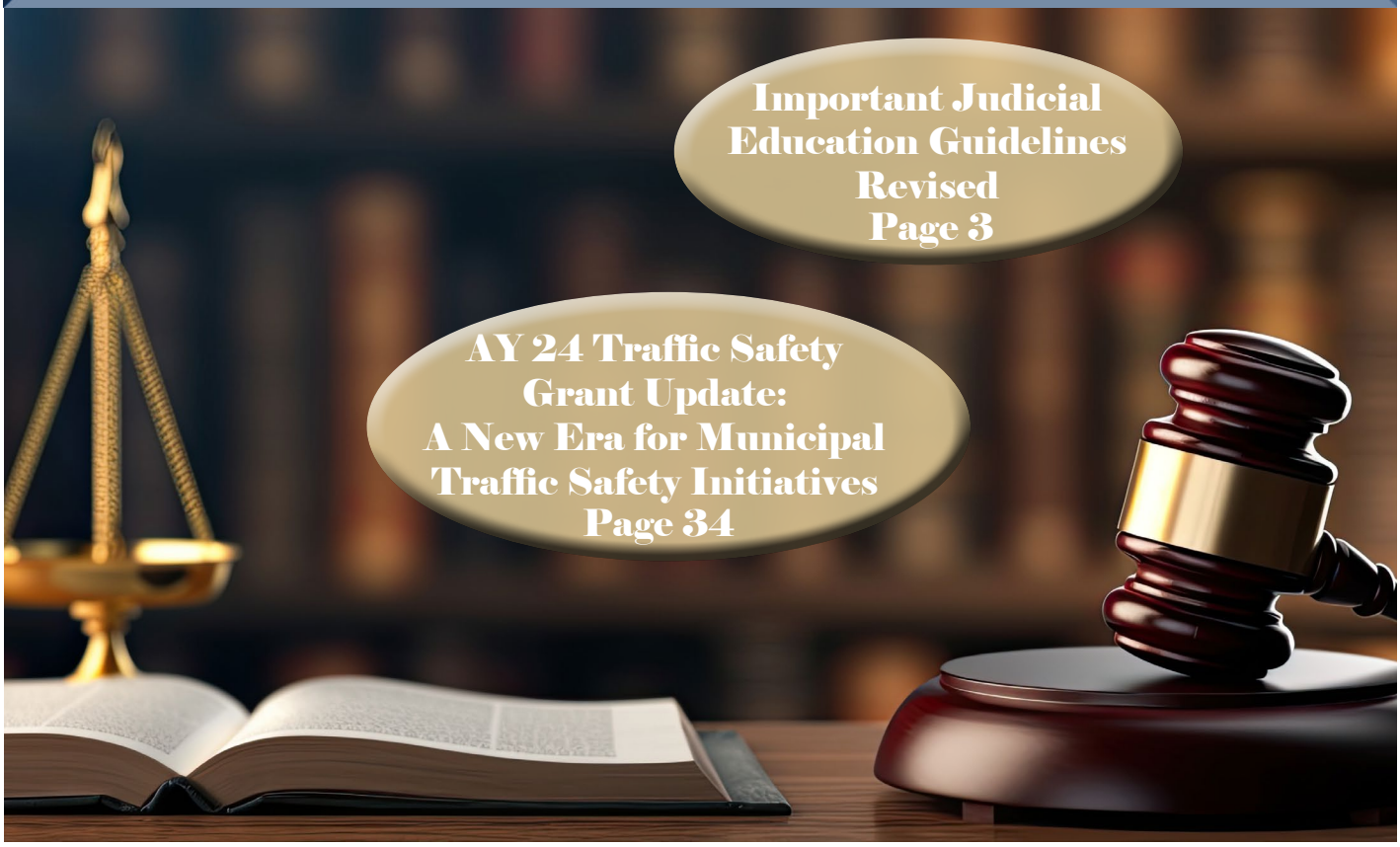

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The Rules of Judicial Education:

Returning to the New Normal

Mark Goodner, General Counsel and Director of Education, TMCEC

After several years of shifting standards and suspended guidelines, this Academic Year marks a return to the Rules of Judicial Education. What follows below is a summary of municipal judges' education requirements and a quick update to recent changes.

The Basics

According to the Rules of Judicial Education, all municipal judges (both attorney and non-attorney) must complete judicial education every year (between September 1st and August 31st). Newly appointed or elected attorney judges must attend a regional seminar within one year of appointment or election and thereafter once every academic year. To qualify as an attorney judge, a judge must be licensed by the State Bar of Texas. Newly appointed or elected non-attorney judges must, within one year from the date of appointment or election, complete 32 hours of continuing judicial education before attending a live, in-person regional seminar the next year and thereafter once every academic year. Completion of a new judge form is required after appointment or election.

After judges have completed at least 2 years of required judicial education, municipal judges can exercise flex-time. This means that while municipal judges must complete 8 hours of continuous education at a live TMCEC Judges Seminar, the remaining 8 hours of flex-time education can be satisfied through live presentation, approved online education, or any combination of approved live events and online education.

Additionally, after 2 years of judicial education, municipal judges may choose to "opt out" of TMCEC education by participating in a relevant, approved live presentation that is at least 8 hours.with the remaining 8 hours through live presentation, online education, or any combination thereof. The choice to "opt out" of TMCEC training is available in alternating years.

The Blip

On March 30, 2020, near the beginning of the COVID-19 pandemic, the Court of Criminal Appeals issued an emergency order suspending all sections of the Rules of Judicial Education that require live, continuous hours of judicial education that would prevent a judge from completing his or her hours during the disaster. Governor Abbott did not renew the disaster declaration on June 15, 2023. Therefore, the emergency order suspending

portions of the Rules of Judicial Education expired July 15, 2023. However, to promote certainty for judges planning their education hours, the Municipal Courts Education Committee passed a resolution providing that the status of the Rules of Education in effect on September 1st were to remain in effect through August 31st of the academic year.

The Return

September 1, 2023 marked a new academic year and a full return to the Rules of Judicial Education. Municipal judges are no longer permitted to satisfy all 16 hours of their annual education requirements by attending 16 separate webinars. Judges have a continuous hours requirement every year. For new judges, the first two years of education must be completed entirely through live, continuous, in-person training. Beginning in year three, judges must complete at least eight continuous hours at a live TMCEC Judges Seminar.

The Tweaks

The Rules of Judicial Education were updated November 20, 2023 and went into effect on November 29, 2023. There are two significant changes in Rule 5 that apply to municipal judges. First, "live TMCEC Judges Seminar" is defined to include synchronous, live programs but does not include on-demand courses. This means that municipal judges may now attend a live, continuous TMCEC Judges Seminar virtually. This academic year is the third consecutive year that TMCEC will offer a Virtual Regional Judges Seminar. This year's virtual seminar will be broadcast live from Lubbock April 23-25, 2024. While webinars (both on-demand and live) will NOT count towards the required 8 continuous hours, they are classified as flex-time and count towards the 16 total required hours.

The second change to the Rules of Judicial Education broadens the topics that may be covered as required by Section 22.1105 of the Government Code. In every academic year ending in 0 or 5, judges must complete two hours of specific instruction related to youth diversion and understanding relevant issues of child welfare, including issues related to mental health and children with disabilities. This requirement was previously limited to instruction related to child welfare and the Individuals with Educational Disabilities Act.

Canon 3: Performing the Duties of Judicial Office Impartially and Dilligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) a judge shall hear and decide matters assigned to the judge excep those in which disqualification is required or recusal is appropriate.

(2) a judge should be faithful to the law and shall maintain professional competence in it, including by meeting all judicial-education requirements set forth in governing statutues or rules. a judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

It should be noted that the Texas Code of Judicial Conduct was also updated in September 2023 related to judicial education. Canon 3B(2) (above) now states that meeting all judicial education requirements is included as a part of maintaining professional competence in the law. With this change it is clear that failing to comply with educational requirements is indeed an ethical violation.

If you have any questions related to judicial education requirements, please contract Mark Goodner at TMCEC.

CASE LAW AND ATTORNEY GENERAL OPINION UPDATE HIGHLIGHTS

Judge Ryan Kellus Turner, TMCEC Executive Director
Regan Metteauer, TMCEC Deputy Director
Ned Minevitz, TMCEC Program Attorney & Senior TxDOT Grant Administrator

Except where noted, the following decisions and opinions were issued between the dates of October 1, 2022 and September 30, 2023. Acknowledgments: Thanks to Judge David Newell, Peyton Maddox, Tiffany Talamantez, and Elaine Riot.

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I. Constitutional Law

A. First Amendment

In true threat cases, the First Amendment requires proof that the accused has some subjective understanding of the threatening nature of a communication. However, in terms of *mens rea*, the First Amendment requires no more than a showing of recklessness.

Counterman v. Colorado, 600 U.S. 66 (2023)

Over a two-year period, Counterman sent hundreds of Facebook messages to C. W., a female singer-songwriter. The two had never met. C. W. did not respond to the Facebook messages. She repeatedly blocked him. However, Counterman repeatedly created a new Facebook account and resumed contacting C. W. Several of his messages indicated that Counterman was surveying her and predicted harm befalling her. Counterman's messages caused C. W. distress. She stopped walking alone, declined social engagements, and canceled some of her performances. C. W. eventually contacted the authorities. Counterman was charged under a Colorado statute making it unlawful to "[r]epeatedly ... make[ ] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... to suffer serious emotional distress." Prior to trial, Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. Following Colorado law, the trial court rejected that argument under an objective standard, finding that a reasonable person would consider the messages threatening. Counterman appealed, arguing that the First Amendment required the State to show not only that his statements were objectively threatening, but also that he was aware of their threatening character. The Colorado Court of Appeals disagreed and affirmed his conviction. The Colorado Supreme Court denied review. The U.S. Supreme Court granted Counterman's petition for certiorari.

In a majority opinion, Justice Kagan, joined by Chief Justice Roberts, Justice Alito, Justice Kavanaugh, and Justice Jackson vacated and remanded the case to the Colorado Court of Appeals. The majority opined that in the context

of a case entailing a true threat (statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals), the First Amendment requires some showing of *mens rea* (culpable mental state) because the absence of such a requirement could have a chilling effect on protected, non-threatening speech. Yet, the Constitution does not require a prosecution to prove specific intent to threaten the victim. Because true threats of violence are an unprotected category of speech, a *mens rea* of recklessness satisfies the need to balance free expression and the danger of a chilling effect on expression with the competing value of regulating unprotected expression. Ultimately, the Court concluded that because Counterman was prosecuted in accordance with an objective standard, requiring the State only to show a reasonable person would understand his statements as a threat, the First Amendment was violated.

Justice Sotomayor filed an opinion concurring in part, joined by Justice Gorsuch. It stated that the Court should not have addressed whether recklessness is sufficient for true-threats prosecutions. Neither of the lower courts addressed whether recklessness was sufficient to prosecute true threats and neither of the actual parties have advocated a recklessness standard. Because Counterman was prosecuted for stalking involving threatening speech, this case does not require resort to the true-threats exemption to the First Amendment. The true-threats doctrine covers content-based prosecutions for single utterances of "pure speech," which need not even be communicated to the subject of the threat. That is not the case here. Counterman was convicted for "stalking [causing] serious emotional distress" for a combination of threatening statements and repeated, unwanted, direct contact with C. W. Delving into *mens rea* entails an unnecessary risk: the risk of overcriminalizing. The risk of overcriminalizing upsetting or frightening speech has only been increased by the internet. It is important to maintain sufficient protection for unintentionally threatening speech. There is no need for the Court to turn a stalking case into a decision about whether something more than recklessness is needed for punishing true threats.

Justice Thomas filed a dissenting opinion critiquing the majority's reliance on New York Times Co. v. Sullivan, 376 U.S. 254 (1965) (holding the First Amendment bars public figures from recovering damages for defamation absent a showing of actual malice). Describing the holding of the decision to be "policy-driven decisions masquerading as constitutional law," he decried the Court extending its analysis into the area of true threats.

Justice Barrett filed a dissenting opinion, joined by Justice Thomas. It explained that Counterman was convicted under a Colorado law that prohibits true threats. The statute requires that the speaker understand the meaning of his words. The question is whether the First Amendment requires more. Colorado maintains that an objective standard is enough (i.e., the government must show that a reasonable person would regard the statement as a threat of violence). Counterman argues that the First Amendment requires a subjective test (i.e., the speaker must intend or know the threatening nature of the statement). It should be easy to choose between these positions because true threats do not enjoy First Amendment protection and most of the other categories of unprotected speech may be restricted using an objective standard. Although it is not the one advanced by Counterman, the Court nevertheless is adopting a subjective standard that speakers must recklessly disregard the threatening nature of their speech to lose constitutional protection. This unjustifiably grants true threats preferential treatment.

Commentary: This decision seeds the legal landscape with questions. When is a true threat analysis required? How do we flesh out the specifics of what constitutes recklessness? How many Texas statutes that utilize an objective standard are likely now ripe for challenge? In terms of probable cause determinations, will *Counterman* affect Texas law enforcement in articulating to a magistrate allegations of harassment, stalking (when based on harassment), and terroristic threat? The implication for prosecutors seems profound. Under *Counterman*, it is no longer sufficient for the prosecution to simply establish the threatening nature of the defendant's statement and that an objective, reasonable person would regard it as threatening. The prosecution must now prove that the defendant was subjectively aware of, but consciously disregarded, a substantial and unjustifiable risk that another person would regard the defendant's statement as threatening. How is this proven? Perhaps recklessness and subjective awareness of the threatening nature of a statement can be proven via circumstantial evidence (e.g., third party communications and social media posts).

In a case of first impression, "tagging" someone on Facebook, while not deemed a true threat, was deemed an intentional or knowing act of communication and sufficient to support a conviction of violation of an emergency protective order.

Boes v. State, No. 07-22-00204-CR, 2023 WL 5242592 (Tex. App.—Amarillo, Aug. 15, 2023, no pet.)

The court of appeals rejected Boes's contention that Section 25.072 of the Penal Code, which criminalizes repeated violations of protective orders, is unconstitutionally overbroad as applied to his non-offensive posts on Facebook, a public forum. The First Amendment's guarantee of free speech generally protects the free communication and receipt of ideas, opinions, and information. However, First Amendment protections are not absolute, and courts have long recognized that the government may nevertheless regulate certain categories of expression. The First Amendment thus permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Threats of violence are outside First Amendment protection. Facebook posts constituting "true threats" are not entitled to First Amendment protection, and neither is Boes's online conduct.

B. Second Amendment

A federal statute prohibiting possession of firearms by someone subject to a domestic violence restraining order entered after a civil proceeding in which a court found a credible threat to another person violates the Second Amendment because it is inconsistent with the historical tradition that delimits the outer bounds of the right to keep and bear arms.

U.S. v. Rahimi, 61 F.4th 443 (5th Cir. 2023)

Commentary: The U.S. Supreme Court granted review of Rahimi on June 30, 2023. This will be the first opportunity for SCOTUS to visit the implications of its decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (The Second Amendment protects an individual's right to carry a handgun for self-defense outside the home. New York's "proper-cause" requirement violated the Fourteenth Amendment in that it prevented law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.). Are there any inconspicuous limitations on the holding in *Bruen*? The lynchpin of the *Bruen* decision is that when the Second Amendment's plain text covers an individual's conduct (i.e., the right to bear arms), the Constitution presumptively protects that conduct. Thus, the government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the scope of the Second Amendment. Get ready for a history lesson on firearms possession and domestic violence.

C. Fourth Amendment

1. Probable Cause

There was probable cause to make a warrantless arrest when a driver was asleep at the wheel in a school pickup line and appeared to be intoxicated even though there was no direct evidence that she ever operated the vehicle or was intoxicated.

State v. Espinosa, 666 S.W.3d 659 (Tex. Crim. App. 2023)

Jennifer Espinosa sat asleep at the wheel of her parked car with the engine running in the middle of a bumper-to-bumper Houston elementary school pickup line at 3:15 p.m. A passerby noticed Espinosa's head at an odd angle. She knocked on the window but could not wake Espinosa up. Another passerby called 911, at which point Espinosa woke up, opened the door, and began speaking unintelligibly. Noticing that the pickup line was not moving as it should, a teacher drove Espinosa's vehicle to a nearby daycare parking lot. None of the witnesses observed Espinosa operating her vehicle, but they did note that the line typically began forming just before 3:00 p.m. and Espinosa was

the fourth or fifth car in line. The police were called to the daycare parking lot, where they observed that Espinosa "smelled like a bar" and "couldn't walk a straight line." She denied having consumed alcohol and stated that, despite being in a school pickup line, she was on her way to work. The officer testified that Espinosa admitted to having recently operated her vehicle. Espinosa also refused to take a Standard Field Sobriety Test or give a blood sample. The officer arrested Espinosa finding that there was probable cause to believe that she was driving while intoxicated.

Espinosa filed a pretrial motion to suppress, which was granted. The trial court relied heavily on *Texas Dept. of Public Safety v. Allocca*, 301 S.W.3d 364 (Tex. App.—Austin 2009, no pet.), which held that evidence of operation of a motor vehicle is insufficient unless there is "at least one additional factor, other than the driver being asleep with the engine running, that indicated the driver had attempted or intended to drive the vehicle."

The State appealed and the court of appeals affirmed the trial court's ruling. The State argued that there was sufficient evidence that Espinosa had operated the vehicle while intoxicated. The court of appeals affirmed the trial court's suppression, citing a lack of evidence that Espinosa had operated the vehicle or that she was intoxicated. Furthermore, it was possible that Espinosa had parked her car in that spot long before the pickup line formed. The Court of Criminal Appeals granted review to determine whether the officer had probable cause to believe that Espinosa had recently operated a vehicle.

In a unanimous decision authored by Judge Hervey, the Court reversed the court of appeals ruling. First, Espinosa's statement that she was going to work could be interpreted as admission to operating her vehicle. She never stated that she arrived in the line long before it formed. It was implausible that the line formed around her parked vehicle. Furthermore, Article 14.01(b) of the Code of Criminal Procedure permits warrantless arrests if an offense is committed in an officer's presence or plain view. If a prudent person would view the facts, circumstances, and reasonably trustworthy information as indicative that a crime is being or was committed, 14.01(b) is satisfied. See *State v. Martinez*, 569 S.W.3d 621 (Tex. Crim. App. 2019). Also, probable cause assessments are based on probabilities and common sense. See *Ornelas v. U.S.*, 517 U.S. 690 (1996). Here, there was sufficient evidence at the time of the arrest to meet the requirements for probable cause. Lastly, the Court distinguished *Allocca*, where the defendant was asleep in his car with the air conditioner running in a legal parking spot as opposed to an active school pickup line. The Court remanded the case to the trial court for further proceedings.

Commentary: The decisions of the trial court and court of appeals seem to have focused on legal sufficiency in finding no probable cause for the warrantless arrest. By remanding the case, the Court of Criminal Appeals did not hold that Espinosa was guilty of Driving While Intoxicated, but only that the arrest was legal and the case should proceed.

2. Search and Seizure

When officers flanked, touched, and asked to see a defendant's hands, it became an investigatory detention requiring reasonable suspicion.

Monjares v. State, 664 S.W.3d 921 (Tex. Crim. App. 2022)

When two Houston police officers observed Monjares, who appeared overdressed for the warm weather, look down when they drove past, they felt that it was "not normal." The officers initiated a conversation with Monjares. When they asked whether he had any weapons, he shook his head "no." The officers then inquired whether they could search Monjares. Rather than answering, he began emptying his pockets. One of the officers put his hand first on Monjares's elbow and then on his lower back and said, "It's a question. Hold on. Talk to me." The other officer moved two steps closer to Monjares with his hands extended and said "manos, manos" ("hands, hands"). Neither officer informed Monjares that he did not have to consent. Eventually, Monjares consented to the search, which led to a conviction for unlawful possession of a firearm by a felon.

On appeal, Monjares argued that the evidence uncovered in the search should have been suppressed because his interaction with the police was an investigative detention without reasonable suspicion rather than a consensual encounter. A divided First Court of Appeals found the encounter to be consensual and thus never reached the issue of whether reasonable suspicion existed. The Court of Criminal Appeals granted Monjares's petition for discretionary review.

In a 5-4 decision delivered by Judge Walker (joined by Judges McClure, Newell, Richardson, and Yeary), the Court concluded that, based on a totality of the circumstances, Monjares's consensual interaction with law enforcement escalated to an investigate detention requiring reasonable suspicion. The officers displayed an authority which indicated that terminating the encounter was no longer an option: flanking him, physically touching him, and asking to see his hands. Furthermore, Monjares evidenced his hesitation to consent to the search by not clearly responding to the search question after he had responded to earlier questions. While the early portion was consensual, the encounter had evolved into a situation where a reasonable person would not have felt free to leave prior to when Monjares consented to the search. The Court remanded the case to determine whether reasonable suspicion existed to justify the investigatory detention.

Judges Hervey, Keel, Keller, and Slaughter dissented without written opinion.

Probable cause to search for information on a seized cell phone did not become stale although the phone was held in evidence for months before a search warrant was obtained.

Veal v. State, No. 01-22-00285-CR, 2023 WL 5616195 (Tex. App.—Houston [1st Dist.] 2023, pet. filed)

Commentary: Was the delay unreasonable? Justice Goodman dissented. Petition for discretion review was filed with the Court of Criminal Appeals on October 13, 2023.

A search warrant was deemed sufficient where an IP (internet protocol) address was implicated in child pornography. Although IP addresses are subject to periodic change, probable cause did not grow stale.

Bordelon v. State, 673 S.W.3d 775 (Tex. App.—Dallas 2023, no pet.)

D. Sixth Amendment

The court of appeals erred by not conducting a Barker speedy trial balancing test and finding that it was unable to review a defendant's speedy trial claim because the trial court did not "conduct a meaningful hearing."

Taylor v. State, 667 S.W.3d 809 (Tex. Crim. App. 2023)

E. Fourteenth Amendment

Holding a pre-trial hearing in the defendant's absence did not violate the Due Process Clause, and any violation of Article 28.01 of the Code of Criminal Procedure was harmless.

King v. State, 666 S.W.3d 581 (Tex. Crim. App. 2023)

King was charged with evading arrest or detention with a motor vehicle and with theft of a firearm. The trial court held a pre-trial hearing on a motion in limine regarding punishment evidence filed by the defense. King's trial counsel attended the hearing, but King was not present in the courtroom.

While King was still outside the courtroom, the trial court granted the unopposed motion in limine after a brief discussion with the attorneys regarding whether King intended to stipulate to an enhancements allegation, the fact

that King had told his trial counsel that he could fire him to delay the trial, and whether King might be disruptive at trial. The hearing then went off the record for two minutes. When King returned to the courtroom, trial counsel advised King of his right to plead not guilty; King said that he wanted to plead guilty on the evading arrest charge and have the jury assess punishment. The jury found King guilty and assessed punishment.

On direct appeal, King argued that his absence from the hearing violated the 14th Amendment's Due Process Clause and Article 28.01 of the Code of Criminal Procedure. The court of appeals agreed but found the error to be harmless because King's presence did not bear a reasonably substantial relationship to his defense and his absence did not affect the outcome of the trial.

King's petition for discretionary review asked, "Can harmlessness be presumed from a silent record when a defendant has been denied his constitutional and statutory rights to be present during a pretrial proceeding?"

In a plurality opinion by Presiding Judge Keller, the Court opined that there was no due process violation from King's absence from a stage of a prosecution when King's presence did not bear a reasonably substantial relationship to the defense.

Judge Newell filed a concurring opinion joined by Judge Hervey and Judge Walker. Rather than analyze whether error occurred in this case or even analyze the proper standard of harm, the Court should have distinguished the case law King was relying upon to affirm the court of appeals. The concurring opinion also noted that the Court only granted review to address harm considering the incomplete record, and yet a plurality analyzed the law surrounding the right to be present.

Judge Yeary and Judge McClure concurred without written opinion.

Conducting a jury trial in a jail courtroom, housed within the Medina County Jail building, created an unacceptable risk that the presumption of innocence afforded to the defendant was eroded. The trial setting was an inherently prejudicial practice.

Nixon v. State, 674 S.W.3d 384 (Tex. App.—San Antonio 2023, pet. granted)

Commentary: In declaring this opinion a matter of first impression, the court of appeals seemingly welcomed review of this decision. The petition for discretionary review was granted by the Court of Criminal Appeals on November 1, 2023. Stay tuned!

Section 545.157 of the Transportation Code ("Move Over and Slow Down") is not unconstitutionally vague because it does not define the term "approaching."

State v. Zuniga, 656 S.W.3d 925 (Tex. App.—Houston [14th Dist.] 2022, pet ref'd)

II. Procedural Law

A. Pre-Trial

1. Bail and Bond Conditions

The *Younger* abstention doctrine applies to claims challenging the constitutionality of Texas procedures pertaining to felony and misdemeanor pretrial bail. *ODonnell v. Harris County* is overruled.

Daves v. Dallas County, 64 F.4th 616 (5th Cir. 2023)

This case began with pretrial detainees in Dallas County filing a Section 1983 lawsuit action against the county and its judges, challenging procedures used in setting felony and misdemeanor pretrial bail. The lawsuit alleged Dallas

County was violating detainees' right to due process and equal protection by imposing and enforcing secured money bail without inquiry into and findings concerning detainees' ability to pay. A federal trial court issued a preliminary injunction. Parties filed interlocutory appeals. On rehearing, en banc, the court of appeals in *Daves I* vacated and remanded.

On remand, the federal trial court declared that challenge to bail procedures was moot considering changes to Texas bail laws and declined to abstain based on *Younger* and its progeny. Having retained jurisdiction, the court of appeals, en banc, obtained supplemental briefing from parties. Subsequently, in *Daves II*, eight of fifteen judges on the 5th Circuit, in an about-face, held that the *Younger* abstention doctrine applied to claims challenging the constitutionality of Texas criminal procedure pertaining to felony and misdemeanor pretrial bail. Accordingly, the court overruled its prior decision in *ODonnell* and concluded that the instant case was mooted by intervening changes in state law made by S.B. 6 during the 87th Legislative Session, including Article 17.028(a) of the Code of Criminal Procedure, which requires magistrates to set bail "imposing the least restrictive conditions" within 48 hours of arrest. Other changes in the law require individual consideration of the defendant's ability to pay as well as the safety of the community, law enforcement, and alleged victims.

The majority opinion states that the previous injunctions in both *Daves* and *ODonnell* "plainly show federal court involvement to the point of ongoing interference and audit of state criminal procedures."

Commentary: Appreciating the significant implication of this decision (*Daves II*) requires understanding (1) the Younger abstention doctrine and (2) the 5th Circuit's previous opinion in *ODonnell v. Harris County*.

In *Younger v. Harris*, 401 U.S. 37 (1971), the U.S. Supreme Court held that federal courts shall decline to exercise jurisdiction over a state criminal defendant's claims when three conditions are met: (1) the federal proceeding would interfere with an ongoing state judicial proceeding; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has an adequate opportunity in the state proceedings to raise constitutional challenges.

In *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018), a three judge panel of the 5th Circuit Court of Appeals held, in part, that Harris County's bail system violated due process because Texas law created a protected liberty interest in a right to bail and the current procedure did not sufficiently protect detainees from magistrates imposing bail as an instrument of oppression. Significantly, the 5th Circuit affirmed the trial court's holding that Harris County's claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions as announced in *Younger*.

For half a decade, *Odonnell* fueled the fire of advocates seeking to impose pretrial bail reform through impact litigation in multiple federal trial courts. *Daves* is just one example. However, in the last year, *Daves* has seemingly thrown a massive wet blanket on such efforts.

Like a bolt of lightning from a clear blue sky, the decision in *Daves II* caught many people, particularly criminal justice reform advocates, by surprise. This time last year, in our summary of *Daves I*, we explained that S.B. 6 appears to have achieved its bail reform goals and serves as a reset for bail litigation. However, the implication of *Daves II* goes much further. It potentially signifies the end of federal courts in Texas judicially imposing pretrial bail reform. In finding that *Daves* and *ODonnell* should have never been filed in federal court, it is implied that Harris County unnecessarily spent over $100 million implementing edicts based on an opinion that should have never been issued.

Is this the end of the *Daves* saga? Petition for certiorari was filed at the U.S. Supreme Court on July 31, 2023. Stay tuned.

Civil filing fees are part of the court costs that a bonding company must pay if a bond is forfeited except when a statute exempts the State from liability for a particular filing fee, unless another provision requires a civil defendant to pay the fee if the State prevails.

Continental Heritage Insurance Company v. State, 675 S.W.3d 315 (Tex. Crim. App. 2023)

The trial court erred by denying habeas relief on the bond condition set by a magistrate requiring the defendant to have no contact with his wife.

Ex parte Allen, 657 S.W.3d 866 (Tex. App.—Texarkana 2022), no pet.).

The condition of bond prohibiting Allen from contact with his wife of 37 years was an abuse of discretion entitling Allen habeas relief. Allen was charged with committing aggravated assault, but his wife was not the victim. In contravention of Articles 17.15 and 17.40(a) of the Code of Criminal Procedure, the bond condition was not reasonable because there was no evidence the no contact order would ensure the safety of the victim or the safety of the community. One purpose of release on bail pending trial is to prevent infliction of punishment before conviction. Discretion to set conditions of bail is not unlimited and should not be used oppressively.

May a magistrate deny bail following a designation under Article 17.027(a)(1) of the Code of Criminal Procedure?

Tex. Att'y Gen. Op. AC-0002 (2023)

Article 17.027(a)(1) of the Code of Criminal Procedure concerns the release on bail of a defendant charged with a felony committed while on bail for a prior felony in the same county. A court designated in writing pursuant to Article 17.027(a)(1) to set bail under these circumstances is not authorized to deny bail unless the designated court is a district court. Only a district judge may deny bail to a person accused of a felony committed while on bail for a prior felony pursuant to Texas Constitution Article I, Section 11a.

Article 103.0031(h) of the Code of Criminal Procedure prohibits a commissioners court from entering into a third-party contract for collection services on forfeited attorney surety bail bonds.

Tex. Atty'y Gen. Op. No. JS-0001 (2022)

Article 103.0031 generally permits a county or a municipality to enter into a third-party collection contract to recover money owed on certain items in criminal cases, including forfeited bonds. The reference to a non-existent "section" in Article 103.003(h), providing that "[t]his section does not apply to commercial bail bonds," is a scrivener's error that creates an absurdity, such that a court would likely construe its exception to refer to Article 103.0031.

A court would likely conclude that attorney sureties execute "commercial bail bonds" to the extent they sell their bonding services for a fee or commission. As such, Article 103.0031(h) would prohibit a commissioners court from entering into a third-party contract for collection services on forfeited attorney surety bail bonds. Instead, forfeited attorney surety bonds would be collected by district and county attorneys, clerks of district and county courts, sheriffs, constables, and justices of the peace pursuant to Article 103.003(a).

Commentary: By extension, the reasoning underlying this attorney general opinion would also apply to a municipal court clerk as Article 103,003(a-1) similarly states that "The clerk of a municipal court may collect money payable to the municipal court under this title."

2. Juvenile Confessions

The magistrate "used" the procedure contained in Section 51.095 of the Family Code for determining the voluntariness of a juvenile"s statements to police, triggering the statute's exclusionary clause.

State v. Torres, 666 S.W.3d 735 (Tex. Crim. App. 2023)

Torres, a juvenile suspect in a murder investigation, was brought in for questioning. While reading the statutorily required warnings from a form, the magistrate requested on the recording (but outside the officer's presence) that the officer return the juvenile and a video recording of his statement to him after questioning so that the magistrate could make a voluntariness determination. In so doing, the magistrate invoked Section 51.095(f) of the Family Code, which states:

A magistrate who provides the warnings required by Subsection (a)(5) for a recorded statement may at the time the warnings are provided request by speaking on the recording that the officer return the child and the recording to the magistrate at the conclusion of the process of questioning. The magistrate may then view the recording with the child or have the child view the recording to enable the magistrate to determine whether the child's statements were given voluntarily. The magistrate's determination of voluntariness shall be reduced to writing and signed and dated by the magistrate. If a magistrate uses the procedure described by this subsection, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily [([(emphasis added].)]

Law enforcement did not, however, return the juvenile and the recording to the magistrate after questioning. No voluntariness determination was made. Defense counsel filed a motion to suppress the juvenile's statement before trial. The trial court granted the motion. The State appealed. The court of appeals affirmed. The State appealed again. The Court of Criminal Appeals affirmed.

Writing for the Court, Judge Yeary explained that by making the request following the express terms of the statute, the magistrate "used" the procedure outlined in Section 51.095(f). To find otherwise would equate the failure of law enforcement to comply with the request with finding the magistrate did not use the procedure. The procedure was used when the initial request was made. The magistrate "used the procedure" outlined in the statute even though law enforcement did not comply with the request. No voluntariness determination was made. Thus, the suppression of the juvenile's statements was proper.

In a concurring opinion, Presiding Judge Keller, joined by Judge Hervey, responded to the State's statutory construction argument that a procedure is not "used" unless completed. The statute clearly contemplates that a magistrate's request will be complied with by law enforcement and that the State's interpretation not only thwarts legislative intent but could encourage law enforcement to disregard a magistrate's request.

Judge Newell also filed a concurring opinion stating that equating the ambiguous phrase "uses the procedure" with "starting the procedure" is unnecessary. Such an interpretation could have the unintended consequence of removing a magistrate's discretion after a request has been made. Law enforcement was required, based on the magistrate's request, to return the juvenile to the magistrate along with the recording. This failure to comply violated the Family Code and warranted suppression under Article 38.23 of the Code of Criminal Procedure.

Extra statements made by the magistrate after giving a juvenile warnings under Section 51.095 of the Family Code did not render the otherwise accurate warnings insufficient or make the juvenile's post-warnings statement involuntary.

Ochoa v. State, No. 02-21-00174-CR, 2023 WL 4630637 (Tex. App.—Fort Worth July 20, 2023, no pet.)

Ochoa, a 14-year-old suspect, was interviewed by police at the sheriff's office. During the interview, a magistrate entered with Ochoa's mother and gave him warnings under Section 51.095 of the Family Code. The interview continued, during which Ochoa made a confession.

On appeal, Ochoa argued that his post-warnings statement was involuntary based on the magistrate "misadvising" him of his rights under Section 51.095 of the Family Code. The court of appeals found that the magistrate read to Ochoa each right listed in Section 51.095, and in that respect, the magistrate complied with Section 51.095. However, the magistrate gave additional explanations of his own for some of those rights. The court then determined whether the additional language rendered the otherwise accurate warnings insufficient, making Ochoa's post-warnings statement involuntary.

First, Ochoa complained that the magistrate advised him that he was only a witness in the case. Ochoa had been brought to the station to be questioned as a witness, not a suspect, but by the time the magistrate arrived, the officer had begun to suspect Ochoa's involvement in the offense. The court found that Section 51.095 does not have a separate set of warnings for persons interviewed as witnesses rather than suspects, and Ochoa did not explain how his status as witness or suspect changed the warnings that he was entitled to receive under Section 51.095 or rendered his statement as not freely given. Further, the magistrate told Ochoa that he had the same rights "any time that he came in contact with law enforcement in any way" and provided Ochoa with the same warnings required to be given in any custodial interrogation.

Second, the magistrate informed him that any statement he made could be used as evidence but then told him, "I'm not saying that it would, you just have to be aware that anything you say could come back—you could be asked to talk about it or verify it at a later point in time." Ochoa argued that with this wording, the magistrate "downplayed the possible impact of any statement [that Ochoa] made later being used against him." The court of appeal disagreed. Although this unnecessary language did not address the fact that Ochoa's statement could be used as evidence—possibly because the magistrate had been told that Ochoa was there only as a witness—the magistrate expressly told Ochoa that "anything" he said could be used as evidence against him. The court held that this additional language did not render Ochoa's decision to confess as not freely given.

The court affirmed the trial court's judgment.

Commentary: The moral of the story for magistrates: anything you say may be held against you, too.

3. Statutes of Limitations

A charging instrument filed on July 9, 2021 for an offense allegedly committed on July 7, 2019 was time-barred by a two-year statute of limitations.

Ex parte Vieira, 676 S.W.3d 654 (Tex. Crim. App. 2023)

A charging instrument for an offense allegedly committed on July 7, 2019 was filed on July 9, 2021. The statute of limitations for the offense was two years. Based on their construction of Article 12.04 of the Code of Criminal Procedure in conjunction with Section 311.014(c) of the Government Code, the First Court of Appeals in Houston held that the charging instrument was timely filed.

Article 12.04 provides that, for the purposes of statutes of limitations (i.e., filing deadlines), "[t]he day on which the offense was committed and the day on which the [charging instrument] is presented shall be excluded from the computation of time."

Section 311.014(c), part of the Code Construction Act, provides that "[i]f a number of months is to be computed by counting the months from a particular day, the period ends on the same numerical day in the concluding month as the day of the month from which the computation is begun, unless there are not that many days in the concluding month,

in which case that period ends on the last day of that month."The court of appeals found that these two provisions, working in tandem, gave the State until July 9, 2021 to bring formal charges in this case: Article 12.04 excluded July 7, 2019; the Section 311.014(c) clock started on July 8, 2021; and Article 12.04—by excluding the date of filing (July 9, 2021)—permitted filing on July 9, 2021.

On review, the Court of Criminal Appeals rejected the court of appeals' construction in a unanimous decision. First, Section 311.014(c) itself provides that its computation begins "*from* a particular day." In this case, that day was July 7, 2019. Starting the Section 311.014(c) analysis on July 8, 2019 was incorrect. Article 12.04 does not mean that the computation begins the day after the alleged offense, it means that the date of the offense is excluded from the computation—a subtle yet important distinction. Finally, the Court notes that it is unclear whether Section 311.014(c) applies at all because Chapter 311 provides a distinct method of computing a period of "days." Article 12.04 provides for calculating time based on years, which Chapter 311 is silent on. According to the Court, it is at least arguable that Section 311.014(c) is inapplicable to Article 12.04.

The Court concluded that, based on a plain reading of Article 12.04, the last day that the State could have timely brought charges in this case was July 8, 2021.

Commentary: Vieira can be boiled down as follows: when determining the deadline to file a criminal charging instrument, the date of the alleged offense does not count. Take the day after the offense, adjust the year accordingly, and that is the filing deadline. For example, if a person is accused of speeding on August 4, 2023, the last day a complaint may be filed in municipal court is August 5, 2025. Also, note that if there is a leap year (i.e., February 29th) that falls within a statute of limitations computation, the State will get one extra day to file the case (731 days instead of 730) but the date on which the case must be brought will be the same as if there was no leap year.

4. Plea Bargains

The prosecutor's agreement to dismiss an assault charge if the defendant pleaded guilty to DWI was in nature a plea-bargain agreement, not an immunity agreement.

State v. Hatter, 665 S.W.3d 584 (Tex. Crim. App. 2023)

Commentary: This case was a point of focus in AY 22 and summarized with detail in the "Case Law & Attorney General Opinion Update," *The Recorder* (February 2022) at 33. At the time, we commented that it was very interesting to see a trial court's "order of dismissal" upheld on appeal and that, as a practical matter, the trial court generated a dismissal outside the motion of a prosecutor. The holding in this case was met with general skepticism at TMCEC seminars. In this unanimous opinion by Judge Walker, reversing the court of appeals, the Court of Criminal Appeals, affirms the skepticism. The Court clarifies that it wasn't an immunity agreement and criticizes the attempt to treat it as such. Importantly, barring evidence of consideration in the record, the Court does not affirm the enforceability of a unilateral promise by the State to dismiss a case as a plea bargain.

B. Trial

1. Discovery and Ex Parte Communications

A trial court does not have authority to hold an ex parte hearing and enter an ex parte order compelling a third party to produce documents without notice to the prosecutor representing the State.

In re City of Lubbock, 666 S.W.3d 546 (Tex. Crim. App. 2023)

The defendant was charged with a felony in district court. Defense counsel filed a pre-trial "Ex Parte Motion for Court Ordered Production of Documents and/or Things," seeking a court order to produce documents held by the Lubbock Police Department. Defense counsel relied upon *Ake v. Oklahoma*, 470 U.S. 68 (1985) and *Williams v. State*, 958 S.W.2d 186 (Tex. Crim. App. 1997) (cases having to with ex parte requests for appointment of psychiatric experts) as support for seeking the records ex parte, arguing that the defense should not be required to disclose its investigative strategies or theories through its request for discovery.

The trial judge granted the motion and ordered the Lubbock Police Department to provide the requested records. The trial court did not disclose the order to the Lubbock County District Attorney's Office.

The City of Lubbock, believing that the trial court exceeded its authority, filed a petition for writ of mandamus before the court of appeals seeking to have the order set aside. The court of appeals denied the City of Lubbock's (Relator's) petition, concluding that that the use of ex parte proceedings to protect defensive strategy is widely accepted by the courts and that the trial court acted within its authority when it entered the ex parte order at issue and denied mandamus relief.

The Court of Criminal Appeals conditionally granted mandamus relief. Writing for the Court, Judge Newell stated that the Court only needed to decide whether the ex parte nature of the proceeding was expressly and constitutionally authorized. Mandamus relief is available if the record establishes that (1) the relator has no adequate remedy at law and (2) that what it seeks to compel is a purely ministerial act, not an act involving a discretionary judicial decision. It is available for a novel issue or one of first impression with uncontested facts when the law points to but one clear result. Citing the Supreme Court of Texas in *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992), "a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in appellate reversal by extraordinary writ." According to the Court, the first prong was satisfied because mandamus is the proper remedy for a trial court's action against a non-party. The second prong was satisfied because the trial court was without authority to entertain an ex parte request for third-party discovery. It lacked authority to enter an ex parte order for that discovery. No statutory provision grants a trial court express authority to consider a discovery request in an ex parte proceeding. As a matter of constitutional law, neither *Ake v. Oklahoma* nor *Williams v. State* had ever been extended to cover criminal discovery and no justification existed in this case.

In a concurring opinion, Presiding Judge Keller, joined by Judge Keel, questioned the Court's citation to the Supreme Court of Texas decision in *Walker v. Packer* because mandamus jurisprudence in civil cases differs from mandamus jurisprudence in criminal cases. They asserted that the Court's reliance on *Walker* is misplaced because it embodies a relaxed mandamus standard applicable in civil law. If this was intended, there should be an explicit acknowledgment of such intent and an explanation.

Judge Slaughter dissented without written opinion.

Commentary: This case is a bit counterintuitive. The City of Lubbock, on behalf of its police department, sought mandamus, not the Lubbock County District Attorney on behalf of the prosecution. Because the trial court and court of appeals perpetuated the ex parte conduct, the District Attorney, Sunshine Stanek, was kept in the dark. By the time she was aware of what was transpiring, the city had already sought relief. Accordingly, the Court decided to treat Stanek's filing as an amicus brief and dismissed her motion for leave to file as improvidently granted. When seeking relief from an order of district or county court, the Court of Criminal Appeals will not consider an application for mandamus relief unless the relator has first sought relief from an intermediate court of appeals, absent a compelling reason. See *In re State ex rel. Stanek*, 666 S.W.3d 543 (Tex. Crim. App. 2023).

Setting all the mandamus stuff aside, this unusual case provides a valuable lesson for the bench and bar regarding ex parte communication and *in camera* inspections. An ex parte communication includes communication that concerns matters between a lawyer representing a client and a judicial officer and that occurs outside of the presence and without the consent of other parties to the litigation or their representatives. *In camera*, on the other hand, refers

most often to action taken in a judge's chambers. Trial courts can inspect evidence *in camera* when there is a dispute about whether such evidence can be disclosed. It is important to appreciate that *in camera* inspections and ex parte proceedings are distinct. While an *in camera* inspection takes place in the absence of the parties, the proceeding is not ex parte. Both parties are involved in the hearing that results in the *in camera* inspection. The request for disclosure is not confidential and both parties can argue the merits of whether evidence should be disclosed. An *in camera* inspection is still part of an adversarial proceeding and does not diminish judicial impartiality. In contrast, an ex parte hearing transforms the nature of a legal proceeding by eliminating the participation of one of the parties and is not allowed unless expressly authorized by law. Ex parte communications diminish judicial impartiality and threaten public confidence in the judicial process. This is why the Code of Judicial Conduct, with a few important exceptions, prohibits all members of the judiciary from permitting or considering ex parte communications.

2. Waiver and Consent

As a matter of first impression, a violation of the right to jury trial is structural error not subject to harmless-error analysis. The evidence was insufficient to show that the appellant, a Spanish speaker, knowingly and intelligently waived his right to a jury trial where there was no written waiver and the record did not support the trial court's findings, which included a judgment prepared by clerks using software that prepopulates the jury waiver recital.

Rios v. State, 665 S.W.3d 467 (Tex. Crim. App. 2022)

Saul Ranulfo Herrera Rios, the appellant, is a Mexican national and native Spanish speaker whose ability to read and write English is limited. He pled not guilty and did not execute a written jury waiver. The trial judge did not admonish him about his right to a jury trial nor was a jury waiver discussed in open court. The trial court found him guilty and sentenced him. On appeal, he filed a motion to abate for findings of fact and conclusions of law, which the Fifth District Court of Appeals granted. The court of appeals asked the trial court to determine: (1) whether the appellant executed a written jury waiver; (2) whether the appellant waived his right to a trial by jury; (3) whether the appellant consented to a trial before the court without a jury; and (4) whether the judgment's recitation that the appellant waived the right of trial by jury was accurately reflected in the trial proceedings.

The trial court determined that the appellant waived his right to a jury. The appellant made two arguments to the court of appeals. First, he argued that the trial court violated Article 1.13(a) of the Code of Criminal Procedure, which sets out the requirements for a defendant to waive the right to a jury trial and the duties of the trial court. Second, he argued that he did not waive his right to a jury trial. The court of appeals disagreed on both counts. It acknowledged that Article 1.13(a) was violated but concluded that the error was harmless under *Johnson v. State*, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002). In *Johnson*, the Court of Criminal Appeals reasoned that because the federal constitution does not require a defendant to execute a written jury waiver, Article 1.13(a) error is harmless if the evidence shows that the defendant voluntarily, knowingly, and intelligently waived his right to a jury. The court of appeals also relied on several pass slips (boilerplate motions for a continuance) signed by the appellant showing that the case was set for a bench trial, the lack of an objection from trial counsel before trial, the lack of an objection from the appellant even though he testified during both phases of the trial, the appellant's motion for new trial in which he did not raise the jury waiver issues, and the judgment recitation stating that the appellant waived a jury because there was no direct proof contradicting the recital.

Judge Hervey, writing for the majority, concluded that the evidence is insufficient to show that the appellant knowingly and intelligently waived his right to a jury trial. No jury waiver was executed in this case and the right to a jury trial was never discussed in open court. While pass slips were admitted at the abatement hearing, the testimony about them was inconsistent, and the trial court did not make findings about when the pass slips were filled out, by whom, or whether the appellant understood the significance of the pass slips marked "Trial by the Court" since he did not read or understand English well. In the light most favorable to the trial court's ruling, the record at most

shows that trial counsel had his client sign blank pass slips, which trial counsel took to the prosecutor as proof of his client's presence in court and to obtain a continuance, before returning to give his clients the pink carbon copy of the pass slip. The majority also found that the record shows that trial counsel vaguely testified that he advised the appellant "of his right to a jury trial" but does not show, because no one asked, what advice trial counsel gave to the appellant about his right to a jury. Also important in this case is that trial counsel testified that the judge said that he did not want to try the case. The judge changed his mind and quickly commenced the trial but the record does not show whether the appellant was told about the comment. The record shows that the arraignment did not include an admonishment about the right to a jury. Rather, the trial court simply accepted the appellant's not guilty plea.

The majority also found it relevant that the record does not show that the appellant was a sophisticated person with legal acumen competently navigating his way through the Texas criminal justice system. It shows the opposite. He could not interact with anyone without a Spanish speaking interpreter. The majority considered the rest of the trial court's findings, including the judgment recital, which was prepared by clerks using software that prepopulated the jury waiver recital; however, nothing informed, supported, or spoke to whether the defendant expressly, intelligently, and knowingly waived the right to a jury.

The majority turned to the issue of harm and whether a violation of the constitutional right to a jury trial is subject to a harmless-error analysis. The Court notes that whether a violation of a defendant's right to a jury trial is structural error defying a harm analysis because the error affected the framework of the trial is a question of first impression, never resolved by the Court or the U.S. Supreme Court. Though the Court does not usually recognize structural errors until the U.S. Supreme Court identifies them, the majority stated it believed resolution of this issue was sufficiently clear that it would deviate from the usual practice and held that a violation of the federal constitutional right to a jury trial is structural error.

The majority concluded that the U.S. Supreme Court's reasoning in *Sullivan v. Louisiana*, 508 U.S. 275 (1993) controls the issue. In *Sullivan*, the U.S. Supreme Court held that the submission of an unconstitutional definition of "reasonable doubt" was structural error because it deprived the defendant of his right to a jury trial and a verdict of guilt beyond a reasonable doubt. In analyzing the issue, the Supreme Court said that "[t]he inquiry ... is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Even though *Sullivan* and this case deal with different types of violations of the right to a jury, the majority believes that the facts of this case are even more compelling than those in *Sullivan*. According to the majority, the appellant was completely denied his constitutional right to a jury and attempting to determine harm would require hypothesizing what verdict a fictional jury would have rendered based on evidence it never heard.

Judge Keel concurred and Judge Slaughter dissented without written opinions.

Judge Keller filed a dissenting opinion agreeing with the court of appeals that the record shows he waived his right to a jury trial. The trial court resolved the disputed issues against the appellant. The trial court found that the appellant consented to a bench trial and that he knew that a bench trial was occurring. Judge Keller states that the Court should defer to those findings because they are supported by the record and defer to the trial court's findings of credibility.

Commentary: For appellate law nerds, the headline of this case is that a violation of the right to jury trial is structural error. However, much can be gleaned by everyone from the facts of this case. Courts have applied many factors to the facts of a case when determining whether a jury trial waiver was knowing and intelligent. This case lists several examples: whether the defendant knew about his right to a jury and the nature of the right, whether the defendant executed a written jury waiver, whether the trial court admonished the defendant about his right to a jury, the defendant's education and background and legal sophistication, the level of the defendant's involvement in his defense, his ability to understand courtroom discussion regarding waiver of a jury, the words and actions of the defendant, discussions with trial counsel about the right to a jury and representations of trial counsel, what language the defendant understands and the presence of an interpreter if not English, the lack of an objection before or shortly

after the bench trial began, and whether there is a docket entry indicating that the defendant expressly waived his right to a jury on the record and that waiver was voluntary, knowing, and intelligent.

Though there is much disagreement about the sufficiency of the record in this case, a few things are clear. The appellant did not speak English and an interpreter was insufficiently available. The trial judge did not admonish him about his right to a jury trial nor was a jury waiver discussed in open court. The judgment was prepared by clerks using software that prepopulates the jury waiver recital for bench trials. While no judge or clerk has control over everything that is said to or understood by a defendant, each court is accountable for its own practices, which should protect the defendant's right to a jury trial.

The right to withdraw a waiver of counsel "at any time" under Article 1.051(h) of the Code of Criminal Procedure is temporal and not absolute.

Huggins v. State, No. PD-0590-21, 2023 WL 5729843 (Tex. Crim. App. Sept. 6, 2023)

In his petition for discretionary review, the appellant argued that Article 1.051 of the Code of Criminal Procedure gave him an absolute right to withdraw his waiver of counsel just before voir dire began, pointing out that the statute prohibits repetition of a proceeding already held or waived and grants discretion to the trial court in allowing newly appointed counsel more time to prepare. He argued that courts may not engraft additional restrictions onto it, citing *McClintock v. State*, 541 S.W.3d 63, 66 (Tex. Crim. App. 2017). The Court disagreed, finding that the plain language of the statute promotes the efficient administration of justice and prevents delay, whereas the appellant's interpretation would sometimes sacrifice these goals for the sake of indulging a defendant's vacillations. Judge Keel, writing for the majority, went on to say that a defendant may not use his right to counsel to manipulate the court. The appellant's interpretation would allow such manipulation. Further, the trial court was not required to unconditionally accommodate the appellant's vacillations between representation by counsel and self-representation.

In this case, the appellant asserted his right to self-representation, then asserted his right to counsel, then waived his right to counsel, and again asserted his right to self-representation. The record reflects that, by the time the appellant waived counsel a second time, he did so knowingly and voluntarily. The record also supports the trial court's finding that when the appellant asked to withdraw his counsel waiver a second time, he was trying to "jack the system around." Under these circumstances, it was within the trial court's discretion to reject the appellant's request.

Judge Hervey concurred without written opinion.

Judge Yeary filed a dissenting opinion, stating that "at any time" would presumably include before voir dire, or even before the entry of a guilty plea in front of a trial judge while a jury venire is waiting in the hallway, as happened here. Judge Yeary notes that it is true that a defendant will not ordinarily be "entitled" to redo any part of the proceedings that have already occurred, or that he previously waived, while he was without counsel. Judge Yeary explains that the statutory withdrawal of his waiver of counsel operates prospectively. The defendant has no recourse regarding the results of his prior decision to proceed without counsel; however, by the literal terms of the statute, he "may" withdraw his waiver, and therefore must be allowed to proceed prospectively with the assistance of counsel from "any" point in "time" at which he chooses to revoke his earlier waiver. In response to the majority opinion, Judge Yeary notes that the only language from Article 1.051(h) that speaks to "the efficient administration of justice" or the prevention of "delay" is the clause that bans retroactive operation of a withdrawal, preventing the repeat of earlier, uncounseled proceedings. Judge Yeary calls it a judicial invention that an unfettered permission to withdraw a previous waiver of the right to counsel should be avoided because of the potential it may otherwise have to clog the gears of justice.

The Supreme Court of Texas's "Seventeenth Emergency Order Regarding the COVID-19 State of Disaster" did not authorize a trial court to conduct a plea proceeding by videoconference without a defendant's written consent.

Appellants in this case reached plea agreements with the State and their cases were set for back-to-back pleas via a "zoom/video-conference plea docket." Prior to the hearing, counsel for the appellants filed identical motions objecting to the trial court's setting the cases for plea hearings via a Zoom videoconference. In the motions, they argued that pleading by videoconference would violate their constitutional right to counsel, right to public trial, and statutory rights under Articles 27.18 and 27.19 of the Code of Criminal Procedure. The State filed identical responses to the motions and argued that the use of Zoom videoconference technology during the hearings would not affect the appellants' ability to consult with counsel, intrude on confidential communications between the appellants and their attorneys, or restrict the public's access to the proceeding. Ultimately, the State argued that emergency orders issued by the Supreme Court of Texas controlled over the Code of Criminal Procedure.

During the videoconference, the judge overruled the appellants' motions and sentenced them. The parties agreed that the appellants would retain their right to appeal on constitutional issues, public trial issues, issues related to Article 27.18, and the right to counsel. On appeal, the appellants argued that their statutory right to enter a guilty plea in person in open court was a substantive right. Thus, it was not subject to the Supreme Court's Emergency Orders. The State argued that, if preserved, the appellants' arguments failed because the Supreme Court had the authority to modify or suspend "the act of criminal defendants appearing live in live courtrooms."

The court of appeals agreed with the appellants, holding that the Seventeenth Emergency Order could not require a defendant in a criminal case to appear via videoconference for a plea hearing over his objection. The court cited *In re State ex. Rel. Ogg*, 618 S.W.3d 361 (Tex. Crim. App. 2021) (orig. proceeding) for the proposition that neither Section 22.0035(b) of the Government Code nor the Seventeenth Emergency Order purported to authorize a trial court to modify substantive rights, which include a defendant's right to appear both in person and in open court. After noting that the conditions set out in Articles 27.18 and 27.19 of the Code of Criminal Procedure had not been met, the court of appeals held that the trial court was not authorized to accept the guilty plea, which was therefore voidable.

The State Prosecuting Attorney (SPA) petitioned the Court of Criminal Appeals for review. The SPA argued that this case is distinguishable from *Ogg* because the statute at issue does not confer jurisdiction or authority over a particular type of proceeding. The appellants responded that this case is like *Ogg* because the requirement of written waiver of pleading in person and in open court are procedures that implicate the trial court's jurisdiction or authority in the same way that the procedural requirement that the State consent to a defendant's waiver of a jury trial does. Appellants acknowledged that a trial court has jurisdiction to accept a defendant's guilty plea but argued that Section 22.0035(b) of the Government Code did not supply it with jurisdiction to suspend their substantive right to appear in person under Article 27.13. The failure to comply with these procedures renders a proceeding void.

Judge Newell wrote the majority opinion. The Court affirmed the judgment of the court of appeals and remanded to the trial court. As the Court held in *Ogg*, the Supreme Court's Emergency Orders cannot suspend procedures designed to protect substantive rights, nor can they create authority for a trial court to preside over proceedings over which it has no authority. Under the plain text of the relevant statutes, the trial court would not have had authority to proceed to the video conferenced plea absent the appellants' consent. The Supreme Court's Emergency Order could not provide a trial court with authority that did not previously exist.

Judge Yeary concurred without written opinion.

Presiding Judge Keller, joined by Judges Keel and Slaughter, filed a dissenting opinion, distinguishing the present case from *Ogg* because, in the absence of a constitutional violation, the Emergency Order not only explicitly authorized what the trial court did in this case, it demanded it. Subsection (c) of the Emergency Order, which was not at issue in *Ogg*, explicitly authorized the trial judge to "require" any person "to participate remotely." The Emergency Order subjected this explicit authorization only to "constitutional limitations." According to the dissent, the Constitution

did not forbid the trial court's actions. The constitutional right to presence is largely rooted in the Confrontation Clause of the Sixth Amendment, but when witnesses and evidence are not being confronted, the right to presence is protected only by Due Process. For a due-process inquiry, the question is simply whether the defendant's "presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." Impeding the spread of COVID-19 during the pandemic was an important public policy interest. The record supports a conclusion that holding a Zoom hearing would better protect the appellants, prison personnel, and court personnel than an in-person hearing would, and the reliability of the proceedings was otherwise assured.

The dissent next addressed whether the Emergency Order lawfully overrides statutes that would otherwise guarantee the defendant a right to physical presence. Section 22.0035 of the Government Code allows the Supreme Court of Texas to suspend, during an emergency, procedures dictated by other statutes. The statutory mandates that may be suspended are those that prescribe "procedures for the conduct of any court proceeding." If the "in person" presence requirement in the statute at issue qualifies as "procedural" under this language, then suspension of that requirement is permitted. Based on the language of the statue, the requirement of in-person presence at a plea and waiver proceeding is a "procedure for the conduct of a court proceeding." According to the dissent, *Ogg* does not require the Court to hold otherwise. *Ogg* did not address whether the Supreme Court could use an emergency order to temporarily override the statutory requirement that the State consent to a jury waiver. It simply held that the Emergency Order at issue did not do so. Even so, *Ogg* is distinguishable in that the fact of consent goes to the core power of the trial court to proceed but the method of consent is a matter of mere procedure, which could be overridden in an emergency. Because the right to physical presence to enter a plea of guilty is merely procedural—as opposed to the fact of pleading guilty—Section 22.0035 authorized the Supreme Court to issue an order overriding that procedural requirement.

Commentary: For readers prepping for legal squabble during the next pandemic or curious about gubernatorial use of executive powers to potentially set the stage for prosecuting local officials mandating use of face masks, see *Tex. Att'y Gen. Op. AC-0005* (2023). It states that pursuant to Section 418.012 of the Government Code, executive orders issued by the Governor pursuant to his emergency powers under Chapter 418 have the force and effect of law. Furthermore, because the Penal Code defines "law" to include a rule authorized by and lawfully adopted under a statute, a court is likely to conclude that executive orders authorized by and lawfully adopted pursuant to the Governor's statutory emergency powers constitute "laws" for purposes of Subsection 1.07(a)(30) of the Penal Code.

3. Evidence

A detective's expert witness testimony as to his understanding of a slang term, which was based on information he learned from individuals outside court, was non-testimonial for Confrontation Clause purposes and was properly offered at trial.

Allison v. State, 666 S.W.3d 750 (Tex. Crim. App. 2023)

Multiple instances where a suspect was instructed to "pull a Carlos" were present on phone recordings captured just prior to a shooting. Detective Reed, a peace officer with 28 years of counter-drug experience, testified as an expert witness that, at the prosecutor's direction, he had consulted with a confidential informant and other sources of information to ascertain the meaning of "pull a Carlos." Based on the information he received from multiple sources, he determined that it meant to "do a shooting." The defendant was convicted of aggravated robbery.

The Texarkana Court of Appeals found that this testimony was effectively a recitation of out-of-court statements procured specifically to use against the defendant and thus violated the Confrontation Clause of the Sixth Amendment. The court expressed concern that "allowing a witness to simply parrot…out-of-court testimonial statements directly

to the jury in the guise of expert opinion would provide an end run around" the *Crawford* rule. See *Crawford v. Washington*, 541 U.S. 36 (2004).

The Court of Criminal Appeals, in a majority opinion by Judge McClure, held that the statements were properly offered at trial. The Court held that both Texas Rule of Evidence 703 and the *Crawford* rule were satisfied. Rule 703 states that "[a]n expert may base an opinion on facts or data that [he] personally observed. If experts in [his] field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." Furthermore, law enforcement experts engage in "soft science" that is subject to the less strict *Nenno* reliability test: (1) whether the field of expertise is a legitimate one; (2) whether the testimony is within the scope of the expert's field; and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. See *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998). Given that such inquiries into the meaning of slang terms is common in law enforcement and that the other two prongs were met, the Court found the *Nenno* test satisfied in this case.

The *Crawford* rule is that testimonial statements by witnesses not subject to cross-examination are generally inadmissible. The majority in the instant case determined that the detective's statements were not testimonial and thus the *Crawford* rule and the Confrontation Clause were not violated. A statement is testimonial if "a reasonable person would have understood that law enforcement officers were conducting a criminal investigation and collecting evidence for the purpose of prosecution." Because the individuals were not told why the detective was inquiring and such inquiries are common in police work for non-prosecution purposes, the definition of the phrase to "pull a Carlos" offered by Reed was not testimonial. Reed never testified as to what his sources told him—he only offered his own understanding of the phrase's definition. No out-of-court statements were admitted. Reed synthesized information from multiple sources to come up with his own definition. Finally, the majority noted that requiring a "proving up of street slang would be inquest into perpetuity." If the confidential informants were called to the stand, what would prevent the defendant from demanding that they also produce the origin of their knowledge?

Judge Yeary filed a concurring opinion in which he agreed with the majority's conclusion because the admission of Reed's testimony was harmless beyond a reasonable doubt, but expressed doubt as to whether Reed should have been characterized as an expert witness in this case and whether "slang interpretation" is a legitimate field of expertise.

Judge Walker dissented without written opinion.

The trial court abused its discretion by excluding defensive evidence that the defendant was a person with autism, which could have negated the mens rea element of the charged offense.

Crumley v. State, 670 S.W.3d 799 (Tex. App.—Dallas 2023, pet. granted)

Commentary: Was evidence of mental disease or defect (that at best bolsters a matter collateral to a defendant's mental state defense) inadmissible under Ruffin v. State, 270 S.W.3d 586 (Tex. Crim. App. 2008)? If such evidence is admissible, did the court of appeals err by assessing harm for constitutional error under Tex. R. App. P. 44.2(a) because Crumley presented a detailed defense? Stay tuned! The Court of Criminal Appeals granted Crumley's petition for discretionary review featuring these questions on October 18, 2023.

4. Sentencing

When two judgments stemming from a single criminal episode provide for separate but identical fines to run concurrently, it is improper for an appellate court to delete the fine from one of the judgments.

Anastassov v. State, 664 S.W.3d 815 (Tex. Crim. App. 2022)

A professional tennis coach was convicted of two separate charges in a single trial for felony indecency with a child by sexual contact. Two written judgments were entered: one for nine years confinement and a $10,000 fine and one for three years confinement and a $10,000 fine. Each judgment specified that the sentence was to run concurrently with the other judgment. In other words, the defendant would serve nine years confinement and owe $10,000 despite being sentenced to a total of twelve years confinement and $20,000.

The Fifth Court of Appeals, however, *sua sponte* determined that because the sentences were to run concurrently, listing the $10,000 fine in each judgment risked "double billing" or a misconception that the fines were stacked. The court of appeals thus modified one of the judgments to remove its $10,000 fine. The State filed a petition for discretionary review to review the court of appeals' deletion of the $10,000 fine from one of the judgments.

Justice Slaughter authored the Court of Criminal Appeals' unanimous decision that deleting the $10,000 fine from one of the judgments was improper. Texas law is clear that when a sentence is entered, whether it be for confinement, a fine, or both, the sentence must be pronounced in the written judgment(s). See Article 42.01 of the Code of Criminal Procedure. Section 3.03 of the Penal Code provides that when multiple convictions stem from a single criminal episode, the sentences shall run concurrently. According to the Court, this does not mean that the judgments need to be adjusted to reflect only the penalties—whether a fine, confinement, or both—that the defendant will ultimately be responsible for under Section 3.03. The judgments only need to state that the sentences, including the fines, run concurrently. This is sufficient to avoid any risk of double billing. The court of appeals erred in removing a $10,000 fine from one of the judgments. Furthermore, the court of appeals erroneously cited illegal-sentence principles, which are generally for when an imposed sentence falls outside the statutory ranges. The court of appeals also incorrectly relied on Article 102.073 of the Code of Criminal Procedure, which states that court costs and fees may be applied only once when a defendant is convicted of two or more offenses in a single criminal action. This provision applies only to court costs and fees, not fines. Finally, the court noted a potential problem with deleting the fine from one of the judgments: if the judgment with the fine listed were to be vacated (but the other judgment remained), the defendant would not be liable to pay any fine.

Commentary: Although the Court references its prior plurality decision in *State v Crook*, 248 S.W.3d 172 (Tex. Crim App. 2008) (holding, as a matter of first impression, that when a defendant is convicted in a single criminal action of multiple counts and the sentences run concurrently, that includes fines), it does not "delve into the merits of *Crook*'s reasoning." Similarly, we warn readers to be careful in attempting to extrapolate the holding in *Crook* (or by extension Anastassov) to criminal cases in municipal or justice courts. See Ryan Kellus Turner "By Hook or Crook: I Maintain Everything is Fine," *The Recorder* (May 2008) at 3.

C. Post-Trial

1. Motion for New Trial

When a trial court grants a motion for new trial based only on the statement "the verdict is contrary to the law and evidence," re-trying the defendant on the same charge violates the principles of double jeopardy.

Sledge v. State, 666 S.W.3d 592 (Tex. Crim. App. 2023)

The defendant was convicted of possession with intent to deliver heroin. The jury, however, rejected the enhancements (related to using a deadly weapon in the commission of a drug offense) that the State alleged. The defendant made a motion for a new trial saying that the verdict was "contrary to the law and evidence." The motions were granted with no explanation, just a check mark next to "granted." Before any new trial commenced, the defendant appealed his convictions. The appeals were dismissed because the granted motions for new trial "restored the cases to their pretrial status." When pretrial began, the defendant had a new lawyer who argued that double jeopardy precluded a

second trial. The trial court held the trial after comparing the situation to when an appellate court sends a case back for a new trial. The defendant was again found guilty and this time the enhancements were found to be "true" by the jury.

The defendant again appealed arguing, among other things, that the original rejection of the enhancement provisions should be upheld. The Dallas Court of Appeals agreed stating that the defendant need not "forego favorable portions of the verdict as a condition of challenging the balance of the verdict…" The State's response, coupled with a motion for rehearing, in a surprising change of heart, posited that the original motions for new trial appear to have been granted based on insufficiency of the evidence, and their appeal deadline had passed. The State effectively conceded the case. The State petitioned the Court of Criminal Appeals requesting clarification on the effect of a motion for new trial granted on the grounds that the verdict is "contrary to the law and evidence." In its petition, the State encouraged a narrower application of *State v. Zalman*, 400 S.W.3d 590 (Tex. Crim. App. 2013), which equates the use of "contrary to the law and evidence" language with legal insufficiency, which dictates acquittal.

In a majority opinion written by Judge McClure, the Court of Criminal Appeals ruled that double jeopardy dictated acquittal in this case. Under Texas Rule of Appellate Procedure 21.3(h), a defendant must be granted a new trial when "the verdict is contrary to the law and evidence." The majority stated that the Court has previously held that Rule 21.3(h) contains some meaning other than legal insufficiency because, if it only meant legal insufficiency, the result would be acquittal, not a trial. See *Ortega v. State*, 668 S.W.2d 701 (Tex. Crim. App. 1983), where a guilty verdict violated Rule 21.3(h) not because of insufficient evidence, but because of a faulty jury instruction. Because the order granting the motion for a new trial in *Sledge* did not contain any information beyond the language of Rule 21.3(h), holding a new trial violated double jeopardy. At the point when the motion for a new trial was granted, the State's only recourse would have been to appeal the granted motion, which it did not.

Judge Yeary dissented, calling the Court's review in this case a "prohibited advisory opinion." The double jeopardy issue was not raised until the State's surprising motion for rehearing to the court of appeals. The appellate court summarily denied the motion without even looking at the merits. Because this was not a "decision," the Court should not have granted review. Judge Yeary also cast doubt on the notion that the original motion for a new trial was based only on the fact that there was insufficient evidence to prove the case. Further inquiry into the reason for the motion to be granted was indicated.

Sending an email alone did not constitute actual notice of a motion for new trial.

Garcia v. State, 673 S.W.3d 361 (Tex. App.—Amarillo 2023, no pet.)

After being convicted and sentenced for aggravated assault with a deadly weapon, Garcia's attorney submitted a "Certificate of Presentment" certifying "that a true and correct copy of the [motion for a new trial] has been e-served on the Office for the 100th Judicial District Court of Collingsworth County…." There was no record, however, that the trial court received the e-service. The court of appeals declined to hold that sending an email alone proves the recipient gained actual notice of its content. The court further listed numerous reasons why an email might not be received, such as incorrect email addresses, missing attachments, landing in a spam folder, or simply being overlooked. The judgment was affirmed.

Commentary: Chief Justice Brian Quinn begins this brief opinion with a quote: "…there's many a slip 'twixt the cup and the lip." This English proverb means that even when something seems certain, things can still go wrong. The tone and tenor of this opinion, coupled with Justice Quinn's choice of quote, indicate that he believes defense counsel genuinely thought the motion for new trial was emailed. This opinion serves as a stark reminder for criminal law practitioners to always confirm receipt of motions and other correspondence sent to the court. It also sends a subtle warning as to potential pitfalls of relying on technology in the judicial system.

2. Appeals

The court of appeals lacked jurisdiction over the State's appeal of the county criminal court of appeals' judgment, which reversed the municipal court of record's judgment and remanded the case for a new trial, because the State did not meet the requirements of Section 30.00027(a) of the Government Code.

State v. Villa, 673 S.W.3d 43 (Tex. App.—Dallas 2023, pet. filed.)

In the City of Mesquite Municipal Court, a municipal court of record, a jury convicted Whitney Villa of assault by contact, a Class C misdemeanor, and the court assessed a fine of $331 as Villa's punishment. Villa appealed to the county criminal court of appeals, which reversed the municipal court's judgment, and remanded Villa's case for a new trial. The State appealed to the Fifth District Court of Appeals in Dallas.

At the outset, the court of appeals questioned its jurisdiction over the State's appeal because it did not meet the requirements of Section 30.00027(a) of the Government Code and asked the parties to show cause why the appeal should not be dismissed. The State responded that the court has jurisdiction to hear its appeal under Article 44.01 of the Code of Criminal Procedure, by and through Section 30.00014 of the Government Code, through Section 30.00027(b) of the Government Code. To support its right to appeal under Article 44.01, the State pointed to the court's decision in *State v. Morales*, 322 S.W.3d 297 (Tex. App.—Dallas 2010, no pet.) and the Texas Court of Criminal Appeals' decision in *State v. Blankenship*, 146 S.W.3d 218 (Tex. Crim. App. 2004). Villa urged the court to follow the unpublished decision in *State v. Pugh*, No. 02-21-00108-CR, 2022 WL 1793518 (Tex. App.—Fort Worth June 2, 2022, no pet.) (mem. op., not designated for publication), and dismiss the appeal for lack of jurisdiction.

The majority of the court agreed with Villa and the decision in *Pugh*. First, Justice Kennedy, writing for the majority, disagreed with the State's reliance on Section 30.00014(a) and its reference to Article 44.01 to establish a right to appeal the county criminal court of appeal's judgment reversing the municipal court of record's judgment and remanding the case for a new trial, finding such reliance misplaced. According to the majority, Section 30.00014(a) applies to initial appeals from the municipal courts of record to the county courts, not to subsequent appeals from the county courts to the courts of appeals. Instead, appeals to the courts of appeals are governed by Section 30.00027.

The court likewise considered the State's reliance on *Morales* to be misplaced, In *Morales*, the court referenced Section 30.00014(a) and Article 44.01, along with Section 30.00027, but according to the majority, they did so only in the recital of the facts while simply noting that the appeal was timely filed. Contrary to the State's assertion, the court did not expressly recognize that it had jurisdiction over the substance of the State's appeal and did not analyze whether a specific statute authorized exercise of jurisdiction over the case. The majority found the fact that the court went on to decide the case on the merits to have no impact on the present case.

The majority concluded that Blankenship does not support the State's assertion that the court of appeals has jurisdiction over its appeal because in that case the Court of Criminal Appeals, though it referenced Article 44.01, the focus of the Court's opinion was on Subsection (d), dealing with the notice of appeal deadline, and whether the county attorney "made" the appeal, and was limited to the issue of whether the county attorney had consented to the city attorney's prosecuting the appeal under Article 45.201 of the Code of Criminal Procedure.

The majority returned to Section 30.00027 of the Government Code, finding it to be the statute governing the court's jurisdiction:

> (a) The appellant has the right to appeal to the court of appeals if:
>
> (1) the fine assessed against the defendant exceeds $100 and the judgment is affirmed by the appellate; or
>
> (2) the sole issue is the constitutionality of the statute or ordinance on which a conviction is based.

(b) The provisions of the Code of Criminal Procedure relating to direct appeals from a county or a district court to the court of appeals apply to the appeal, except that:

(1) the record and briefs on appeal in the appellate court constitute the record and briefs on appeal to the court of appeals unless the rules of the court of criminal appeals provide otherwise; and

(2) the record and briefs shall be filed directly with the court of appeals.

From this statute, the majority reasoned as follows:

1. Unlike Section 30.00014, Section 30.00027 does not expressly refer to Article 44.01 of the Code of Criminal Procedure; if the legislature intended to give the State the right to appeal to the courts of appeal under Article 44.01, it could have used the same language in Article 30.00027, but it did not.

2. The history of Section 30.00027, specifically changing the reference in Subsection (a) from "defendant" to "appellant" in 1999, broadened the application of the statute to include the State, and because the State falls under Section 30.00027(a), the court has no need to look beyond it for a default provision, and Article 44.01 is not implicated.

3. Section 30.00027(b) does not impact the parties' right to appeal because it addresses procedural, not jurisdictional, issues, as evidenced by the reference to the record and briefs. This subsection does not "broaden" the court's jurisdiction beyond that set forth in Section 30.00027(a).

4. Reading Section 30.00027(b) to include Article 44.01 requires including Article 44.02, but because Article 44.02 generally gives defendants unrestricted appeals, this would render Subsection 30.00027(a) meaningless. Had the legislature intended that subsequent appeals to the court of appeals be governed solely and completely by the Code of Criminal Procedure, with only the restrictions in Subsections30.00027 (b)(1) and (2), it could have eliminated Subsection (a).

The majority concluded that the State did not satisfy Subsection 30.00027(a) and dismissed the appeal for want of jurisdiction.

Justice Goldstein filed a dissenting opinion, finding erroneous the majority's conclusion that when the legislature replaced the word "defendant" with "appellant" in Section 30.00027(a) it intended the subsection to apply equally to the State if it were the appealing party, and that a court of appeals has no jurisdiction over the State's appeal if neither of the conditions in Subsection (a) are met. Justice Goldstein finds this erroneous because it: (1) conflicts with the court's precedent; (2) misconstrues Section 30.00027(a), resulting in a scenario where the State may appeal only in a case in which it has prevailed in the lower courts; (3) ascribes limitations to Section 30.00027(b) that conflict with the provisions of the Code of Criminal Procedure relating to direct appeals in criminal cases, including the State's right to appeal, a result the legislature did not intend; and (4) fails to consider the applicability of Section 30.00026, which authorizes the State's appeal if a new trial is granted.

Disagreeing with the majority's analysis of the case law on which the State relies, Justice Goldstein said the court is bound by *Morales*. In that case, the court was not simply stating dictum as the majority concludes but was rather citing the statutory provisions that authorized the court's exercise of jurisdiction over the case. Though the majority concluded the cases cited by the State are not binding because the issue of jurisdiction was not directly addressed, the question of jurisdiction is at issue in every case, because judges have a duty to determine their own jurisdiction irrespective of whether the parties challenge it.

According to her dissent, the majority's conclusion about Section 30.00027(a) eviscerates the State's right to appeal to the court of appeals and the Court of Criminal Appeals, making the county criminal court of appeals, with respect to municipal courts of record, the court of last resort. Specifically, the majority's interpretation would lead to absurd results, as it is unlikely the State would ever have the authority to appeal. Justice Goldstein addresses both provisions in Section 30.00027(a).

To appeal under Subsection (a)(1), the municipal court of record would have to find the defendant guilty and the appellate court would have to affirm the conviction. So, the State would be authorized to appeal only if it successfully defended a conviction in the appellate court. This result is more limited than the general right of direct appeals in criminal cases under Article 44.01, and specifically 44.01((a)(3), where, as here, the defendant has been granted a new trial.

Analyzing Subsection (a)(2), the State would have to secure a conviction and then challenge the constitutionality of the very statute or ordinance that it charged against the defendant. This is at odds with the prosecutor's duty not to convict but see that justice is done. The State could have dismissed the charges.

Justice Goldstein pointed out that the practical effect of the majority's interpretation of Section 30.00027(a) goes beyond what the legislature has expressly done—establish the county criminal court of appeals as the court of last resort for the State while preserving the defendant's right to appeal to the constitutionally established court of last resort, the Court of Criminal Appeals.

Justice Goldstein turned to Section 30.00027(b) finding erroneous the majority's conclusion, that Subsection (b) addresses procedural, not jurisdictional, issues because it bases its conclusion on the fact that the two exceptions are themselves procedural. This strips the language of its meaning. When the legislature provides that judges should follow all the provisions of a statute except some of the procedural ones, Justice Goldstein advised against construing that directive to mean ignore all of the statute's substantive provisions. Section 30.00027(b) requires application of the appellate provisions of the Code of Criminal Procedure to a direct appeal like the one before the court. The court applied them in *Morales* and should do so here.

The appellate provisions include Article 44.01 of the Code of Criminal Procedure. Though the majority argued that opening the door to the application of Article 44.01 requires application of Article 44.02, which, due to its broad application, would render Section 30.00027(a) meaningless, Justice Goldstein pointed out that Article 44.02 is already subject to the limitations in Section 30.00027 by way of Article 4.03 of the Code of Criminal Procedure, which contains substantially the same limitations as Section 30.00027(a). Article 44.02 is no broader than Section 30.00027(a).

Finally, Justice Goldstein addressed the majority's conclusion that Section 30.00014 of the Government Code does not apply because it governs appeals from the municipal court of record to the appellate court, not appeals from the appellate court to this court. The majority overlooked Section 30.00026, which provides that if the appellate court awards a new trial to the appellant, the case stands as if a new trial had been granted by the municipal court of record. When the municipal court of record grants a new trial, the State may appeal that decision under Section 30.00014 because that section provides that the State has the right to appeal as provided by Article 44.01, and Article 44.01 provides that the State may appeal the grant of a new trial.

Commentary: No one may have noticed the unpublished decision in *Pugh*, but all municipal courts of record should take note of this case. Though the mystery of the statutory construct of appeals from municipal courts of record is long-standing, the conclusion that a county court is the court of last resort for the State, but not the defendant, is a conclusion many will find hard to accept.

An Argument section of an appellate brief containing incorrect, illogical, and irrelevant case citations violated the Texas Rules of Appellate Procedure and, as such, the court declined to consider its prayer.

Ex parte Lee, 673 S.W.3d 755 (Tex. App.—Waco 2023, no pet.)

In an appeal following an unsuccessful application for a writ of habeas corpus to either be released or have bail reduced, Allen Michael Lee contended that the trial court set his bail excessively high and abused its discretion by denying his application without explanation. Lee's brief to the Waco Court of Appeals was filled with deficiencies.

For example, it cited a few unpublished opinions and the published opinions cited had nothing to do with the arguments presented or were from other states. When the State pointed out these deficiencies, Lee made no effort to amend or explain the deficiencies. Texas Rule of Appellate Procedure 38.1(i) states that the Argument section of an appellate brief must contain "appropriate citations to authorities." Lee provided nothing for the court to review and the court stated that it is not required to make an appellant's arguments for him. The order denying habeas corpus relief was upheld.

In Footnote 2 the court raises suspicion that the Argument section of Lee's brief was created by artificial intelligence (AI). The footnote also provides Federal District Court Judge Brantley Starr's solution to this problem: a signed certification that pleadings filed in his court will not be generated using AI programs, such as ChatGPT. Because the Waco Court of Appeals had only suspicions, but no evidence, that Lee's brief was created using AI, the court "resisted the temptation" to report the attorney to the State Bar of Texas for a potential investigation for a violation of State Bar rules. The court also pointed out a recent case from New York, *Mata v. Avianca, Inc.*, 2023 WL 3696209 (S.D.N.Y., May 4, 2023, order) where a federal district judge issued an order commanding an attorney to show cause why he should not be sanctioned for submitting a brief containing numerous incorrect and irrelevant citations.

Commentary: The age of AI is upon us. While it remains to be seen what, if any, statewide rules, guidance, or laws will emerge, municipal courts in Texas should start thinking about the extent to which they wish to address AI-generated motions. Many respectable lawyers believe there is a place for AI in the practice of law, but few if any condone blind reliance on it. *Lee* and *Mata* show that courts have little patience for deficiency regardless of whether it stems from AI or incompetent lawyering.

3. Revocation of Deferred Disposition

The appellant did not prevail in numerous challenges to the municipal court's final judgment following the appellant's violation of the conditions of deferred disposition where the municipal court complied with the provisions of Article 45.051 and the appellant did not request a court reporter, incorrectly applied provisions related to deferred adjudication, and otherwise applied no arguments or authority to support his assertions.

Felts v. State, 668 S.W.3d 69 (Tex. App.—Houston [1st Dist.] 2022, no pet.)

Martin Felts, the appellant, pleaded no contest to misdemeanor theft of property having a value less than $100. The Pearland Municipal Court, a municipal court of record, assessed a $200 fine as punishment. Under the authority of Article 45.051 of the Code of Criminal Procedure, the trial court ordered deferred disposition and set several conditions, including that the appellant "NOT be subsequently charged with any offense against the laws of the state, the United States, or any penal ordinance of any political subdivision of the state."

On July 6, 2021, the municipal court notified the appellant that the court was setting a show cause hearing on August 2, 2021, at which the appellant could "explain why you failed to comply with your agreement(s) made with this court." The municipal court also informed the appellant that "[y]ou may show any proof you have to the judge that your condition(s) have been met." Finally, the municipal courted noted that "[i]f your case(s) results in a conviction, then the judge will inform you of any fines due and the due date." The municipal court held the show cause hearing, after which it issued a final judgment, which constituted a final conviction.

The appellant filed a motion for new trial, making numerous challenges related to the deferred disposition. The trial court denied the appellant's motion and the appellant appealed to the county court at law. The appeal in the county court at law was on the record only and, after both appellant and the State filed briefs, the county court at law affirmed the municipal court judgment.

In 12 issues on appeal to the court of appeals, the appellant contended that (1) the county court at law and the court of appeals have jurisdiction over his appeal, (2) his trial counsel was ineffective for advising him to plead guilty, (3) the municipal judge could not, *sua sponte*, move to revoke the deferred disposition, (4) he was denied advance notice of such revocation, (5) his deferred disposition could not be revoked without evidence that the conditions of deferred disposition had been violated, (6) the municipal court could not revoke his deferred disposition without an evidentiary hearing, (7) the municipal court could not place the burden of proof on the appellant in the revocation proceeding, (8) Article 45.051 of the Code of Criminal Procedure unconstitutionally shifts the burden of proof to the appellant, (9) the court could not revoke a deferred disposition without an actual violation of the law, (10) the municipal court did not properly follow Article 45.051, give the appellant adequate notice of the hearing, or preserve a record thereof, (11) requiring the appellant to prove compliance with the conditions of deferred disposition violates his right against self-incrimination, and (12) the trial court abused its discretion in revoking the appellant's deferred disposition.

Responding to the appellant's issue related to jurisdiction, the State argued that the appellant had no right of appeal because he had contractually waived it in return for the State's recommendation that the disposition of his case be deferred. The court disagreed, citing *Hargesheimer v. State*, 182 S.W.3d 906, 913 (Tex. Crim. App. 2006), where the Court of Criminal Appeals held that "in a plea-bargain case for deferred adjudication community supervision, the plea bargain is complete at the time the defendant enters his plea of guilty in exchange for deferred adjudication community supervision." While the appellant may not appeal his no-contest plea or the order deferring disposition of his case, a presentencing plea bargain does not deprive an appellant of the right to appeal from a later adjudication proceeding. Here, the appellant's appeal to the county court at law was not from the municipal court's order of deferred disposition, but was from the municipal court's final judgment, which was appealable after the denial of his motion for new trial.

Determining that the reviewing court had jurisdiction and the court of appeals had jurisdiction under Section 30.00027 of the Government Code, the court addressed the appellant's remaining issues. The court first addressed the appellant's issue related to preservation of the record because its resolution impacts the remaining issues on appeal. The appellant's complaint is that he was not "informed how to request a record of the [Zoom] hearing." However, he does not contend that he ever even attempted to request a record, not that he was unable to do so. Because the appellant never requested a court reporter as required by Section 30.00010 of the Government Code, he was not denied his due-process right to have a court reporter present—he merely failed to exercise that right.

Besides the ineffective assistance of counsel issue, the appellant's remaining issues all concerned the proper application of Article 45.051 of the Code of Criminal Procedure, which permits a municipal court to suspend a sentence and defer final disposition of a criminal conviction.

In issues 3 and 4 related to notice, the appellant equated the deferred process set forth in Article 45.051 with the revocation of community supervision and deferred adjudication community supervision found in Articles 42A.751 (revocation of community supervision) and 42A.108 (revocation of deferred adjudication community supervision) of the Code of Criminal Procedure. However, those statutes do not apply and the appellant provided no argument or authority to support his assertion that due process requires the same level of specificity in the notice to revoke a deferred disposition in municipal court as a motion to revoke either community supervision or deferred adjudication supervision. Here, the municipal court complied with the requisite notice in Article 45.051.

In four evidentiary issues, the appellant complains about the allocation of the burden of proof and the sufficiency of the evidence at the show cause hearing. However, the court mentioned again that the appellant did not request a record from the show cause hearing, so he cannot show that the evidence is legally insufficient, regardless of which party bears the burden of proof.

The court summarized the appellant's position in issue 8: the trial court was required to wait until the end of the deferral period to hold a show cause hearing. The court, assuming without deciding that the statute gives appellant

until the expiration of the deferral period before he can be required to show cause why the deferral should not be revoked, found that the appellant cannot show that he was harmed by a premature hearing. The deferred disposition was revoked because, on July 3, 2021, the appellant was charged with subsequent offenses, i.e., Class C theft and Class B unlawful carrying of a weapon in violation of the conditions of deferred. Waiting until the end of the deferral period would not have changed this fact.

In issue 9, the appellant argued that the condition that appellant "'not be subsequently charged with any offense" do[es] not make it clear to a person of ordinary intelligence what they are required to do or avoid doing." The court found that the appellant voluntarily entered into a plea agreement with this condition and did not object to the condition at the time the deferred disposition order was signed. Instead, he waited until after the court revoked the deferred disposition before objecting. As such, his objection is untimely and does not preserve error.

Finally, in issue 12, the appellant contends that "the trial court abused its discretion not to revoke by misunderstanding the nature of its discretion." Specifically, the appellant points out that, even though the statute gives the trial court the discretion to extend the deferral period or reduce the fine in Section 45.051(c-3)(d), the court's show cause notice stated "You *will be convicted* if: you do not appear for this show cause hearing; the judge finds at the hearing that you have not fully complied with the terms of your agreement; you have paid your balance or fines after your due date on your agreement, and before coming to this court." The court disagreed, finding that the line in the notice to appellant does not, in and of itself, show any misunderstanding by the trial court. Even if it did, the court stated the appellant cannot show that the actions taken by the trial court in the exercise of that discretion—finding appellant guilty and assessing punishment—constituted an abuse of discretion. Nothing in the record supports the appellant's supposition that the trial court might have acted otherwise had it known it was able to do so.

Overruling all the appellant's objections, the court affirmed the county court at law's judgment, which in turn affirmed the municipal court's judgment.

Commentary: This may be the most comprehensive treatment of deferred disposition by a court of appeals. It is also nice to see an appellate court treat deferred disposition and deferred adjudication as similar but not the same. For more on this topic, see Ryan Kellus Turner, "Deferred Disposition Is Not Deferred Adjudication," *The Recorder* (August 2002).

III. Substantive Law

A. Penal Code

Section 32.42(b) of the Penal Code does not require jury unanimity on the same specific act of deception to convict.

Dunham v. State, 666 S.W.3d 477 (Tex. Crim. App. 2023)

B. Executive Orders

The Governor did not exceed his authority by issuing executive orders that prohibited local government entities from requiring face coverings as part of their COVID-19 mitigation efforts.

Abbott v. Harris County, 672 S.W.3d 1 (Tex. 2023)

Do executive orders issued by the Governor pursuant to his emergency powers under Chapter 418 of the Government Code have the force and effect of law?

Tex. Att'y Gen. Op. AC-0005 (2023)

AY 24 Traffic Safety Grant Update

A New Era for Municipal Traffic Safety Initiatives

Elizabeth De La Garza, TxDOT Grant Administrator, TMCEC
Ned Minevitz, Program Attorney and Senior TxDOT Grant Administrator, TMCEC

On October 1, 2023, TMCEC ushered in a new era for its traffic safety grants: Municipal Traffic Safety Initiatives (MTSI) and Driving on the Right Side of the Road (DRSR) merged into a single grant under the "MTSI" moniker. Practically speaking, nothing has changed. All the longstanding initiatives, programs, conferences, and goals that municipal court personnel and teachers across Texas know and love are not going anywhere.

What Has Changed?

Logos and Branding

TMCEC's school-based outreach program, which is often referred to as "DRSR," has undergone a name change. Teachers will no longer attend "DRSR teacher workshops," they will now attend "MTSI teacher workshops." Existing publications containing the DRSR logo, however, will continue to be distributed and utilized until the inventory is depleted. Any reprints will be revised to replace "DRSR" with "MTSI." It will likely be years before "DRSR" is completely phased out of all printed materials.

Webpages

Moving forward, TMCEC will only have one traffic safety webpage, MTSI (tmcec.com/mtsi). A new "Educators" tab for teachers will be added to the MTSI page. Everything else on the current DRSR page will be transferred to a corresponding section of the MTSI page. TMCEC expects the DRSR page to be removed by January 2024. With the gradual decrease of physical materials (see "Physical Materials & Shipping" below), MTSI plans on providing more digital materials on its webpage moving forward.

Physical Materials & Shipping

Budget concerns have dictated a gradual move away from physical materials and shipping. The days of TMCEC being able to send cities and schools large quantities of traffic safety materials are almost completely in the rearview mirror. As of December 2023, TMCEC does still have a limited supply of physical materials to distribute, such as Our Town maps, DUI Mock Trial book, posters, Sober Prom Cards, and children's

traffic safety books in Spanish. Please submit the new order form available at tmcec.com/mtsi/resources-municipal-courts if you are interested. The following materials will no longer be available as hard copies (at least for the foreseeable future) but may be available to courts, schools, and community groups as PDFs on the MTSI website:

- A Day in the Municipal Court, Tex and Dot, and Buckle Up Texas coloring books
- Pocket U.S. Constitution
- All DRSR children's books (the *Don't Monkey Around* series)
- Curricula

Other Traffic Safety Grant Updates

MTSI Awards

It is award season! Applications for the 2024 MTSI traffic safety awards are due December 29, 2023. Please visit tmcec.com/mtsi/mtsi-awards to apply and for more information.

Traffic Safety Outreach

As noted above, MTSI will be making fewer physical materials distributions moving forward. Fortunately, the MTSI grant staff will fill this void with more hands-on, personalized assistance for organizations seeking to promote traffic safety in their communities. For example, grant staff will provide practical tips on utilizing social media and digital MTSI resources. There are also numerous traffic safety resource-providing organizations, such as TxDOT and the Texas Transportation Institute, that TMCEC can put its constituents in touch with.

Teacher Workshops

Summer 2024 MTSI teacher workshops are back! MTSI's premier teacher training opportunity, the Teacher Traffic Safety Academy, will be held at the AT&T Hotel and Conference Center in Austin from July 15-17, 2024. Once available, the full workshop schedule will be accessible at tmcec.com/mtsi/educators. If you know a teacher who would like free continuing education, encourage them to contact MTSI!

Judicial Training

As usual, TMCEC will be offering a series of special traffic safety related trainings in AY24 for municipal judges, court personnel, and prosecutors. This year's three marquee events are:

Event	Participants	Dates	Location	Anticipated Credit
Teen Court Workshop	All municipal court personnel	February 26-27, 2024	Georgetown	Judicial Education, Clerk Certification, MCLE
Municipal Traffic Safety Initiatives Conference	All municipal court personnel	April 3-5, 2024	San Antonio	Judicial Education, Clerk Certification, MCLE
Impaired Driving Symposium	Judges from all levels of the Texas judiciary	August 1-2, 2024	College Station	Judicial Education, MCLE

Thanks to funding from TxDOT, travel reimbursement and free lodging are available for all Teen Court Workshop and Impaired Driving Symposium participants. To register for any of these events, please visit tmcec.com/registration.

Contact Us

The MTSI grant staff can be reached by calling TMCEC at (512) 320-8274. Elizabeth De La Garza (elizabeth@tmcec.com) and Ned Minevitz (ned@tmcec.com) are also reachable via e-mail.

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MISSION STATEMENT

TMCEC

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

January 23-26, 2024

Clerks Level III Assessment Clinic

Pflugerville

Courtyard by Marriott Austin Pflugerville & Pflugerville Conference Center

Those interested in becoming a Certified Municipal Court Clerk (CMCC) must attend a 24-hour Level III Assessment Clinic sponsored by TMCEC. The clinic is designed as a workshop that emphasizes development of skills in court management and human resources. The purpose of the clinic is to build mastery and confidence in the performance of management duties and become better prepared for providing efficient oversight of court operations. Participants can expect to practice collaborative problem solving, presentations, and public speaking.

To accomplish these goals, the program is typically limited to 25 or fewer registrants. Participants are encouraged to make self-assessments of their own management and human resources skills. Registration is $150. Housing is $50 per particpant per night. To sign up, visit register.tmcec.com.