CASE LAW AND ATTORNEY GENERAL OPINION UPDATE
TMCEC Academic Year 2019

Ryan Kellus Turner
TMCEC General Counsel and Director of Education

Regan Metteauer
TMCEC Program Attorney

Henry W. Knight
TMCEC Intern
Juris Doctor Candidate 2019, University of Texas School of Law

Except where noted, the following decisions and opinions were issued between the dates of October 1, 2017 and October 1, 2018. Acknowledgments: Thanks to Judge David Newell, Victoria Ford, Ned Minevitz, and Patty Thamez.

I. Constitutional Issues
A. 1st Amendment

The existence of probable cause for an arrest at a city council meeting for failing to leave the podium when ordered to do so did not bar the arrestee's claim that the arrest was made in retaliation for past speech in violation of the 1st Amendment.

Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018)

After Lozman towed his floating home into a slip in a marina owned by the city of Riviera Beach, he became an outspoken critic of the City's plan to use its eminent domain power to seize waterfront homes for private development and often made critical comments about officials during the public-comment period of city council meetings. He also filed a lawsuit alleging that the city council's approval of an agreement with developers violated Florida's open-meetings laws. In June 2006, the council held a closed-door session, in part to discuss Lozman's lawsuit. He alleged that the meeting's transcript shows that councilmembers devised an official plan to intimidate him, and that many of his subsequent disputes with city officials and employees were part of the City's retaliation plan. Five months after the closed-door meeting, the Council held a public meeting. During the public-comment session, Lozman began to speak about the arrests of officials from other jurisdictions. When he refused a councilmember's request to stop making his remarks, he was ordered by council to be arrested. The State's attorney determined there was probable cause for the arrest, but decided to dismiss the charges.

Lozman then filed a Section 1983 suit alleging a number of incidents he believed showed the City had an "official municipal policy" of intimidation and that the council ordered his arrest in retaliation for previous acts of free speech against the City. The jury returned a verdict for the City. The court of appeals ruled that the existence of probable cause for Lozman's arrest defeated a 1st Amendment claim for retaliatory arrest. Whether that ruling is correct was the question before the Court.
Justice Kennedy delivered the opinion of the Court (8-1), finding that this case does not involve a typical retaliatory arrest claim. For example, Lozman claims the City itself retaliated against him, not the officer. Also, Lozman alleges the City's official policy towards him is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made. The Court places these facts in a unique class of retaliatory claims.

The City and Lozman each argue that different precedents should apply. Lozman argues that the rule in *Mt. Healthy City Bd. Of Ed. v. Doyle* should apply, i.e. requiring the city to show the arrest would have been ordered even without reference to previous protected speech, using but-for causation from the law of torts. The City argued that the rule in retaliatory prosecution cases should apply where the existence of probable cause is a bar, stemming from *Hartman v. Moore*.

The Court found that in retaliatory prosecution cases, there is a "presumption of regularity accorded to prosecutorial decisonmaking." That presumption does not apply in this context. Also, there is a risk that some police officers may exploit the arrest power as a means of suppressing speech. The Court declines to decide which case should apply when speech is made in connection with, or contemporaneously to, criminal activity. Here, the alleged free speech was made prior to and apart from his alleged criminal activity of refusing to leave the podium. In cases that fall in the unique type of retaliation claim made in this case, the *Mt. Healthy* rule should be applied. The Court suggests that the court of appeals on remand may want to consider (1) whether any reasonable juror could find that the City actually formed a retaliatory policy to intimidate Lozman during its June 2006 closed-door session; (2) whether any reasonable juror could find that the November 2006 arrest constituted an

official act by the City; and (3) whether, under Mt. Healthy, the City has proved that it would have arrested Lozman regardless of any retaliatory animus—for example, if Lozman's conduct during prior city council meetings had also violated valid rules as to proper subjects of discussion, thus explaining his arrest here.

As a final matter, the Court underscores the recognition that the right to petition is one of the most precious of the liberties safeguarded by the Bill of Rights. Lozman's speech is high in the hierarchy of 1st Amendment values; when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.

Justice Thomas dissented, finding that no one briefed, argued, or even hinted at the rule the Court "dreamed up" for a "unique class of retaliatory arrest claims." To the contrary, the parties concentrated on resolving the question posing a decades-long disagreement in federal courts: whether the existence of probable cause defeats a 1st Amendment retaliatory-arrest claim as a matter of law. Justice Thomas would have held that Lozman must plead and prove a lack of probable cause as an element of his 1st Amendment retaliatory-arrest claim. This conclusion is based on Section 1983 lawsuits as a "species of tort liability." The closest analogies to this claim under common law are false imprisonment, malicious prosecution, and malicious arrest, which all emphasize the importance of probable cause. Allowing plaintiffs to bring a retaliatory-arrest claim in circumstances like this case, without pleading and proving a lack of probable cause, would permit plaintiffs to harass officers with the kind of suits that common-law courts deemed intolerable.

An individual subject to a protective order violates the order by "communicating in a harassing manner" when he intentionally or knowingly sends information or messages, or speaks to, the protected person in a manner that would persistently disturb, bother continually, or pester another person.

Wagner v. State, 539 S.W.3d 298 (Tex. Crim. App. 2018)

In an 8-1 opinion, written by Judge Alcala, the Court of Criminal Appeals held that Section 25.07(a)(2)(A) of the Penal Code does not violate the 1st Amendment because it is not overly broad and has narrow applicability in that it applies only in a very precise set of circumstances to a limited group of individuals whose communications have been restricted through one of seven types of judicially imposed bond conditions or protective orders which only prohibits communications that are intentionally or knowingly made in a threatening or harassing manner towards protected individuals.

The statute, as applied to Wagner's conduct was not impermissibly vague. The common meaning of the term "harassing" is clear enough to afford a person of ordinary intelligence a fair opportunity to know what is prohibited. In this case, Wagner repeatedly communicated with his estranged wife during the duration of a protective order in a manner that a person of ordinary intelligence would know to be persistently disturbing, bothersome, or pestering.

Presiding Judge Keller dissented explaining that Section 25.07 of the Penal Code is probably not facially unconstitutional, even under the Court's construction, but the majority opinion will cause uncertainty as to what conduct the statute prohibits. The Court's definition of "harassing" does not adequately address the intensity and frequency of the conduct necessary to violate Section 25.07.

Presiding Judge Keller's dissent offers an alternative construction of the statute she believes eliminates uncertainty and better conforms to the language of the statute. Specifically, she employs a definition that sets the intensity of the conduct as that which would produce substantial emotional distress. This is preferable because the amount of repetition required to constitute harassing

communication may vary based on the context of the communication. Focusing on "substantial emotion distress" avoids reading a repetition element into Section 25.07.

Section 21.16(b) of the Penal Code, known as the "revenge pornography" statute, to the extent it proscribes the disclosure of visual material, is unconstitutional on its face in violation of the Free Speech clause of the 1st Amendment.

Ex parte Jones, 2018 Tex. App. LEXIS 3439 (Tex. App.—Tyler May 16, 2018, pet. granted)

Jordan Bartlett Jones was charged with unlawful disclosure of intimate visual material in violation of Section 21.16(b) of the Penal Code, commonly known as the "revenge pornography" statute. In his appeal from the trial court's denial of his pretrial application for writ of habeas corpus, he alleged that Section 21.16(b) is unconstitutional on its face because it violates the 1st Amendment. Because the photographs and visual recordings are inherently expressive and the 1st Amendment applies to the distribution of such expressive media in the same way it applies to their creation, the court concludes that the right to freedom of speech is implicated in this case. The court also concludes that the statute is an invalid content-based restriction and overbroad.

Commentary: Magistrates should be apprised of criminal statutes held unconstitutional. This is one to watch, however, because the Court of Criminal Appeals granted the State's petition for discretionary review.

Section 551.143(a) of the Government Code (Texas Open Meetings Act (TOMA)), which makes it a criminal offense for a member or group of members of a governmental body to knowingly conspire to circumvent TOMA by meeting in numbers less than a quorum for the purpose of secret deliberations, is not unconstitutionally overbroad or vague.

State v. Doyal, 541 S.W.3d 395 (Tex. App.—Beaumont 2018, pet granted)

Doyal, a member of the Montgomery County Commissioners Court, was indicted for knowingly conspiring to circumvent the provisions of TOMA by meeting in a number less than a quorum for the purpose of secret deliberations "by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond[.]" In his motion to dismiss, Doyal argued that Section 551.143 of the Government Code burdens free speech and is subject to strict construction. The trial court granted the motion. The State appealed.

The court, found that the statute is not a content-based restriction, applying rational basis review. According to the court, the statute is directed at conduct, i.e., the act of conspiring to circumvent TOMA by meeting in less than a quorum for the purpose of secret deliberations in violation of TOMA. The court also concluded that Section 551.143 describes the criminal offense with sufficient specificity that ordinary people can understand what conduct is prohibited; the statute provides reasonable notice of the prohibited conduct; and the statute is reasonably related to the State's legitimate interest in assuring transparency in public proceedings. Although the terms "conspire," "circumvent," and "secret" were not defined, they were terms with plain meanings.

Commentary: Stay tuned. The Court of Appeals granted Judge Doyal's petition for discretionary review.

B. 4th Amendment / Search and Seizure Issues
1. Expectation of Privacy

People maintain an expectation of privacy in the record of their physical movements as captured through cell service location information. Therefore, under the requirements of the 4th Amendment, law enforcement officers must generally obtain a warrant before obtaining such information.

Carpenter v. United States, 138 S. Ct. 2206 (2018)

In a 5-4 decision, the U.S. Supreme Court reversed the decision of the court of appeals and trial court. Writing for a five-judge majority, Chief Justice Roberts explained that acquisition from wireless carriers of Carpenter's historical cell-site location information (CSLI) constituted a search under the 4th Amendment. When law enforcement accessed defendant's CSLI and his physical movements, it invaded his reasonable expectation of privacy and the fact that law enforcement obtained the information from a third party did not overcome Carpenter's 4th Amendment protections.

A court order obtained under the Stored Communications Act (18 U.S.C.S. Sec. 2703(d)) was not a permissible mechanism for accessing historical CSLI because the showing required under the Act (reasonable grounds) fell short of probable cause. A search warrant was necessary to obtain CSLI in the absence of an exception such as exigent circumstances.

Justice Kennedy, joined by Justice Alito, dissented because the scope of the Court's ruling endangered congressionally authorized investigations and because CSLI records are business records in which Carpenter had no reasonable expectation of privacy.

Justice Thomas dissented because the 4th Amendment protects "persons, houses, papers, and effects," not CSLI records. Furthermore, the 4th Amendment contains no express expectation of privacy and that the creation of the expectation of privacy test in *Katz v. U.S.* (1967) was wrongly decided.

Justice Gorsuch also dissented. Although critical of the expectation of privacy test, he acknowledged the application of precedent. He postulated that the CSLI records could arguably constitute "papers or effects" worthy of 4th Amendment protections but that argument was not presented by Carpenter.

Commentary: Seizure of electronic customer data is governed by Article 18.02(a)(13) and Article 18.21 of the Code of Criminal Procedure. Notably, an order for CSLI records under Article 18.21, Section 5, may only be issued by a district judge. It does not require probable cause, only reasonable belief. A search warrant can be obtained from a district judge under Section 5. It is most likely a legislative oversight but neither Article 18.01 nor Article 18.20 of the Code of Criminal Procedure contains an express restriction on who can issue a search warrant under Article 18.02(a)(13) for electronic customer data held in electronic storage, including the records and other information related to a wire communication or electronic communication held in electronic storage. Arguably the search warrant in Article 18.02(a)(13) is the search warrant in Article 18.20. In other words, it is a search warrant that can only be issued by a district judge (which makes sense particularly if the information were located outside of Texas). Hopefully *Carpenter* will prompt some revisions of these provisions in the Code of Criminal Procedure.

A driver in lawful possession or control of a rental car, who is nevertheless not listed as an authorized driver on the rental agreement, still maintains an otherwise reasonable expectation of privacy under the 4th Amendment. Furthermore, the fact that a driver violates the rental

agreement signed by a third party does not eliminate any reasonable expectation of privacy that the driver has in the vehicle.

Byrd v. United States, 138 S. Ct. 1518 (2018)

In a 9-0 decision, Justice Kennedy, joined by Chief Justice Roberts and Justices Sotomayor, Breyer, Kagan, and Ginsburg vacated the Third Circuit Court of Appeals' judgment convicting defendant of possession of heroin with intent to distribute and of being a prohibited person in possession of body armor. Justice Thomas filed a concurring opinion in which Justice Gorsuch joined. Justice Alito also filed a concurring opinion.

Latasha Reed rented a car in New Jersey while petitioner Terrence Byrd waited outside the rental facility. Her signed agreement warned that permitting an unauthorized driver to drive the car would violate the agreement. Reed listed no additional drivers on the form, but she gave the keys to Byrd upon leaving the building. Byrd stored personal belongings in the rental car's trunk and then left alone for Pittsburgh. After stopping Byrd for a traffic violation, Pennsylvania State Troopers learned that the car was rented, that Byrd was not listed as an authorized driver, and that Byrd had prior drug and weapons convictions. Byrd also stated he had a marijuana cigarette in the car. The troopers proceeded to search the car, discovering body armor and 49 bricks of heroin in the trunk. The district court denied Byrd's motion to suppress the evidence as the fruit of an unlawful search, and the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car.

The Court held that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. Furthermore, while a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it, *see, e.g., Jones v. United States*, 362 U.S. 257, 259 (1960), legitimate presence on the premises alone is insufficient. The Court held that the expectation of privacy that comes from lawful possession and control and the attendant right to exclude should not differ depending on whether a car is rented or owned by someone other than the person currently possessing it. It disagrees with the Government's contention that Byrd had no basis for claiming an expectation of privacy in the rental car because his driving of that rental voided the agreement. The Government provided no explanation of the bearing that this breach has on expectations of privacy.

It is important to note that the Court remanded two issues. First, whether those who intentionally use a third party to procure a rental car by fraudulent scheme for purposes of committing a crime lack 4th Amendment expectations of privacy, similar to car thieves. Second, even if Byrd had a right to object to the search, whether probable cause justified it in any event.

In his concurrence, Justice Thomas questions the Court's use of the "reasonable expectation of privacy" test from *Katz v. United States*, 389 U.S. 347, 360-61 (1967). Nevertheless, he joins the Court's opinion because he states that it "correctly navigates our precedents, which no party has asked us to reconsider." Justice Alito, in his concurrence, stated that the court of appeals is free to reexamine on remand the question whether petitioner may assert a 4th Amendment claim or decide the appeal on another appropriate ground.

2. Exceptions to the Warrant Requirement
a. Automobile Exception

The partially enclosed top portion of defendant's home driveway, in which defendant's motorcycle was parked, was curtilage, for 4th Amendment purposes. Additionally, the automobile exception to the warrant requirement for searches did not justify the police officer's invasion of curtilage of home.

Collins v. Virginia, 138 S. Ct. 1663 (2018)

In an 8-1 decision, the Court in an opinion written by Justice Sotomayor, joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Kagan, and Gorsuch, reversed the Supreme Court of Virginia's judgment convicting defendant of receiving stolen goods and remanded the case.

During the investigation of two traffic incidents involving an orange and black motorcycle with an extended frame, the officer learned that the motorcycle was likely stolen and in the possession of petitioner Collins. The officer discovered photographs on Collins' Facebook profile of an orange and black motorcycle parked in the driveway of a house, drove to the house, and parked on the street. From there, without a search warrant, the officer walked to the top of the driveway, removed the tarp covering the motorcycle, confirmed the vehicle was stolen by running the license plate and vehicle identification numbers, took a photograph of the motorcycle, replaced the tarp, and returned to his car to wait for Collins. When Collins appeared, the officer arrested him. The trial court denied Collins' motion to suppress the evidence on the ground that the officer violated the 4th Amendment when he trespassed on the house's curtilage to conduct a search, and Collins was convicted of receiving stolen property.

In crafting the automobile exception to the warrant requirement, the Court emphasized the "ready mobility of the automobile" and "the pervasive regulation of vehicles capable of traveling on public highways," in justifying their different constitutional treatment from homes. *See California v. Carney*, 471 U.S. 386, 390, 392 (1985). When these justifications are present, officers may search an automobile without a warrant so long as they have probable cause. In contrast, curtilage—"the area 'immediately surrounding and associated with the home'"—is considered "part of the home itself for 4th Amendment purposes." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). Thus, when an officer physically intrudes on the curtilage to gather evidence, a 4th Amendment search has occurred and is presumptively unreasonable absent a warrant.

The Court determined that the partially enclosed top-portion of the driveway where Collins' motorcycle was parked and subsequently searched was curtilage, comparing the area to a front porch, side garden, or area "outside the front window." *Id*. at 7. Those types of areas constitute "an area adjacent to the home and 'to which the activity of home life extends.'" *Id.* An officer does not have the right to enter a home or its curtilage to access a vehicle without a warrant. The Court also disagreed with Virginia's claim that the automobile exception is categorical, and permits a warrantless search of a vehicle at any time, including in a home or curtilage. The Court clarified that curtilage is an afforded constitutional protection, and that creating a carve-out for certain types of curtilage would likely create confusion.

In his dissent, Justice Alito concluded that the officer's search was "reasonable" on 4th Amendment grounds. He continued by stating that the officer had probable cause to believe that the object under the tarp was the motorcycle in question, that the petitioner had been operating the motorcycle, and that a search of the motorcycle would provide evidence that it had been stolen. Ascertaining the

bounds of curtilage determines only whether a search is governed by the 4th Amendment and plays no role in 4th Amendment analysis. Therefore, Justice Alito argues that even though the motorcycle was within the curtilage of the home, the search was nevertheless reasonable because curtilage should have no effect on the reasonableness of the 4th Amendment search.

Probable cause did not exist, on the facts, to search the defendant's vehicle under the automobile exception to the warrant requirement because his short visit to the sports bar, which had a well-documented history of narcotics sales, unsupported by any details concerning the nature of his visit there, did not sufficiently "relate" him to any evidence of crime.

Marcopoulos v. State, 538 S.W.3d 596 (Tex. Crim. App. 2017)

The State also argued that the defendant's furtive gestures when he noticed a patrol car was behind him supported probable cause. Judge Keasler delivered the opinion of the Court. While the Court does not discount the suspiciousness of Marcopoulos' unusually brief appearance within the bar, this behavior does not "warrant a man of reasonable caution in the belief that an offense has been or is being committed." There remains, then, a discernible gap between the reasonable suspicion aroused by Marcopoulos' brief presence at the bar and the proof necessary to establish probable cause. The Court holds that this gap was not bridged by Marcopoulos's furtive gestures.

The Court has held that furtive gestures must be coupled with "reliable information or other suspicious circumstances relating the suspect to the evidence of crime" to establish probable cause. Marcopoulos' short visit to the bar, unsupported by any details concerning the nature of his visit there, did not sufficiently "relat[e]" him to any "evidence of crime." Furthermore, Marcopoulos did not exhibit furtive gestures in response to police action (e.g., wailing sirens or flashing lights), but rather mere police presence. He was situated in front of a marked police car that had not yet indicated an intention to stop him, and beside an unmarked police car driven by an undercover officer. Finally, Marcopoulos' movements were not connected to a known or suspected instrumentality of crime. Under these circumstances, Officer Oliver's notions about Marcopoulos, though certainly providing reasonable suspicion justifying a temporary investigative detention, did not rise to the level of probable cause justifying a full-blown search.

The Court emphasizes three points in its conclusion. First, as with any probable cause determination, this decision is fact-driven. The Court does not hold that observations akin to Officer Oliver's will never meet the standard of probable cause; but simply concludes that Marcopoulos' observed behavior was insufficient in this case. Second, it was only barely insufficient. The Court does not hesitate to say that, had Oliver observed any additional indicators of drug activity, either at the bar or within Marcopoulos's car, the scale would tip in favor of a finding of probable cause. Finally, although probable cause to search the vehicle was lacking on these particular facts, the Court does not conclude that the 4th Amendment was necessarily violated—but decides only that the automobile exception is unavailing. The Court remanded the case back to the court of appeals to review the remaining grounds for challenging the validity of the search of his truck.

Judge Keel filed a dissenting opinion, joined by Presiding Judge Keller. According to the dissent, the Court should either dismiss this petition as improvidently granted or uphold the finding of probable cause to search the appellant's truck. A trial court's ruling on a motion to suppress must be upheld on appeal if any applicable legal theory supports it. *State v. Copeland*, 501 S.W.3d 610, 612-13 (Tex. Crim. App. 2016). Here, the cocaine found on his person was admissible because it was found in a search incident to his arrest. The trial court's ruling was correct on that theory and must be upheld on appeal. The Court does not need to address the legitimacy of the search of his truck.

Alternatively, the totality of these circumstances viewed in the light most favorable to the trial court's ruling — the appellant's brief, repeat visit to a location notorious for drug sales, his behavior there mirroring that of other drug buyers, plus his efforts to hide something when he realized the police were after him — indicated a "fair probability" of finding contraband in his car. But instead of evaluating the totality of the circumstances, the majority opinion picks them off one by one, viewing them in a light unfavorable to the trial court's ruling and holding each inadequate to support a finding of probable cause.

As to the majority's analysis of furtive gestures, the dissenters find it significant that a marked patrol unit pulled in behind the appellant's truck, the appellant knew that the patrol car was behind him, and his gestures, far from ambiguous, looked as if he were hiding something. Deliberately furtive gestures at the approach of police "are strong indicia of mens rea," and the majority errs to discount them in this case. Even if the law required police "action" for furtive gestures to have incriminating significance, the gestures here would meet that requirement because the appellant continued them after he pulled over in response to the patrol officer's activation of his emergency equipment, a fact ignored by the majority opinion.

Commentary: On remand, the Houston Court of Appeals (1st Dist.) addressed the appellant's four remaining challenges: (1) whether the search of his truck fit within the inventory-search exception to obtaining a search warrant, (2) whether the search could properly be characterized as an inventory-search, (3) whether the Houston Police Department's inventory search requirements were constitutional, and (4) whether the search exceeded the scope of his arrest.

The court found that: (1) the search of the appellant's vehicle incident to his arrest for failing to signal a lane change and a turn exceeded the proper scope of a warrantless search incident to that arrest (the appellant was arrested for the offenses of failing to signal a lane change and a turn, so the officers who arrested him could not have expected to find further evidence of the crime for which he was arrested in the passenger compartment of his vehicle and the appellant was safely secured in police custody and had no further access to his vehicle by the time the officers started searching it); (2) the State failed to carry its burden of establishing the search qualified as an inventory pursuant to an impoundment of a vehicle (lack of testimony on the inventory search and the inventory procedures); harm was established because the appellant pleaded guilty only after the trial court erroneously denied his motion to suppress. The State filed a petition for discretionary review, which the Court of Criminal Appeals refused. *Marcopoulos v. State*, 548 S.W.3d 697 (Tex. App.—Houston [1st Dist.] 2018, pet ref'd).

Officers were not required to cease searching a vehicle without a warrant pursuant to the automobile exception despite identifying the passenger as the perpetrator in the reported crime.

Robino v. State, 548 S.W.3d 108 (Tex. App.—Texarkana 2018, no pet.)

The officers immediately responding to a victim's report of an attempt to pass a counterfeit bill located a car matching the description of the suspect's car travelling on the same street which the victim reported it to be travelling near the location of the offense. During interrogation, Robino offered a story about being given counterfeit currency the night before, which indicated his and the other occupant's probable involvement. Then, as the officers were interviewing the occupants, officers saw a crumpled counterfeit bill on the front passenger's seat. These facts gave the officers a reasonable belief that items connected with the crime of forgery would be found inside the car. Thus, the officers had probable cause to search the entire car and all of its contents that may have concealed evidence of forgery under the 4th Amendment.

Although one of the passengers was identified as the person who attempted to pass the counterfeit bill, this neither exonerated Robino nor required the officers to cease their search of the vehicle and its contents for additional evidence of forgery. Further, a reasonable officer could believe that Robino was also involved in passing the counterfeit bill when he volunteered a story of how they came into possession of the counterfeit currency.

b. Community Caretaking Exception

Defendant waived or forfeited her 4th Amendment expectation of privacy when she asked officers to retrieve things from her car. Lay opinion testimony regarding intoxication was not improper.

Daniel v. State, 547 S.W.3d 230 (Tex. App.—Eastland 2017, no pet.)

Daniel was charged with driving while intoxicated. After her single-vehicle crash, Daniel spoke with a DPS Trooper, where she denied drinking any alcohol that day. However, she did say she was taking several prescription medications and the trooper testified that he observed her crying, that she was unsteady on her feet, and that her speech was slow and slurred. When the trooper asked for the appellant's driver's license, she told him that it was in her vehicle. A sheriff then proceeded to the appellant's vehicle, took several prescription medication bottles from the floorboard and the glove compartment, and placed them in the appellant's purse. Afterward, the trooper attempted to perform a horizontal gaze nystagmus test, but he stopped after the third attempt because the appellant stumbled and he felt that it would not be safe to continue.

Daniel alleged that law enforcement personnel conducted an illegal warrantless search and asked that the trial court suppress photographs of the prescription pill bottles and pills found in her vehicle. The court of appeals concluded that the appellant waived or forfeited any legitimate expectation of privacy in her vehicle when she requested that law enforcement officers go to her vehicle and collect her personal things. Because she lacked a subjective expectation of privacy in her vehicle, Daniel therefore did not have standing to challenge the legality of the search. See, *Matthews v. State*, 431 S.W.3d 596, 606 (Tex. Crim. App. 2014). The appellant also argued that the trial court erred in admitting lay opinion testimony from the arresting officers and a pharmacist concerning her intoxication. The court found that Texas law permits lay opinion testimony by a police officer to prove a person's intoxication. *Emerson v. State*, 880 S.W.3d 759, 763 (Tex. Crim. App. 1994). Furthermore, the court found that the appellant's counsel did not object to the pharmacist's testimony and did not preserve the issue for appeal.

3. Reasonable Suspicion

Based on the totality of the circumstances, the officer did not have reasonable suspicion to stop the defendant's vehicle after it veered onto the fog line. If the defendant's tires touched the fog line at all, which was debatable, that momentary touch, without any other indicator of criminal activity, was not enough to justify a stop for illegally driving on an improved shoulder.

State v. Cortez, 543 S.W.3d 198 (Tex. Crim. App. 2018)

Cortez was stopped by a state trooper for unlawfully driving on the improved shoulder of the highway because the tires on Cortez's minivan purportedly touched the white painted "fog line" separating the roadway from the shoulder. Upon searching Cortez's vehicle, the trooper found drugs and arrested Cortez. The trial court granted the defendant's motion to suppress evidence. The court of

appeals affirmed. The Court of Criminal Appeals vacated and remanded. The court of appeals affirmed again. The State petitioned for discretionary review (again).

In a 5-4 decision, the Court of Criminal Appeals affirmed. Writing for the majority, Judge Richardson stated that the officer lacked objectively reasonable suspicion to stop Cortez's vehicle. Given that it is a violation to "drive on an improved shoulder," the officer would have reasonable suspicion to stop the defendant if such an event occurred; however, the Court concluded that it was unclear whether the defendant's vehicle touched the fog line and, even if it did, the defendant was statutorily entitled to do so. During the motion to suppress hearing, the officer testified that he noticed the defendant's vehicle touched the fog line as he drove in the left lane beside the defendant. The Court found that, from the vantage point of driving in the left lane, next to a vehicle in the right lane, it cannot be seen, and there is no way to know, that the vehicle in the right lane is touching the fog line on *that* vehicle's right. Additionally, although "shoulder" is defined by statute, the statutory definition does not include the term "fog line" or mention the line separating the shoulder from the roadway. The Court therefore rejected the State's argument that driving on the fog line should be considered "driving on the improved shoulder" because the fog line is part of the shoulder itself.

Finally, the Court addressed two justifications for touching the fog line contained in Section 545.058(a) of the Transportation Code. Specifically, that section permits a driver to drive on an improved shoulder to "allow another vehicle traveling faster to pass," and to "decelerate before making a right turn." Because it appeared that the state trooper was intending to pass Cortez's vehicle on the left, Cortez was statutorily permitted to drive on the improved shoulder during that brief period of time. Also, because Cortez was signaling a right turn to exit the highway and turn right, Cortez was statutorily permitted to drive on the improved shoulder during that time as well.

Judge Newell filed a concurring opinion, joined by Judge Keel. Judge Newell noted that even though the court of appeals did not decide whether Cortez drove upon the improved shoulder to allow another vehicle to pass or to decelerate to make a turn, in the interest of judicial economy, it was appropriate to reach that issue in this case. In cases like this where the text, structure, and history of the statute in question provides no resolution to the inherent ambiguity of the statute, the rule of lenity requires the Court to draw the line in favor of the accused. Lastly, Judge Newell noted that the majority opinion is consistent with prior precedent interpreting this statute which rejected a "shifting-burden, self-defense-style framework."

Presiding Judge Keller filed a dissenting opinion, which was joined by Judge Keasler. Presiding Judge Keller opined that it was unclear whether Cortez's vehicle touched the fog line and would have held that any amount of time in which a moving vehicle is in contact with the fog line constitutes driving on the fog line and that the Court should have afforded the parties an opportunity to brief the issue of whether Cortez's driving on the improved shoulder was statutorily permitted.

Judge Yeary filed a dissenting opinion stating that the issue of whether Cortez was permitted to drive on the improved shoulder pursuant to one of the statutorily permitted circumstances was not before the Court. The Court should have limited review to the issue granted and should have remanded the remaining issues to the court of appeals.

An officer did not unduly prolong a traffic stop by questioning the passenger of the vehicle prior to running the driver's license for a warrant check.

Lerma v. State, 543 S.W.3d 184 (Tex. Crim. App. 2018)

Judge Newell wrote for the majority, finding that the officer in this case acted diligently in his investigation into the traffic stop and questioning a nervous passenger making furtive movements in the vehicle. The officer was justified in conducting a pat-down of the passenger and developed reasonable suspicion to continue questioning him. A mere nine minutes passed between the initiation of the stop and when the passenger fled from the officer. Importantly, the officer was joined by backup four minutes after the stop and discovered the passenger had provided a false identity a minute later. All of the officer's actions were connected to the traffic stop. The Court distinguished other cases relied upon by the court of appeals because unlike in this case, the officer's actions occurred after the traffic stop was complete.

The plain feel doctrine did not justify an officer removing a pill bottle from Young's pant pocket while conducting a *Terry* frisk because the officer could not have had a reasonable belief on feel alone that a pill bottle was contraband.

Young v. State, 2018 Tex. App. LEXIS 6424 (Tex. App—Houston [1st Dist.] August 16, 2018, no pet.)

The plain feel doctrine permits an officer who is legitimately conducting a *Terry* frisk to seize an item whose identity is already plainly known through the officer's sense of touch. Central to the plain feel doctrine's application is that, through touch, the officer "plainly know[s]" (i.e., has probable cause that) the object is contraband. A pill bottle is a common and typically benign object, according to the court of appeals. The totality of the circumstances, taken together, did not create probable cause that the pill bottle contained contraband. Young was a passenger in a car. He was not suspected of any crime, and he committed no alleged infraction. No evidence suggests that drugs or drug paraphernalia were visible in the car. The court also disagreed with the State's argument concerning Young's gestures toward the center console, finding that such gestures were not connected to a known or suspected instrumentality of crime.

The arresting officer did not have reasonable suspicion to initiate a traffic stop that led to the arrest of the defendant because the record showed that the sole reason for the stop was that Smith "banged" on the door of a residence and left in a silver Mercedes after the occupant denied him entry.

State v. Smith, 2018 Tex. App. LEXIS 5597 (Tex. App.—Texarkana July 24, 2018, no pet.)

Terrance Smith knocked on the door of a residence, was refused entry, and then drove away. After the encounter was reported to the Bonham Police Department (BPD), Smith was pulled over and subsequently arrested for driving while intoxicated (DWI). Smith filed a motion to suppress all evidence obtained after the initial stop on the ground that the arresting officer could not reasonably conclude that he was, had been, or would be engaged in criminal activity. The trial court agreed. Here, the facts before the trial court included that (1) Terrance Smith "banged" on the door of a residence occupied by Shamya Barnett at 8:18 p.m., (2) Barnett denied Smith entry, (3) Smith did not threaten Barnett, (4) Smith left the residence in a silver Mercedes, and (5) Barnett called 9-1-1. Given the absence of evidence showing (1) the nature of Barnett and Smith's relationship, if any, (2) that Smith had threatened Barnett in any manner, or (3) that Smith would return to Barnett's home after he left, there "was no indication of crime being afoot." Moreover, at the suppression hearing, no traffic violation was reported when a vehicle driven by defendant was stopped by the police officer. Rather, the evidence indicated that they merely followed the directive to stop a silver Mercedes.

Officers had reasonable suspicion for an investigatory stop based on a report made to dispatch by a citizen-informant that the defendant was engaging in a pattern of repetitious behavior that

was unusual and suspicious, i.e., continuously driving through neighborhood streets and alleyways for an extended period in a manner that was suspicious to a neighborhood resident.

Herrera v. State, 546 S.W.3d 922 (Tex. App.—Amarillo, no pet.)

The detaining officer need not be personally aware of every fact that objectively supports a reasonable suspicion to detain; rather, the cumulative information known to the cooperating officers at the time of the stop is to be considered in determining whether reasonable suspicion exists. A police dispatcher is ordinarily regarded as a "cooperating officer" for purposes of making this determination. Finally, information provided to police from a citizen-informant who identifies himself or herself and may be held to account for the accuracy and veracity of his or her report may be regarded as reliable.

The trial court did not err by implicitly finding that the deputy did not have reasonable suspicion to support the stop based on the deputy's testimony related to the error rate of TexasSure.

State v. Brinkley, 541 S.W.3d 923 (Tex. App.—Fort Worth 2018, no pet.)

Deputy Christopher Kristufek of the Parker County Sheriff's Office stopped Randall Lee Binkley in the Horseshoe Bend area solely because of an "unconfirmed" return from the state vehicle insurance database regarding whether Binkley's vehicle had liability insurance. Deputy Kristufek ultimately arrested Binkley for driving while intoxicated—felony repetition (DWI), a grand jury indicted him, and Binkley filed a motion to suppress all evidence gleaned from the stop. The trial court granted the motion. In its interlocutory appeal, the State contended in its sole point that sufficient reasonable suspicion existed to stop Binkley's vehicle when the detaining deputy received information from the state vehicle insurance database that the insurance policy on said vehicle had been expired for over five months.

According to the court, cases addressing the validity of stops based on an officer's database-derived suspicion from ambiguous terms like "unconfirmed" that the driver may be committing this misdemeanor fall into two general groups: cases in which the evidence dispels the ambiguity and shows that the data is reliable and cases in which the evidence falls short of doing so. This case does not fall clearly into either group. Rather, the record contains a plethora of information about the database and testimony supporting its reliability, but it also contains evidence casting doubt on the reliability of the database. Presented with a "close case," the court views the evidence in the light most favorable to the trial court's ruling. The trial court attached greater significance and credibility to Deputy Kristufek's testimony indicating a weekly error rate of 33 percent and potentially up to 100 percent in his experience with the database and to database coordinator Burkhardt's inability to explain the error rate experienced by Deputy Kristufek. That evidence supports the trial court's implied finding that the database was not reliable. The undisputed evidence shows that Deputy Kristufek had no basis (reasonable suspicion) for the stop other than the return from the database.

4. Probable Cause

An affidavit contained enough particularized facts given by a named informant to allow the magistrate to determine there was probable cause to issue a search warrant.

State v. Elrod, 538 S.W. 3d 551 (Tex. Crim. App. 2017)

In a unanimous opinion written by Judge Richardson, the Court found that the extensive and detailed statement given by the named informant and witness to the ongoing criminal activity showed that she had personal and direct knowledge of the matters she asserted. This made her a reasonably trustworthy source. The magistrate, therefore, correctly determined that the facts the informant gave established probable cause. The Court also found information in the affidavit that independently corroborated the facts the informant gave in her detailed statement to police.

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

State v. Ford, 537 S.W.3d 19 (Tex. Crim. App. 2017)

Writing for six members of the Court, Presiding Judge Keller opined that the officer had knowledge of undisputed facts that supported a conclusion that Ford exercised control over the items in her purse with the requisite intent to take them from a Dollar General Store. The fact that some items were visible in the cart while others were concealed in Ford's purse caused the officer to infer that she intended to pay for some items while concealing others. The officer could have reasonably believed that a jacket covering the purse was designed to further conceal the items.

Judge Newell concurred without written opinion.

Judge Walker, joined by Judge Alcala, dissented because, although probable cause existed, the officer lacked reasonable suspicion to stop Ford and that the majority opinion failed to show proper deference to the court of appeals decision to uphold the trial court's ruling suppressing the methamphetamine discovered subsequent to her arrest for shoplifting.

Commentary: This case got overlooked in last year's update. It was handed down on September 20, 2017. It is a worthy addition in light of the Legislature's modification of the value ladder for theft offenses. Theft of less than $100 is now a Class C misdemeanor. Section 31.03 (e)(1), Penal Code. The theft in this case involved property worth $75.10, which at the time was a Class B misdemeanor. TMCEC has received a number of phone calls over the years pertaining to this kind of scenario. Notably, under Texas law, a person does not have to leave a store with the property to commit theft. Nor is appropriation of property or the act of concealing merchandise necessarily tantamount to unlawful appropriation with the intent to deprive. Rather, such a determination has to be made on a case-by-case basis.

The trial court should have granted a motion to suppress surveillance video evidence found on a computer hard drive because the warrant's supporting affidavit did not establish probable cause that surveillance video or equipment existed and would be located at the business searched, and the magistrate could not reasonably infer the existence of such video or equipment.

Foreman v. State, 2018 Tex. App. LEXIS 7264 (Tex. App.—Houston [14th Dist.] August 3, 2018, no pet.)

The core of the 4th Amendment's warrant clause and Article I, Section 9, of the Texas Constitution is that a magistrate may not issue a search warrant without first finding probable cause that a particular item will be found in a particular location. Probable cause must be found within the "four corners" of the affidavit supporting the search warrant affidavit. Magistrates are permitted to draw reasonable inferences from the facts and circumstances contained within the four corners of the affidavit.

In this case, the appellant's issue centers around whether probable cause existed that the surveillance video or surveillance equipment was located at the auto shop, not whether probable cause existed that the surveillance video or surveillance equipment constituted evidence of the charged offenses or evidence that appellant committed the offenses. Nonetheless, the magistrate inferred not only that the surveillance video and surveillance equipment was at a specific location (inside of the auto shop); it also inferred that the surveillance video and surveillance equipment existed.

The court of appeals points out in its analysis that generally, to support a search warrant for a computer, it has held there must be some evidence that a computer was directly involved in the crime. When there is no evidence that a computer was directly involved in the crime, more is generally needed to justify a computer search. Deferring to all reasonable inferences that the magistrate could have made, the court concludes that the affidavit in this case failed to establish probable cause that surveillance video or surveillance equipment existed and would be located at the business. The affiant provided no facts that a computer containing surveillance video was involved in the crime, directly or indirectly, such that the existence of surveillance video or surveillance equipment could be reasonably inferred. The affidavit did not reference any computers or computer hard drives.

"[A]udio/video surveillance video and/or video equipment" was mentioned in the introductory paragraph of the affidavit, but no facts were described to support the conclusion that a video surveillance system existed at the body shop to the text of the note Nor were facts included from which it could reasonably be inferred that surveillance video or equipment would probably be found at the shop. Also, the presence of surveillance video or equipment in an auto shop is not so well known to the community as to be beyond dispute.

The affidavit established probable cause to search the appellant's home; additional findings were not required under Article 18.02(c) of the Code of Criminal Procedure because the warrant at issue here was not a "mere evidence" warrant where it authorized a search for both "evidence" and items under Subsection (a)(8).

Jennings v. State, 531 S.W.3d 889 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd)

Jennings argues the trial court erred in denying his motions to suppress because the affidavit used to obtain the search warrant failed to establish probable cause for the search of his home. The court looks at Chapter 18 of the Code of Criminal Procedure to determine whether the supporting affidavit at issue was required to contain evidence establishing certain elements. If the warrant was issued under Article 18.02(a)(10), then the supporting affidavit would need to satisfy the heightened requirements of article 18.01(c), which provides that a search warrant may not be issued under Subsection (a)(10) unless the affidavit sets forth sufficient facts to establish probable cause that: (1) a specific offense has been committed, (2) the specifically described property or items that are to be searched for constitute evidence of that offense, and (3) the property or items are located at the place to be searched. These heightened requirements do not apply to warrants issued under Article 18.02(a)(8). Jennings argues that the additional findings under (a)(10) are required here. The State maintains that the search warrant was issued under subsection (a)(8) and, therefore, the additional findings are not required. The court agrees with the State that because the warrant at issue here was issued under Subsection (a)(8), it is not a mere evidentiary search warrant and is not subject to the heightened requirements of 18.01(c). While the warrant authorizes the search for items that could only be characterized as "evidence," it also authorizes the seizure of property the possession of which is prohibited by law. Accordingly, the warrant seeks more than "mere evidence." Sorting that out, the court concludes that the magistrate had a substantial basis for determining that probable cause existed for the search of Jennings' home.

Based on the odor of alcohol and the defendant's admission that there was an open container in his vehicle, there existed probable cause to search his vehicle for the open container.

Elrod v. State, 533 S.W.3d 52 (Tex. App.—Texarkana 2017, no pet.)

The trooper had sufficient knowledge to believe that the defendant committed DWI, and thus the trooper had probable cause for the warrantless arrest.

Dansby v. State, 530 S.W.3d 213 (Tex. App.—Tyler 2017, pet. ref'd)

A Smith County Sheriff's deputy stopped at a convenience store and noticed an unoccupied vehicle running in the parking lot. In the adjoining Whataburger, Dansby admitted to owning the vehicle and the deputy noted that Dansby's eyes were red and watery, and that he smelled of alcohol. Dansby said that earlier that night he had a few beers at a nearby bar, went home, changed clothes, and returned to Whataburger for food. The deputy, believing that Dansby might be guilty of public intoxication, asked a deputy fire marshal to administer a horizontal gaze nystagmus test. After the test was conducted, Dansby was arrested for public intoxication and a DPS Trooper, upon hearing the facts, decided to investigate for DWI. The trooper conducted standard field sobriety tests and subsequently arrested Dansby for DWI.

The court found that, based on the evidence adduced and the reasonable inferences that can be made from it, the trial court could reasonably conclude that the facts and circumstances within the DPS trooper's knowledge were sufficient to warrant a belief that Dansby committed DWI, and thus the trooper had probable cause to arrest the defendant without a warrant. Sufficient evidence justified findings that (1) Dansby was the driver of the vehicle, (2) Dansby operated the vehicle, and (3) Dansby was intoxicated when he drove the vehicle to the restaurant. Furthermore, the court found that the Whataburger restaurant met the requirements of a statutory suspicious-place exception to the warrant requirement, meaning that the warrantless arrest did not violate Dansby's 4th Amendment rights.

Commentary: This case somehow eluded us last year which is hard to explain because we really like Whataburger.

5. Exclusionary Rule

The prosecution presented sufficient evidence to establish that the recording of private conversations did not violate the Texas wiretap statute or exclusionary rule.

White v. State, 549 S.W.3d 146 (Tex. Crim. App. 2018)

White was convicted of organized criminal activity and money laundering. The trial court assessed punishment in each case at ten years' imprisonment, suspended for eight years of community supervision and ordered restitution in the amount of $32,822.04.

On direct appeal, White argued that that trial court erred in admitting an audio recording of a conversation between himself, codefendant Robey, and a third party because the recording was unlawfully obtained, was not properly authenticated, and constituted inadmissible hearsay. These and other arguments were rejected by the court of appeals.

The Court of Criminal Appeals granted PDR to address the issue of whether there was sufficient evidence to establish that the recording of private conversations did not violate the Texas wiretap

statute (Section 16.02, Penal Code) and whether the recording was barred by the Texas exclusionary rule (Article 38.23, Code of Criminal Procedure).

In a unanimous opinion by Judge Richardson, the Court affirmed the court of appeals' determination that the audio recording was admissible. There was no evidence indicating that the conversation between White, codefendants, and a non-accomplice third party (Brandon) was recorded by someone other than Brandon, or that the record was made without Brandon's consent, or that the recording was furnished by anyone other than Brandon.

By the time the defense objected to the admission of the recording, the prosecution had already presented enough evidence to prove by a preponderance of the evidence that Brandon had recorded the conversation, and that evidence substantiated that the recording had been legally obtained.

Presiding Judge Keller wrote a concurring opinion joined by Judges Keasler, Keel, and Yeary explaining that the rules of admissibility place the burden on the proponent of the evidence to establish admissibility, while rules of exclusion require the opponent of the evidence to establish a basis for exclusion. Because Article 38.23 is a statutory rule of exclusion it was White's burden to establish that the recording was inadmissible.

Commentary: It is too early to call it a trend, but this is the second year in a row that the Court of Criminal Appeals has decided a case with intriguing facts involving the Texas wiretap statute. Judges and prosecutors who attended TMCEC conferences in AY 18 likely recall *Long v. State*, 535 S.W.3d 511 (Tex. Crim. App. 2017) (holding that for purposes of Section 16.02 of the Penal Code, a high school basketball coach had a reasonable expectation of privacy in the team's locker room). Although legally they are dissimilar, both contain unique and memorable facts.

The trial court did not err in failing to suppress images recovered from a phone stolen from the appellant's home because he lacked standing to complain of the search and seizure of a phone that he gave to his girlfriend.

Grant v. State, 531 S.W.3d 898 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd)

A defendant must show that he was the victim of the illegal search and seizure to establish standing to complain about evidence that was obtained in violation of the law. Here, although the appellant purchased the phone, the trial court reasonably could have concluded that appellant did not own it at the time it was stolen because he had given it to his girlfriend, Alisha, and thus, had relinquished any property or possessory right in the phone. The legal right invaded as a result of the theft, if any, was not the appellant's—the victim, if any, was Alisha's.

6. Blood Draws

The Officer had probable cause to arrest Ruiz for driving while intoxicated, but the totality of the circumstances did not justify a warrantless blood draw by exigent circumstances.

State v. Ruiz, 545 S.W.3d 687 (Tex. App.—Corpus Christi 2018, pet. granted)

This is the second time this case has come before this court. See, *State v. Ruiz*, 509 S.W.3d 451, 452 (Tex. App.—Corpus Christi 2015). Since the first case, the Court of Criminal Appeals decided two cases analyzing the issue of exigent circumstances in the context of suppressing blood evidence obtained pursuant to a warrantless draw (*Cole v. State* and *Weems v. State*). Thus, the Court of

Criminal Appeals vacated the previous opinion and remanded this case for further analysis in light of those two opinions.

An officer responded to a midnight automobile collision between a Lincoln and a Pontiac. One of the drivers informed the officer that the other driver—later identified as Ruiz—had fled the scene and had run behind a car wash near the area. The officer located Ruiz and described him as "unresponsive," that he "couldn't open his eyes," and "wouldn't respond," also noting a strong odor of alcohol and no apparent injuries on his body. EMS transported Ruiz to the hospital, where the officer placed him under arrest and then gathered and filled out paperwork to order the hospital personnel to perform a blood draw.

The court discussed two main issues: (1) the trial court's ruling on Ruiz's motion to suppress the blood evidence and (2) whether there were exigent circumstances that validated a warrantless search. On the motion to suppress issue, the state stipulated that Ruiz's blood was drawn without a warrant, meaning the burden shifted to the state to establish that the search was reasonable. The state cited Texas' implied-consent framework under Section 724.011(a) of the Transportation Code, which implies consent to search for an individual who has been arrested for driving while intoxicated. The court found that Ruiz was unable to consent freely and voluntarily, or have the opportunity to revoke such consent, due to the fact that he was unconscious and did not respond to the officer. On the exigent circumstances issue, the court found that the officer had probable cause to arrest Ruiz, but the totality of the circumstances did not justify Ruiz's warrantless blood draw because of exigent circumstances. The trial court found that the officer erroneously relied upon the implied consent statute in ordering the hospital staff to draw Ruiz's blood. Therefore, she could not have relied upon the existence of an exigent circumstance in ordering the blood draw.

Commentary: Stay tuned! The State's petition for discretionary review was granted on April 25, 2018.

7. Emergency Detention Warrants

A magistrate may direct an emergency detention warrant to any on-duty peace officer listed in Article 2.12 of the Code of Criminal Procedure, regardless of the apprehended person's location within the county.

Tex. Atty. Gen. Op. KP-0206 (5/16/18)

The opinion also finds that (1) Subsection 573.012(e) of the Health and Safety Code contemplates that the peace officer apprehending the person also takes responsibility for transporting the person; (2) a peace officer may not refuse to transport a person he or she apprehends pursuant to an emergency detention warrant; and (3) a subsequent action for contempt could likely be brought in a court (having jurisdiction over mental health proceedings) to enforce a magistrate's emergency detention warrant issued pursuant to Subsection 573.012(d) of the Health and Safety Code.

TMCEC: This request for opinion stemmed from a dispute between the municipal police department and the sheriff's department revolved around who is responsible for transporting a person apprehended within city limits pursuant to an emergency detention warrant. Chapter 573 of the Health and Safety Code governs the emergency detention of a person evidencing mental illness who may pose a substantial risk of imminent serious harm to himself or others if not immediately restrained. Upon review of a filed written application, if certain requirements are met, the magistrate shall issue to an on-duty peace officer a warrant for the person's immediate apprehension.

8. Qualified Immunity

An officer was entitled to qualified immunity, even assuming a 4th Amendment violation occurred, because no existing precedent squarely governs the specific facts at issue.

Kisela v. Hughes, 138 S. Ct. 1148 (2018)

Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." According to the Court in this per curiam opinion, it is this part of the qualified-immunity standard that the court of appeals failed to implement correctly.

Officer Kisela said he shot the suspect because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick, a woman standing nearby. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. According to the Court, this is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the 4th Amendment.

The Court rejects the court of appeals conclusion that its own precedent clearly established excessive force. Even "if a controlling circuit precedent could constitute clearly established law," the most analogous circuit precedent favors Kisela. The Court finds that not one of the cases relied on by the court of appeals supports denying Kisela qualified immunity.

Officers were entitle to qualified immunity because they reasonably but mistakenly concluded probable cause was present.

District of Columbia v. Wesby, 138 S. Ct. 577 (2018)

Justice Thomas delivered the opinion of the Court. Officers are entitled to qualified immunity under Section 1983 unless the unlawfulness of their conduct was "clearly established at the time." To be clearly established, a legal principle must be "settled law," and it must clearly prohibit the officer's conduct in the particular circumstances before him. In the warrantless arrest context, "a body of relevant case law" is usually necessary to "'clearly establish' the answer" with respect to probable cause. The lower court failed to identify a single precedent finding a 4th Amendment violation under similar circumstances.

The lower court should have asked whether a reasonable officer could conclude--considering all of the surrounding circumstances, including the plausibility of the explanation itself--that there was a "substantial chance of criminal activity."

Considering the totality of the circumstances, officers in this case made an entirely reasonable inference that the partygoers knew they did not have permission to be in the house. Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several

"'common-sense conclusions about human behavior.' "Because most homeowners do not live in such conditions or permit such activities in their homes, the officers could infer that the partygoers knew the party was not authorized. The officers also could infer that the partygoers knew that they were not supposed to be in the house because they scattered and hid when the officers arrived.

Justice Sotomayor wrote separately, joined by Justice Ginsburg, concurring in part and concurring in the judgment. She agrees with the majority that the officers are entitled to qualified immunity, but disagrees with the majority's decision to reach the merits on the issue of probable cause.
Justice Ginsburg also wrote separately, calling for a re-examination in a future case whether a police officer's reason for acting, in at least some circumstances, should factor into the 4th Amendment inquiry regarding the existence of probable cause.

C. Double Jeopardy

Consenting to two trials when one would have avoided a double jeopardy problem precluded any constitutional violation associated with holding a second trial because, in those circumstances, the defendant won a potential benefit and experienced none of the prosecutorial oppression the Double Jeopardy Clause exists to prevent.

Currier v. Virginia, 138 S. Ct. 2144 (2018)

Michael Currier was indicted for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. Because the prosecution could introduce evidence of Currier's prior burglary and larceny convictions to prove the felon-in-possession charge, and worried that evidence might prejudice the jury's consideration of the other charges, Currier and the government agreed to a severance and asked the court to try the burglary and larceny charges first, followed by a second trial on the felon-in-possession charge. At the first trial, Mr. Currier was acquitted. He then sought to stop the second trial, arguing that it would amount to double jeopardy. Alternatively, he asked the trial court to prohibit the state from relitigating at the second trial any issue resolved in his favor at the first. The trial court denied his requests and allowed the second trial to proceed unfettered, which resulted in a conviction. Both the Virginia Court of Appeals and the Virginia Supreme Court affirmed the conviction.

Currier argued that *Ashe v. Swenson*, 397 U.S. 436, (held that the Double Jeopardy Clause barred a defendant's prosecution for robbing a poker player because the defendant's acquittal in a previous trial for robbing a different poker player from the same game established the defendant was not one of the robbers) requires a ruling in his favor.

Justice Gorsuch delivered the opinion of the Court (Parts I and II), joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, concluding that, because Currier consented to a severance, his trial and conviction on the felon-in-possession charge did not violate the Double Jeopardy Clause. According to Justice Gorsuch, this consent is a critical difference between this case and *Ashe*. If consent can overcome a traditional double jeopardy complaint about a second trial for a greater offense, it must also suffice to overcome a double jeopardy complaint under Ashe's more innovative approach. Holding otherwise would be inconsistent Supreme Court case law. The cases relied upon by the defendant merely apply the *Ashe* test and conclude that a second trial was impermissible. They do not address the question whether the Double Jeopardy Clause prevents a second trial when the defendant *consents* to it (emphasis in original). Currier faced a lawful choice between two courses of action that each bore potential costs and rationally attractive benefits. Difficult strategic choices are "not the same as no choice," *United States v. Martinez-Salazar*, 528 U.S. 304, 315, and the

Constitution "does not . . . forbid requiring" a litigant to make them, *McGautha v. California*, 402 U.S. 183, 213.

Justice Gorsuch, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, concluded in Part III that civil issue preclusion principles cannot be imported into the criminal law through the Double Jeopardy Clause to prevent parties from retrying any issue or introducing any evidence about a previously tried issue. Currier argues that, even if he consented to a second trial, that consent did not extend to the relitigation of any issues the first jury resolved in his favor. Even assuming for argument's sake that Currier's consent to holding a second trial didn't more broadly imply consent to the manner it was conducted, his argument must be rejected on a narrower ground as refuted by the text and history of the Double Jeopardy Clause and by the Court's contemporary double jeopardy cases.

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. The dissenters would hold that Currier's acquiescence in severance of the felon-in-possession charge does not prevent him from raising a plea of issue preclusion based on the jury acquittals of breaking and entering and grand larceny. The question presented in *Ashe* was whether issue preclusion is not just an established rule of federal criminal procedure, but also a rule of constitutional stature. The Court had no hesitation in concluding that it is. Since *Ashe*, the Court has reaffirmed that issue preclusion ranks with claim preclusion as a Double Jeopardy Clause component.

Virginia courts hold that unless the government and the defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction due to the hugely prejudicial effect introduction of prior felony convictions has on juries. Currier and the government acceded to the default rule and the trial court accordingly severed the possession charge. The Court has found waiver of fundamental constitutional rights *by conduct* only where a defendant has engaged in conduct inconsistent with the assertion of the right (emphasis is the writer's). Where a defendant takes no action inconsistent with the assertion of a right, the defendant will not be found to have waived the right. Here, Currier took no action inconsistent with the assertion of an issue-preclusion plea. Unlike the right against a second trial for the same offense (claim preclusion), issue preclusion prevents relitigation of a previously rejected theory of criminal liability without necessarily barring a successive trial. Issue preclusion bars only a subset of possible trials—those in which the prosecution rests its case on a theory of liability a jury earlier rejected. That being so, consenting to a second trial is not inconsistent with—and therefore does not foreclose—a defendant's gaining the issue-preclusive effect of an acquittal.

The first trial established that Currier did not participate in breaking and entering the Garrisons' residence or in stealing their safe. The government can attempt to prove Currier possessed firearms through a means other than breaking and entering the Garrisons' residence and stealing their safe. But the government should not be permitted to show in the felon-in-possession trial what it failed to show in the first trial, i.e., Currier's participation in the charged breaking and entering and grand larceny, after a full and fair opportunity to do so.

Commentary: How might issue preclusion manifest itself in municipal court? One example is junk vehicle cases where the ordinance provides that each day of violation is a separate offense. Would a favorable ruling in a case adjudicating an offense involving a junk vehicle (i.e., that the vehicle was not in violation of the ordinance) preclude litigating the issue resolved in the defendant's favor in a trial involving a subsequent offense for the same vehicle? The issue in this case, the effect of consent to severance of offenses into more than one trial on the applicability of the Double Jeopardy Clause, might surface in municipal courts, especially because complaints in municipal courts generally

charge the defendant with one offense at a time, even where the defendant was cited for multiple offenses during a single encounter.

A city ordinance conviction for failure to obtain a building permit violated the defendant's double-jeopardy rights.

Rodriguez v. State, 2018 Tex. App. LEXIS 7240 (Tex. App.—Austin Aug. 31, 2018) (mem. op., not designated for publication)

The case involved the same 2006 wall/fence-building activities of which Rodriguez was previously found not guilty. In absence of additional construction or changes to the property, there could not be an ongoing failure to first obtain the appropriate permit for the same wall and fence. With regard to Rodriguez's conviction for failure to obtain a site plan, the previous complaints alleging that Rodriguez had violated an ordinance were dismissed by the municipal court on the prosecutor's motion before trial on the merits had begun. Accordingly, jeopardy had not yet attached. The court of appeals affirmed in part; reversed and rendered in part.

Double jeopardy barred the defendant's prosecution for aggravated assault of a public servant under Subsections 22.02(a)(2) and (b)(2)(B) of the Penal Code because he had already been convicted of the same offense in an adjacent county.

Marson v. State, 2018 Tex. App. LEXIS 6522 (Tex. App.—Eastland August 16, 2018, no pet.)

Here, the accused discharged a firearm toward two troopers during a pursuit that spanned Andrews and Ector counties. Whether the appellant's double jeopardy claim succeeds depends upon the allowable unit of prosecution (i.e., for each victim or each discharge of the firearm). The State argued that double jeopardy did not bar the appellant's prosecution in Ector County (following two convictions in Andrews County) because the appellant committed multiple offenses of aggravated assault of each complainant because he fired numerous shots in their direction and each shot "was the result of a separate impulse." The State urged the court to hold that each time the appellant pulled the trigger, he was committing a separate criminal act, requiring a separate culpable mental state. The court of appeals disagreed.

Here, the State charged the appellant with four violations of the same statute (two in Andrews County and two in Ector County). The prosecutions against the appellant must be viewed as the acts of a single sovereign under the Double Jeopardy Clause. If each alleged violation of the statute involved a separate "allowable unit of prosecution," the appellant's claim of double jeopardy must be rejected. Looking at legislative intent, the court found that the allowable unit of prosecution for the aggravated assaults with which the appellant was charged is each victim, not each discharge of the firearm.

Jeopardy did not attach because the trial court did not dismiss the first case with prejudice.

State v. Atkinson, 541 S.W.3d 876 (Tex. App.—Houston [14th Dist.] 2017, no pet.)

When Atkinson's case was called for trial, the State moved for a continuance. Atkinson objected and announced ready for trial. The trial court denied the State's motion for continuance. The prosecution moved to dismiss and filed a motion captioned "Motion to Dismiss," in which he requested the court dismiss the case "with leave to refile." On the same page as the motion's text appeared a proposed order stating that the cause was dismissed with leave to refile. Atkinson objected to the motion to dismiss and again announced ready for trial. The State re-urged its motion for continuance or dismissal. The trial judge offered the prosecutor two options: (1) come back after lunch for trial or (2)

dismiss with prejudice. Faced with these alternatives, the prosecutor told the court to "dismiss the case." The trial judge wrote on the State's motion to dismiss, "/w prejudice" directly following the words "Motion to Dismiss" in the caption of the State's motion. The judge made no other alterations to the motion. The judge then signed the State's proposed order dismissing the case, which said dismissed *with leave to refile* (emphasis added).

The court of appeals concluded that changing the caption, which was altered by the trial judge (not the prosecution), did not change the substance of the motion. Accordingly, it reversed the trial court's order granting Atkinson's special plea of double jeopardy and remanded this case for trial.

D. 6th Amendment

The 6th Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.

McCoy v. Louisiana, 138 S. Ct. 1500 (2018)

Over McCoy's repeated objections, his defense attorney conceded his guilt during trial and at the penalty phase. The jury convicted him and he unsuccessfully sought a new trial. The Louisiana Supreme Court affirmed the trial court's ruling that the defense attorney had authority to concede guilt, despite McCoy's opposition.

Justice Ginsburg delivered the opinion of the Court, joined by the Chief Justice and Justices Kennedy, Breyer, Sotomayor, and Kagan. The defendant does not surrender control entirety to counsel. The lawyer's province is trial management, but some decisions are reserved for the client, including whether to plead guilty, waive the right to a jury trial, testify on one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in this reserved-for-the-client category. Justice Ginsburg notes that McCoy opposed the assertion of guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. This is in contrast to the defendant in *Florida v. Nixon*, 543 U.S. 175 (2004), who was unresponsive. The Court's ineffective-assistance-of-counsel jurisprudence does not apply here, where the client's autonomy, not counsel's competence, is in issue. Finding this to be structural error, it is not subject to harmless-error review.

Justice Alito dissented, joined by Justices Thomas and Gorsuch, finding that the majority changed the facts of the case. The defense counsel did not admit that McCoy was guilty. Instead, faced with overwhelming evidence, counsel admitted that petitioner committed one element of that offense. But he strenuously argued that McCoy was not guilty because he lacked intent. According to Alito, "the Court's newly discovered fundamental right simply does not apply to the real facts of this case."

The real case is far more complex and the result of a "freakish confluence of factors that is unlikely to recur." Likewise, the "constitutional right that the Court has now discovered—a criminal defendant's right to insist that his attorney contest his guilt with respect to all charged offenses—is like a rare plant that blooms every decade or so. Having made its first appearance today, the right is unlikely to figure in another case for many years to come." This is because the right is only likely to come into play in a capital case where the jury must decide both guilt and punishment, few rational defendants are likely to insist on contesting guilt under similar circumstances, conflicts with counsel like in this case generally result in a parting of ways, substitute counsel will likely be appointed, and the defendant has to expressly protest counsel's strategy (the right would be waived if the defendant is silent or equivocal).

A claim to habeas relief based on affirmative mis-advice from an attorney regarding possible deportation is congnizable and not barred as a non-retroactive *Padilla* claim.

Ex parte Garcia, 547 S.W.3d 228 (Tex. Crim. App. 2018)

The United States Supreme Court held in *Padilla v. Kentucky*, 559 U.S. 356 (2010), that defense attorneys have a duty to advise their clients regarding immigration—of the possibility of deportation if immigration law is not succinct and straightforward and if the law is truly clear to give correct advice that is equally clear. In *Ex parte De Los Reyes*, 392 S.W.3d 675 (2013), the Court of Criminal Appeals decided that the duty announced in *Padilla* is not retroactive. Thus, if Garcia's claim is a *Padilla* claim, it is not cognizable.

Judge Hervey delivered the opinion of a unanimous Court. The Court agrees with the court of appeals' thorough and well-reasoned opinion making a crucial distinction between *Padilla* and Garcia's claim: *Padilla* imposed an affirmative duty to advise a client that he would be deported in certain cases, but Garcia's claim is not that his attorney had an affirmative duty to advise him (like Padilla); rather, he is arguing that when his attorney rendered immigration advice, which he was under no obligation to render, he had a duty to state the law correctly. This is more akin to bad-probation advice claims and bad parole-eligibility claims, which the Court has entertained for a number of years. The Court sees no reason to treat Garcia's claim differently than a similarly situated ineffective-assistance-of-counsel claim.

The trial court erred by failing to obtain a written waiver of jury trial, but that error was harmless because the judgment stated that Hinojosa waived his right to a jury trial, and he did not present any evidence to the contrary.

Hinojosa v. State, 2018 Tex. App. LEXIS 4822 (Tex. App.—Houston [1st Dist.] June 28, 2018, no pet.)

Every criminal defendant has the fundamental right to a trial by jury. Unless a defendant is facing the death penalty, he or she may waive his right to a jury trial, and the record must reflect that he or she made an express, knowing, and intelligent waiver. Under Texas law, such a waiver must be made in person, in writing, and in open court. Because neither the state nor the federal constitution requires that this waiver be written, a violation of this aspect of Article 1.13(a) of the Code of Criminal Procedure constitutes a statutory error rather than a constitutional error. When there is no written jury waiver, a defendant is not harmed by the violation if the record otherwise reflects that he knew about his right to a jury trial, and that he waived this right. In this case, the document that Hinojosa references as the only evidence that he waived his right to a jury trial is titled "JUDGMENT OF CONVICTION BY COURT—WAIVER OF JURY TRIAL." It specifically stated: "Defendant waived the right of trial by jury. . . ."

Hinojosa does not claim in his brief that he actually wanted a jury trial, and despite a discussion on this very subject at the hearing to correct the judgment, his counsel did not dispute the trial judge's observation that a bench trial had been requested, nor did counsel present any evidence that Hinojosa did not knowingly and intentionally waive his right to a jury trial, or any evidence that he wanted anything other than a bench trial.

E. 10th Amendment

The Professional and Amateur Sports Protection Act (PASPA) violates the 10thAmendment, specifically by its provision prohibiting states from authorizing sports gambling schemes.

Murphy v. NCAA, 138 S. Ct. 1461 (2018)

Justice Alito wrote for the majority. As the 10th Amendment confirms, all legislative power not conferred on Congress by the Constitution is reserved for the States. Absent from the list of conferred powers is the power to issue direct orders to the governments of the States. The anticommandeering doctrine that emerged in *New York v. U.S.*, 505 U. S. 144 (1992), and *Printz v. U.S.*, 521 U. S. 898 (1997), simply represents the recognition of this limitation. Thus, "Congress may not simply 'commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.' " *New York*, at 161.

The Court also found that (1) the anti-authorization (which includes authorization by repealing a statute that prohibited gambling as New Jersey did in this case) is not a valid preemption provision; (2) PASPA's provision prohibiting state licensing of sports gambling schemes also violates the anticommandeering rule; and (3) no provision of PASPA is severable from the provisions directly at issue.

Justice Thomas wrote separately to express his "growing discomfort" with the Court's modern severability precedents. He agreed with the majority that PASPA exceeds Congress' Article I authority to the extent it prohibits New Jersey from authorizng or licensing sports gambling. Under the Court's current severability precedents, the Court must make the severability determination by asking a counterfactual question: "'Would Congress still have passed' the valid sections 'had it known' about the constitutional invalidity of the other portions of the statute?" Justice Thomas believes the Court gave the best answer it can. But in future cases, the Court should take another look at its severability precedents, which are in tension with traditional limits on judicial authority.
Justice Breyer concurred in part and dissented in part, joined by Justice Ginsburg, finding part of of the Act to be severable, i.e., Section 3702(2), which applies to individuals and not the states.
Justice Ginsburg dissented, joined by Justice Sotomayor, finding no cause, in light of the question presented to the Court (does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States) to "deploy a wrecking ball destroying" PASPA in its entirety. Two federal edicts should remain intact. First, PASPA bans States themselves (or their agencies) from "sponsor[ing], operat[ing], advertis[ing], [or] promot[ing]" sports-gambling schemes. Second, PASPA stops private parties from "sponsor[ing], operat[ing], advertis[ing], or promot[ing]" sports-gambling schemes if state law authorizes them to do so. Section 3702(2). Nothing in these Section 3702(1) and Section 3702(2) prohibitions commands States to do anything other than desist from conduct federal law proscribes. Nor is there any doubt that Congress has power to regulate gambling on a nationwide basis, authority Congress exercised in PASPA.

Commentary: Chapter 47 of the Penal Code (Gambling) criminalizes gambling (including sports gambling), promoting gambling, keeping a gambling place, communicating gambling information, and possessing gambling devices, equipment, or paraphernalia. Attorney General Ken Paxton joined a brief of amici curiae with 20 other states in support of New Jersey's repeal of its sports gambling laws, however, that brief was more in favor of states' rights than the practice of sports gambling. An attorney general opinion in 2016 found participation in paid fantasy sports leagues to be akin to gambling because it involves "partial chance" (*Tex. Atty. Gen. Op. KP-0057* (1/19/16)). Legislation filed in the 85th Legislature addressing that opinion was not successful (i.e., H.B. 1418, 1422, and 1457). It is not likely that Texas will join other states in legalizing sports gambling in light of the Court's opinion, but only time will tell.

F. 14th Amendment

The federal trial court properly found Harris County's bail setting procedures violated Due Process and Equal Protection in the United States and Texas Constitutions because indigent misdemeanor arrestees were unable to pay secured bail, which resulted in a deprivation of basic liberty interests.

ODonnell v. Harris County, 882 F.3d 528 (5th Cir. 2018), opinion withdrawn and superseded on rehearing, *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018)

Affirming and reversing in part the trial courts conclusions of law, the 5th Circuit Court of Appeals held that Harris County's bail system violated due process because Texas law created a protected liberty interest in the right to bail and the current procedure did not sufficiently protect detainees from magistrates imposing bail as an instrument of oppression. The 5th Circuit, however, stopped short of accepting the trial court's assertion that inability to pay a bail bondsman or post bail constitutes an automatic order of detention without due process and in violation of equal protection or that the matter of willful non-payment, which governs fines and costs, should also apply to bail. Thus, the trial court's injunction was overbroad because instead of simply establishing a system for a case-by-case evaluation, including ability to pay, and appropriate hearing procedures, the injunction amounted to outright elimination of secured bail for indigent misdemeanor arrestees despite the fact that there was no fundamental substantive due process right to be free from any form of wealth-based detention.

Commentary: Subsequently, on August 14, 2018, the 5th Circuit granted Harris County judges' motion for stay, pending appeal, because the federal judge's sweeping and overly expansive injunction entered on remand entirely precluded the possibility of secured bail for indigent misdemeanor arrestees and presupposed a nonexistent" fundamental substantive due process right to be free from any form of wealth-based detention. *Odonnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2018). On September 20, 2018, citing *Odonnell*, the United States District Court for the Northern District of Texas, granted the plaintiff's preliminary injunction against Dallas County and motion of class certification. *Daves v. Dallas County*, Civil Action No. 3:18-CV-0154-N, (N.D. Tex. 2018). Although similar to *ODonnell*, *Daves* differs in that it includes felony arrestees and the plaintiffs raise a substantive due process argument not raised in *ODonnell*. Bail reform impact litigation is seemingly in full bloom. Bail reform is certain to be one of the biggest issues when the 86th Texas Legislature convenes in January 2019. Stay tuned!

II. Substantive Law

A. Penal Code

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

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

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

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

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

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

As to the second point, the Court found support in several courts in other jurisdictions that cropping or editing an otherwise innocent picture can result in child pornography, such as the 6th, 8th, 9th, and 11th circuit courts. The Court emphasized that the determination of whether an image is a lewd exhibition of the genitals must be done on a case-by-case, picture-by-picture basis.
Applying the *Dost* factors the Court uses as a guide, it found that child's genital area is the focal point of the cropped image, since the image is of only the child's genital area, it could be viewed as unnatural and sexually suggestive, since the image is a close-up of the child's genitals, it is an image depicting a child who is at least partially nude, the visual depiction suggests sexual coyness or a willingness to engage in sexual activity, and the visual depiction appears to have been intended and designed to elicit a sexual response in the viewer.

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

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

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

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

On the 4th of July, Timmins was in a head-on collision which killed a married couple driving home to Helotes. Timmins was indicted in Bandera County for manslaughter and criminally negligent homicide. He was arrested and subsequently released on bail. Prior to trial, the prosecution moved to revoke Timmins' bail, alleging he had used drugs in violation of the conditions of his bail bond. The trial court set a hearing on the State's motion. Because Timmins could not drive and believed he

would not be taken into custody, Timmins had his elderly mother drive him from San Antonio to Bandera County for the bail revocation hearing.

At the hearing, the trial court revoked Timmins' bail, but allowed Timmins to accompany his mother on her return to San Antonio. The trial court ordered Timmins to report to the county jail by 3:00 p.m. later that same day. Timmins accompanied his mother to San Antonio, but did not report to jail as ordered. He was subsequently indicted and convicted by a jury for failing to appear under Section 38.10 of the Penal Code (Failure to Appear/Bail Jumping).

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

In a matter of first impression, the court of appeals construed the term "appear" in Section 38.10 as including places, other than a courtroom, where a defendant may be required to report or be physically present as required by the conditions of the defendant's release from custody. The court of appeals concluded that there was legally sufficient evidence that Timmins failed to appear in accordance with the terms of his release in violation of Section 38.10(a) of the Penal Code because it showed that he had criminal charges pending, he was released on bail, the trial court revoked his bail, the trial court released him from the courtroom and imposed a condition on his release, the terms of his release required him to report to and be physically present at the county jail by 3:00 p.m. later that day to await trial, and Timmins failed to report to and be physically present at the county jail as required by the terms of his release.

Commentary: Ostensibly there could be broader implications to this decision. Petition for Discretionary Review was filed in this case on September 18, 2018. There are good reasons for it to be granted. Most FTA cases in Texas involve Class C misdemeanors. (Could a defendant who is ordered to appear for a meeting with a juvenile case manager, but who fails to do so, be charged with failure to appear? What about a defendant ordered to appear at a specific location to perform community service but who does not?) Although it is dicta, in footnote 1 the court of appeals seemingly accepts the argument that a judge is a public servant and that a person who is subject to a judge's order is in custody for purposes of Failure to Appear/Bail Jumping. Could this be construed to mean that where a defendant makes an initial appearance in court but fails to make subsequent appearances each one could be a separate FTA?

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

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

The evidence was sufficient for the jury to have found beyond a reasonable doubt that Judge Zarate intentionally and knowingly agreed to confer on the arrestee a benefit as consideration for a violation of his legal duty to set a bond under Article 17.15 of the Code of Criminal Procedure. Directing jail staff to reduce the bonds from $30,000 to $5,000 was sufficient to allow the jury to reasonably conclude that Judge Zarate agreed to accept the $500 bribe. The record does not suggest that Judge

Zarate was either subjectively or objectively induced to commit the offense by such persuasion that would cause an ordinarily law-abiding person of average resistance to commit the crime of bribery.

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

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

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

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

B. Transportation Code
1. Red Light Cameras

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

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

The court of appeals held that the grant of exclusive appellate jurisdiction to the municipal court in cases arising under Chapter 707 within a city does not violate Article V, Section 3 or Section 6 of the Texas Constitution. The Legislature granted the hearing officer sole authority to make an initial determination in a dispute involving red light camera ordinances. Accordingly, Bowman was required to exhaust administrative remedies regarding his claim that the City did not comply with Section 707.003(c) and (e) of the Transportation Code. Bowman's challenges to the constitutionality of the laws regulating red light cameras presented pure questions of law outside of the exclusive jurisdiction of the hearing officer. In terms of these questions, Bowman was not required to exhaust his administrative remedies. The State and City each had legitimate interests in deterring red light violations and in funding emergency medical services and traffic safety programs. The civil penalty provided by red light camera laws is rationally related to those interests. Petition for review was filed with the Texas Supreme Court on July 12, 2018.

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

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

The court of appeals held that the district court lacked jurisdiction to hear the two appellants' equitable claims that the red light camera ordinance was unconstitutional because they showed no irreparable injury giving the trial court equitable jurisdiction. The plaintiffs, however, did not have to exhaust administrative remedies because the ordinance was not published. One of the plaintiffs could

sue on behalf of a class because the City of Diboll had placed a registration hold on his vehicle, which constituted a remediable concrete injury. Governmental immunity did not bar declaratory judgment claims contesting the ordinance because Sections 37.004 and 37.006(a) of the Civil Practice and Remedies Code waived it. Another plaintiff pled sufficient facts to confer jurisdiction for a takings claim.

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

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

2. Junked Vehicles

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

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

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

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

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

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

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

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

Because the City utilized an alternative administrative process like the one set out in Section 54.044 without having adopted an ordinance permitting it to do so, the administrative board lacked the authority to assess $8,000 in administrative penalties against Pixler. Section 54.044 provides no authority for the City to enforce the penalty in the district court, extinguishing the district courts statutory subject-matter jurisdiction to consider the claim. The court of appeals also rejected the City's claim that by adoption an ordinance under Chapter 30 of the Government Code making the Newark Municipal Court a municipal court of record, it also conferred civil jurisdiction on the municipal court to provide for an administrative adjudication process under Subchapter E of Transportation Code Chapter 683.

III. Procedural Law
A. Pleas

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

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

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

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

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

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

B. Discovery

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

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

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

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

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

Alvarez argued that under *Brady v. Maryland*, 373 U.S. 83 (1963), the videos of the skirmish constituted exculpatory evidence that he was constitutionally entitled to before the entry of his guilty plea. Following a two-day trial in federal district court, Alvarez was awarded $2.3 million.
On appeal, the 5th Circuit Court of Appeals considered whether the City of Brownsville should have been subjected to municipal liability for Alvarez's claim under *Brady* and whether Alvarez was precluded from asserting his constitutional *Brady* claim for his Section 1983 action against the City of Brownsville because he pled guilty. The 5th Circuit Court reversed the district court's judgment, and rendered judgment in favor of the City of Brownsville. Alvarez's action against the City of Brownsville was dismissed with prejudice.

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

Commentary: The case is a good reminder of the distinction between federal and state law when it comes to criminal discovery matters. As the dissent notes, since 1979, Texas has interpreted the federal *Brady* right to require the government to provide exculpatory information to defendants who

plead guilty as well as to those who plead not guilty. In contrast to federal law, Texas law construes due process to require disclosure of exculpatory evidence to defendants who plead guilty.

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

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

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

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

Applying the non-exclusive factors provided by the Texas Court of Criminal Appeals in *Ex parte Wheeler*, 203 S.W.3d 317 (Tex. Crim. App. 2006), in determining whether the prosecutor had the requisite intent so as to bar any retrial based on double jeopardy, the court found that the habeas court was within its discretion in concluding Martinez failed to establish by a preponderance of the evidence that prosecutors intended to goad him into moving for a mistrial or feared an acquittal. Evidence supporting the habeas court's ruling included: (1) it did not reasonably appear in the time leading up to the mistrial that Martinez was likely to obtain an acquittal; (2) there is no evidence that the first-chair prosecutor or any other prosecutor or member of the District Attorney's Office continued to withhold information after being ordered to disclose it; (3) the decision to withhold disclosure of the second-chair prosecutor's one-time encounter with a witness was based on his good-faith desire to protect a colleague's reputation in the legal community and at the courthouse; (4) the one-time sexual encounter between the second-chair prosecutor, who was firewalled from the case prior to indictment, with a potential "star witness," would not tend to negate Martinez's guilt or reduce his sentence; and (5) The decisions by the prosecution to seek advice from the head of the appellate and ethical integrity units—and subsequently the trial court itself—belies any intent to engage in misconduct. The court also noted that the district attorney's unprofessional behavior (ranting and making threats in an off-the-record meeting in chambers, mentioning mistrial) was conducted in an effort to deter the defense from alleging prosecutorial misconduct, not to force a mistrial.

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

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

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

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

Commentary: The Waco Court of Appeals had a discovery-themed docket on July 25, 2018. This case and at least three others were decided the same day and centered on the Texas Discovery statute, Article 39.14 (also referred to as the Michael Morton Act). See, the summary for *Majors v. State*, infra, and its commentary. The court used identical language in its analysis in this case and *Carrera v. State*, 554 S.W.3d 800 (Tex. App.—Waco 2018, no pet.). In *Carrera*, the defendant challenged the admission of three photographs taken shortly before the trial depicting the inside of portions of the Navarro County Jail where the offense occurred and a page from the Navarro County Policy Manual which described the policies for the use of force in the jail. Carrera was accused of hitting a jail officer who was attempting to move him to another location within the jail. Carrera was being moved after he had refused to follow directions given to him to stop communicating with the woman who was arrested with him who had been placed in an adjacent cell. The three photographs were admitted to further explain the jail layout shown in a drawing which was previously admitted. The page of the Navarro County Policy Manual was admitted to show the procedures that were required in order to use force against a prisoner. However, Carrera did not make any argument that the evidence was material. Further, he made no showing to the trial court that the exhibits were material at the time of their admission. So he did not establish that he was entitled to the production of the exhibits in question.

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

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

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

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

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

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

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

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

To the extent that information obtained by an assistant criminal district attorney acting in a civil capacity is confidential under Section 261.201 of the Family Code, any duty of disclosure in Subsection 39.14(a) would not be triggered except pursuant to court order obtained under Subsection 261.201 (b) or (c). A court would likely conclude that any exculpatory information obtained by an assistant criminal district attorney that meets the requirements of Subsection 39.14(h) but that is made confidential by Section 261.201 shall be disclosed only pursuant to court order obtained under subsection 261.201 (b) or (c).

C. Competency

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

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

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

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

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

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

D. Pretrial

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

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

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

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

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

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

Judge Yeary and Judge Keel dissented without written opinion.

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

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

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

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

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

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

attached. The court of appeals reversed the trial court and granted Macias relief on his habeas application.

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

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

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

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

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

E. Trials
1. Judicial Conduct

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

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

The Court of Criminal Appeals in a 6-3 decision, Judge Keasler writing for the majority, opined that the judge had an independent duty under Article 38.05 to refrain from conveying to the jury her

opinion of the case. Article 38.05 states, "In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case."

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

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

Presiding Judge Keller filed a dissenting opinion, which was joined by Judge Yeary and Judge Keel. The dissent asserted that the contemporaneous objection requirement is the general rule applied to claims of error. Complaints under Article 38.05 should require preservation and the Court should have held that the statutory language of Article 38.05 does not create a non-forfeitable right.

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

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

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

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

> "When the trial judges of this State don their robes and ascend the bench each morning, those with criminal dockets are often confronted with defendants who are rude, disruptive, noncompliant, belligerent, and in some cases, even murderously violent. In the face of this reality, Texas trial judges shoulder another heavy burden: the burden to tame the chaos before them, impose order, and uphold the dignity of the justice system. 'The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated.' *Illinois v. Allen*, 397 U.S. 337, 343, (1970). When challenging defendants breach decorum and threaten to tarnish proceedings with bad behavior, we afford trial judges 'sufficient discretion to meet the circumstances of each case.' *Id.* But discretion has its limits." *Morris* at *1. "While the trial court's frustration with an obstreperous defendant is understandable, the judge's disproportionate response is not. We do not believe that trial judges can use stun belts to enforce decorum. A stun belt is a device meant to ensure physical safety; it is not an operant conditioning collar meant to punish a defendant until he obeys a judge's whim. This

> Court cannot sit idly by and say nothing when a judge turns a court of law into a Skinner Box, electrocuting a defendant until he provides the judge with behavior he likes. Such conduct has no place in this State's courts. We have no choice but to reverse." *Id.* at *63-64.

2. Evidence

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

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

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

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

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

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

The trial court erred in admitting Facebook messages concerning drug use by the accused six to seven hours before the crime, as the evidence's probative value was substantially outweighed by

the danger it would confuse and distract the jury; however, the error was harmless because given the State's lack of emphasis on the evidence, and the strong evidence of defendant's guilt, the brief discussion of his drug use and possession was unlikely to have influenced the jury's verdict.

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

The State argues that the appellant's use of ecstasy on the day of the crime was relevant to his claim of self-defense, in that his "intoxication would tend to make it less probable that his belief that the degree of force he used was immediately necessary was objectively reasonable." Judge Newell delivered the unanimous opinion of the Court. The Court agrees that evidence of intoxication under certain circumstances can be relevant in a given case. The Court has held that evidence of extraneous offenses can be admissible to show the context and circumstances in which the criminal act occurred. However, evidence of drug use is not relevant if it does not apply to a "fact of consequence." The Court finds that it does not need to decide the precise outer boundaries of the relevance for the prior drug use in this case. Even if the Court assumes that the appellant's drug use six-to-seven hours before the offense was relevant, the trial court abused its discretion by determining that its probative value was not substantially outweighed by the danger of unfair prejudice.

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

The record was silent as to what type of drug ecstasy is, what the intoxicating effects of ecstasy are, and how long those effects persist. Assuming the relevance of the evidence, the inference that the appellant was actually under the influence of ecstasy at the time of the offense was weak at best. The State's need for the evidence was equally weak. Further, the low probative value of the evidence also lowered its ability to directly rebut Appellant's self-defense claim.

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

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

Most importantly, the evidence of drug use and possession was not the only evidence that called the appellant's credibility into question. The trial was riddled with inconsistencies in the appellant's trial testimony and prior statements made at the time of the incident. Given the amount of inconsistencies

between the trial testimony and the prior statements, the Court was not convinced that the brief discussion of drug use and possession would influence the determination of the jury's verdict. Having but a slight effect on the jury's verdict; therefore, the appellant's substantial rights were not affected.

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

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

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

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

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

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

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

> (a) Notwithstanding Rule 614, Texas Rules of Evidence, a court at the request of a party may order the exclusion of a witness who for the purposes of the prosecution is a victim, close relative of a deceased victim, or guardian of a victim only if the witness is to testify and the court determines that the testimony of the witness would be materially affected if the witness hears other testimony at the trial.
> (b) On the objection of the opposing party, the court may require the party requesting exclusion of a witness under Subsection (a) to make an offer of proof to justify the exclusion.

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

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

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

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

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

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

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

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

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

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

Alma Amberson was charged with intentionally or knowingly possessing a controlled substance, specifically clonazepam, in an amount of less than 28 grams. Amberson pleaded not guilty. The relevant testimony elicited during the guilt/innocence phase of the case came from Allen McCollum, a patrol officer with the Corpus Christi Police Department (CCPD) and Pablo Hernandez, a CCPD

patrol officer at the time of Amberson's arrest, who had been promoted to detective in the narcotics/vice division three months before trial.

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

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

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

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

3. Jury Argument

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

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

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

4. Jury Instructions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court found that there was significant proof of intent (i.e., extreme severity of injuries), such that the appellant did not suffer egregious harm by the omission of a voluntariness instruction.

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

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

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

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

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

E. Sentencing

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

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

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

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

Commentary: Texas criminal case law has long contained a tug of war between the "judgment" and the "sentence." This is the Court of Criminal Appeals' newest installment in the canon. It aims to strike a balance with precedent and practical understanding of the relationship between judgment and sentence. Notably, this case pertains to the general judgment statute (Article 42.01, Code of Criminal Procedure). Absent from *Ette* is any reference to *Ex parte Minjares* in which the Court wrestled with whether "judgment" and "sentence" are one and the same or distinct under Article 45.041 of the Code of Criminal Procedure (the specific judgment statute governing judgments in municipal and justice courts). Nevertheless, this case could arguably have application in municipal and justice court cases (i.e., in Class C misdemeanor cases where pleas are entered by mail or over the internet, etc., the defendant has notice of the fine amount, but the judgment/sentence is not orally pronounced.) Of course, the long lingering issue in such case is that Article 45.041(d) states that "[a]ll judgments, sentences, and final orders of the justice or judge shall be rendered in open court."

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

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

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

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

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

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

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

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

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

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

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

F. Restitution

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

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

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

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

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

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

G. Contempt

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

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

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

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

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

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

Commentary: This is a good example of how years of case law describing contempt as "quasi-criminal" can result in quasi-confusion and potentially a quasi-mess. Hess could not cite to any authority holding that an officer of the court is entitled to a jury trial in a contempt proceeding under Section 21.002(d) of the Government Code because, as the court of appeals pointed out, none exists. These kinds of arguments typically seek to advance the contemnor's interests – and are sometimes successful – by playing between the blurred lines in the law. See generally, *Ex parte Reposa*, 541 S.W.3d 186 (Tex. Crim. App. 2017) (denying, without addressing the denial of Relator's request for a jury trial, his motion for emergency personal bond, bail, or personal recognizance bond pending appeal, following a Section 21.002(d) contempt proceeding where he was ordered incarcerated). In *Ex parte Reposa*, Judge Alcala, joined by Judge Richardson and Judge Newell, dissented from the Court's decision to deny Reposa's motion for leave and request for bond because the Court should have allowed further briefing. See also, *In re State ex rel. Escamilla*, 2017 Tex. App. LEXIS 11483 (Tex. App.—Austin December 11, 2017, no pet.), holding that: (1) a district court judge in a neighboring county lacked any authority to take action on attorney-contemnor's application for writ of habeas corpus; (2) the district court judge had a ministerial duty to refrain from granting attorney-contemnor's motion for leave to file an application; and (3) except in limited circumstances, the State may not appeal from a trial court's decision to grant habeas relief.

H. Expunction

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

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

T.S.N. was charged for the misdemeanor offense of theft by check, and a warrant issued for her arrest. Months later she was arrested for a different offense (assault with a deadly weapon). During the arrest process, the officer also executed the previous warrant and arrested T.S.N. on the theft by check charge as well as the assault charge. The theft and assault charges were filed in different courts with different cause numbers. T.S.N. pleaded guilty to the theft charge but not guilty to the assault charge. The assault charge was tried to a jury and she was acquitted. Following her acquittal, T.S.N. filed a petition pursuant to Article 55.01 of the Code of Criminal Procedure, seeking expungement of the records and files relating to the assault charge.

The State opposed her petition, asserting that Article 55.01 entitles an individual to expunction of arrest records only if the results of the prosecutions as to all of the charges underlying the arrest meet the statutory requirements for expunction. The trial court disagreed and granted the petition. The State appealed, arguing that the expunction statute is "arrest-based;" whereas T.S.N. argued the statute is "offense-based." The court of appeals affirmed, concluding that the statute linked "arrest" to a single "offense," permitting expunction under the facts of this case, where the charge T.S.N. was acquitted of, and the charge she pleaded guilty to, did not relate to a single episode of criminal conduct.

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

Article 55.01 is neither entirely arrest-based nor offense-based. Addressing only the expunction provision in Subsection (a)(1) (concerning acquittals and pardons), the Court finds that although the Legislature has specifically provided for expunction under only limited, specified circumstances, that it has done so at all evidences its intent to, under certain circumstances, free persons from the permanent shadow and burden of an arrest record, even while requiring arrest records to be maintained for use in subsequent punishment proceedings and to document and deter recidivism. The Department of Public Safety (DPS) filed an amicus brief joining the State in emphasizing the difficulties of effectuating "partial" expunction. The State asserts that permitting expunction in multiple-offense circumstances as to offenses for which a person has been acquitted or pardoned will result in widespread record keeping inconsistencies. DPS cautions that under T.S.N.'s interpretation, state employees may well be placed in jeopardy because of the complexities regarding releasing records in circumstances where a multi-charge arrest has been made and one of the charges resulted in acquittal and subsequent expunction. Additionally, DPS asserts that requiring expunction as to one offense will require the destruction of all documents mentioning the expunged offense, even if another offense from the arrest is successfully prosecuted.

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

obliteration (i.e., redaction) is required as to those portions of the record or file that identify the individual.

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

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

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

The Texas Department of Public Safety (DPS) appealed the trial court's order granting expunction relief to appellee N.B.J. After N.B.J. was arrested on the same day on two unrelated charges, the State dismissed one of the charges, which N.B.J. then sought to have expunged. DPS argued that, because expunction is not available for both charges, it is not available for the dismissed charge. Under Article 55.01(a)(2), a person who has been arrested is entitled to have all records and files relating to the arrest expunged if: (1) the person has been released; (2) the charge, if any, has not resulted in a final conviction and is no longer pending; (3) there was no court-ordered community supervision for the offense; and (4) the applicable limitations period has expired.

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

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

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

The subsequent charge was dismissed and did not result in a final conviction and the statute of limitations has expired.

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

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

I. Forfeiture

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

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

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

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

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

J. Appeals

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

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

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

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

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

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

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

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

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

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

Presiding Judge Keller filed a concurring opinion, agreeing with the Court that the appellant preserved error regarding his new claim, but pointing out that his brief was the cause of the court of

appeals' failure to recognize that. Judge Keller thinks the court of appeals was justified in relying on the motion to suppress and the suppression hearing to find that the claim was not preserved. Nevertheless, the appellant did preserve his claim, and even though his brief misled the court of appeals, he did include a citation in a footnote that led to the part of the record where he made his new claim at trial. Because of the footnote citation, the appellant has shown that he is entitled to have his claim reviewed on the merits.

K. Attorney Misconduct

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

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

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

IV. Court Costs, Fees, and Indigence

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

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

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

Judge Newell concurred without written opinion.

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

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

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

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

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

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

The court abused its discretion by revoking the defendant's community supervision because revocation would violate his 14th Amendment right prohibiting the State from revoking an indigent defendant's community supervision for failure to pay restitution, monthly community supervision fees, fines, court costs, and restitution.

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

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

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

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

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

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

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

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

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

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

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

Commentary: Another issue of interest in this case pertained to the visiting judge's oath of office. Macias argued that in absence of evidence of the oath, the judgment of the trial court was void. However, the court of appeals rejected the argument because Macias pointed to no evidence that the visiting judge failed to take the oaths of office and merely alleged, unsupported by any proof, that the judge did not take the required oaths. Notably, the court of appeals rejected this argument by invoking the presumption of regularity (a judicial construct that requires an appellate court, absent evidence of impropriety, to indulge every presumption in favor of the regularity of the trial court's judgment). Nevertheless, it is important for municipal judges to take responsibility for maintaining a current oath of office even if reappointed by operation of law. See, Regan Metteauer, "When the Acts of Judges May be Void," *The Recorder* (May 2013).

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

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

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

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

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

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

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

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

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

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

V. Local Government

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

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

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

Chief Justice Hecht, affirming the decision of the court of appeals, delivered the opinion of the Texas Supreme Court. (Justice Blacklock did not participate.) The ordinance's purpose was to manage solid waste; it was preempted by Section 361.0961(a)(1) of the Health and Safety Code (which states "A local government or other political subdivision may not adopt an ordinance, rule, or regulation to

prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law"). While home-rule cities have the power of self-governance unless restricted by state law, Section 361.0961(a)(1) applies to local regulation when the manner is not authorized by state law. Accordingly, the Court rejected the City's contention that laws granting the city general regulatory authority authorized the City to regulate the use of single-use plastic and paper bags.

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

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

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

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

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

Nor can the County fairly trace any injury to Holcomb's letter. While Holcomb had a right to write the County about an ostensible violation of Section 411.209(a) and complain to the Attorney General if the County failed to act, he could not have filed suit over the matter. See, Section 411.209(d). The Attorney General alone has the authority to investigate an alleged violation and decide if it merits further action. Thus, any legal dispute over the lawfulness of the County's signage would be between the County and the Attorney General, not Holcomb. The County tacitly conceded as much in its petition for declaratory judgment, in which it contended that its prohibition of concealed handguns from the entire courthouse was lawful and disputed the contrary interpretation of the law made by the Attorney General in his opinion letters. Holcomb is not a proper party to any lawsuit concerning the County's disagreement with the Attorney General.

Waller County effectively sought and obtained a declaratory judgment in its favor as to its disagreement with the Attorney General without making him a party. Because only the Attorney General has the authority to decide whether a suit for violation of Section 411.209(a) is warranted, he

was a necessary party and the judgment rendered in his absence was an impermissible advisory opinion. A trial court has no subject-matter jurisdiction to declare the rights of a non-party.

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

VI. Health and Safety Code

A. Dogs

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

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

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

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

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

B. Opioids

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

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

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

Section 483.101(2) of the Health and Safety Code defines an "opioid antagonist" as any drug that binds to opioid receptors and blocks or otherwise inhibits the effects of opioids acting on those receptors. The opinion notes that such antagonists were recognized by the Legislature in 2015 in passing S.B. 1462, which permitted prescribing and dispensing an opioid antagonist to both persons at risk of experiencing an overdose and to individuals in a position to assist those experiencing an overdose. The question presented is whether law enforcement agencies are "persons in a position to assist" a person at risk of experiencing an opioid-related overdose within the meaning of the statute. According to the opinion, experiences of law enforcement agencies outside of Texas leave no question about the ability of law enforcement agencies to assist a person experiencing an opioid overdose. For example, between 2010 and 2015, one municipal police department alone administered the opioid antagonist naloxone 419 times and rescued 402 individuals from opioid overdose. As of December 2016, over 1,200 law enforcement departments nationwide carried naloxone in an effort to prevent opioid-related deaths. As first responders, law enforcement officers have been and will continue to regularly be in a position to assist persons experiencing an opioid-related drug overdose.

VII. Land Use

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

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

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

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