Case Law and Attorney General Opinion Update
TMCEC Academic Year 2015

Ryan Kellus Turner
General Counsel and Director of Education
TMCEC

Regan Metteauer
Program Attorney
TMCEC

The following decisions and opinions were issued between the dates of October 1, 2013 and October 1, 2014.

Acknowledgment: Thank you Janette Ansolabhere, Peter Haskell, David Newell, and Patty Thamez. Your insight and assistance helped us bring this paper to fruition.

I. Constitutional Issues

A. 1st Amendment

Section 21.15(b)(1) of the Penal Code, to the extent it proscribes taking photographs and recording visual images is unconstitutional on its face in violation of the First Amendment as an invalid content-based restriction and as overbroad.

Ex Parte Thompson, 2014 Tex. Crim. App. LEXIS 969 (Tex. Crim. App. September 17, 2014)

According to the Court, Section 21.12(b)(1) fails to satisfy strict scrutiny because less restrictive alternatives would adequately protect the substantial privacy interests that may sometimes be threatened by nonconsensual photography. The Court also found Section 21.15(b)(1) to be extremely broad, applying to any non-consensual photograph, occurring anywhere, as long as the actor has an intent to arouse or gratify sexual desire. The Court did not address the constitutionality of the part of Section 21.15(b)(1) that proscribes the broadcast or transmission of visual images.

Plaintiff's law firm's limited evidence of Texas practices was insufficient to establish a right under the 1st Amendment to inspect citations and automated court case file information because they failed to even allege that other municipalities provided access to the documents within one business day of their filing, and the right to immediate access to certain types of court records was not established throughout the United States.

Sullo & Bobbitt, P.L.L.C. v. Milner, 2014 U.S. App. LEXIS 15149 (5th Cir. Aug. 6, 2014)

The Texas Flag Destruction statute in Section 42.11 of the Penal Code is unconstitutionally overbroad; it is not sufficiently narrow to prevent a chilling effect on the exercise of free speech.

State v. Johnson, 425 S.W.3d 542 (Tex. App.—Tyler 2014, pet. granted)

According to the court, under Section 42.11, the criminalization of burning, damaging, and defacing a flag, unless it is for purposes of "proper disposal," prohibits conduct that case law has recognized and deemed constitutionally protected. The court compares the statute to previous versions finding a significant distinction in that the current statute does not condition criminal culpability on the actor's intent to offend someone. According to the court, by omitting this element, the current statute criminalizes: (1) conduct intended and not intended to offend others; (2) conduct intended and not intended to convey a particularized message; and (3) conduct involving the use or treatment of one's personal property in the privacy of one's home. The statute prohibits all conduct that threatens the physical integrity of a flag, criminalizing a substantial amount of constitutionally protected conduct compared to its legitimate sweep.

Commentary: The Court of Criminal Appeals granted the State's petition for discretionary review on April 9, 2014. Oral argument will be permitted, but has not yet been scheduled.

B. 4th Amendment

1. Search Warrants

a. Blood Warrants

Appellant's consent to a breath test did not deprive the magistrate of authority to issue a warrant for appellant's blood draw under Article 18.01(j) of the Code of Criminal Procedure. Even though the breath test indicated appellant's blood-alcohol content was 0.00, the search warrant for the blood draw was supported by probable cause because, under the totality of the circumstances presented to the magistrate, there was a fair probability or substantial chance that evidence of a crime (DWI) would be found in appellant's blood.

Thom v. State, 2014 Tex. App. LEXIS 6693 (Tex. App.—Houston [14th Dist.] June 19, 2014, no pet.)

Commentary: The court of appeals presumed for the sake of argument that Thom proved that a search warrant could not be issued under subsections 18.01(d) or (i) and that the magistrate issued the warrant under the authority of Article 18.01(j). Article 18.01(j) provides that any magistrate who is an attorney licensed in Texas may issue a warrant under Article 18.02(10) to collect a blood specimen from a person who is arrested for an enumerated intoxication offense under Section 49 of the Penal Code and refuses to submit to a breath or blood alcohol test.

b. *McNeely*-Related Case Law

It has been a roller coaster of a ride for Texas law enforcement and prosecutors since the U.S. Supreme Court opinion in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) (holding that natural metabolization of alcohol does not present a per se exception that justifies an exception to the 4th Amendment's warrant requirement for nonconsensual blood testing). While *McNeely* did not expressly strike down state implied consent laws, the question nonetheless appears to be whether such laws continue to exist in light of *McNeely*. In the last 18 months, more than 33 courts of appeals' opinions in Texas have cited *McNeely*. Collectively, these decisions put a cloud of doubt over the constitutionality of Texas implied consent laws (Chapter 724, Transportation Code). Two things appear certain. First, municipal judges in their roles as magistrates should anticipate continued concerted efforts by law enforcement to procure blood pursuant to a search warrant. Second, the Court of Criminal Appeals and/or the Legislature will have to reconcile "loose ends" in Texas law stemming from *McNeely*. Here is a recent chronology of *McNeely*-related case law in Texas:

> **October 31, 2013** – The Corpus Christi Court of Appeals held that it was not error to admit the results of the defendant's blood tests taken involuntarily pursuant to the implied consent statute because the U.S. Supreme Court, when clarifying exigency, in *McNeely* did not invalidate Texas' implied consent statute. *Smith v. State*, 2013 Tex. App. LEXIS 13403 (Tex. App.—Corpus Christi – Edinburg October 31, 2013, pet. dism'd).
>
> **January 8, 2014** – The Texarkana Court of Appeal held that an implied-consent blood draw based on the suspect's two previous DWI convictions was not unconstitutional in light of *Missouri v. McNeely*. *Reeder v. State*, 2014 Tex. App. LEXIS 147 (Tex. App.—Texarkana January 8, 2014, pet. granted). On April 29, 2014, on rehearing, the court of appeals reached

the opposite conclusion in light of the U.S. Supreme Court's remand of *Aviles v. State* on January 13, 2014. The Court of Criminal Appeals granted the State's PDR on August 27, 2014.

January 13, 2014 – The San Antonio Court of Appeals held that under Section 724.012(b)(3)(B) of the Transportation Code, a police officer was authorized to require the mandatory blood draw from Aviles without express consent and without a search warrant, given Aviles' two prior DWI convictions in *Aviles v. State*, 385 S.W.3d 110 (Tex. App.—San Antonio 2012, pet. ref'd), *vacated and remanded, Aviles v. Texas*, 134 S. Ct. 902 (2014). The U.S. Supreme Court granted petition for writ of certiorari on January 13, 2014, vacated the judgment, and remanded the case for further consideration in light of *McNeely*.

January 23, 2014 – The Corpus Christ Court of Appeal held the absence of a search warrant, the absence of exigent circumstances, and the absence of consent supported the trial court's conclusion that the State failed to demonstrate that the involuntary blood draw was reasonable under the 4th Amendment or that an exception to the search warrant requirement was applicable. The court expressed no opinion on the constitutionality of the repeat offender provision of the mandatory blood draw law except as applied to Villarreal (who had three prior DWI convictions) where the police officer admitted that he could have obtained a search warrant and chose not to because of the implied consent statute, which does not purport to dispense with the 4th Amendment's warrant requirement. *State v. Villarreal*, 2014 Tex. App. LEXIS 645 (Tex. App.—Corpus Christi – Edinburg January 23, 2014, pet. granted). (Note: The Court of Criminal Appeals granted the State's petition for discretionary review on May 5th, 2014. Earlier in the year, the Court granted petition for discretionary review in *State v. Baker*, 2014 Tex. Crim. App. LEXIS 133 (Tex. Crim. App. January 29, 2014), where the question posed is: Did the appeals court err by failing to hold that the draw of Appellee's blood was lawful under the implied consent mandatory blood-draw provision, which establishes advance voluntary and irrevocable consent under narrowly tailored circumstances?)

January 30, 2014 – In an unpublished opinion, the Dallas Court of Appeals held that where defendant was arrested for DWI and a criminal background check showed he had two prior DWI convictions, a blood draw was mandatory under Chapter 721 regardless of whether he consented or refused. As there was no causal connection between the alleged statutory violation caused by the officer's failure to request consent and the collection of the evidence, the trial court did not err by denying the defendant's motion to suppress. *Polito v. State*, 2014 Tex. App. LEXIS 1107 (Tex. App.—Dallas January 30, 2014, no pet.) (mem. op., not designated for publication).

March 11, 2014 – The 1st Court of Appeals in Houston held that because of consent, "third-strike" blood draws do not violate the 4th Amendment when a search for blood containing alcohol occurs without a search warrant. Notably, the court of appeals declined to consider the constitutionality of implied consent under *McNeely* on grounds that the argument was not preserved at trial. *Perez v. State*, 2014 Tex. App. LEXIS 2681 (Tex. App.—Houston [1st Dist.] March 11, 2014, no pet.).

April 7, 2014 – The Amarillo Court of Appeals held that the implied consent provision in the Transportation Code does not provide an exception to the warrant requirement for a warrantless blood draw. By vacating and remanding *Aviles v. State* in January, the U.S. Supreme Court rejected any position that would treat Section 724.012(b)(3)(B) of the Transportation Code as an exception to the 4th Amendment. To the extent that Section

724.012(b)(3)(B) can be read to permit a warrantless seizure of a suspect's blood without exigent circumstances or consent, it violates the 4th Amendment's warrant requirement. *Sutherland v. State*, 436 S.W.3d 28 (Tex. App.—Amarillo 2014, no pet.).

May 14, 2014 – The San Antonio Court of Appeals held that in light of *McNeely* and the U.S. Supreme Court's vacating and remanding of *Aviles,* Texas' implied consent and mandatory blood draw statutes do not constitute an exception to the 4th Amendment's warrant requirement. The 4th Amendment prohibits *per se, categorical* exceptions to the warrant requirement. Texas' implied consent and mandatory blood draw statutes amount to *per se, categorical* exceptions because they do not take into account the totality of the circumstances. *Weems v. State*, 434 S.W.3d 655 (Tex. App.—San Antonio 2014, pet. granted). (Note: The State's petition for discretionary review in *Weems v. State* was granted on August 27, 2014.)

June 5, 2014 – The 14th Court of Appeals in Houston (en banc, on rehearing) decided 5-4 that the time necessary to investigate the crash (and in which a victim had to be hospitalized), coupled with the dissipation of alcohol in the defendant's blood stream did not provide sufficient exigent circumstances to justify a blood draw under Section 724.012 (b)(1)(C) of the Transportation Code without a search warrant. The focus of the exigent circumstances analysis in *McNeely* and *Schmerber v. California*, 384 U.S. 757 (1966), is whether the delay that would be caused by obtaining a search warrant, not investigating a crash, would threaten the destruction of the evidence. There were no facts on the record in this case indicating that the delay in investigating the crash led to a delay in obtaining a warrant. In fact, the record is silent as to why the officer did not obtain a search warrant. Justice Boyce, writing for the dissent, opines that the record supports the trial court's determination that the officer considered whether the delay caused by the investigation made any further delay in obtaining a warrant impracticable. The facts in this case are similar to the facts in *Schmerber*, where the U.S. Supreme Court found exigent circumstances justified a warrantless blood draw. *Douds v. State*, 434 S.W.3d 842 (Tex. App.—Houston [14th Dist.] 2014, pet. granted). (Note: The State's petition for discretionary review in *Douds v. State* was granted on September 17, 2014.)

July 31, 2014 – The Eastland Court of Appeals opined that implied consent is not the equivalent of voluntary consent for purposes of establishing an exception to the warrant requirement of the 4th Amendment. In absence of a search warrant, blood draws under Texas' "third strike" implied consent statute (Section 724.012(b)(3)(B), Transportation Code) are presumed unreasonable and must be evaluated on a case-by-case basis. To rule otherwise creates a per se exception prohibited under *McNeely*. *Forsyth v. State*, 438 S.W.3d 216 (Tex. App.—Eastland 2014, no pet.).

August 6, 2014 – The San Antonio Court of Appeals opined that the fact a county had no magistrate "on call," does not by itself establish exigent circumstances and that the arresting officer could not make a warrantless blood draw in good-faith reliance under the "third strike" implied consent statute (Section 724.012(b)(3)(B), Transportation Code) because the statute does not purport to authorize warrantless blood draws. *McNeil v. State*, 2014 Tex. App. LEXIS 8519 (Tex. App.—San Antonio August 6, 2014, no pet.).

August 14, 2014 – The Waco Court of Appeals held that appellant failed to point to anything that would show Section 724.012(b)(3)(B) of the Transportation Code to be unconstitutional on its face and that the court of appeals presumed the statute to be constitutionally valid. The majority of the court, relying on *Douds*, *Weems*, and *Reeder*, found no reason to fault the

constitutionality of the mandatory blood draw statute because it does not require an officer to obtain a blood draw without first securing a warrant. Rather, it is the officer's failure to obtain a search warrant and the State's failure to prove an exception to the warrant requirement, not the mandatory nature of the blood draw statute, that violate the 4th Amendment. The dissent points out that while it appears that no court has explicitly passed on the facial constitutionality of Section 724.012(b), six other courts of appeals have criticized the statute from a 4th Amendment perspective that indicates a facial problem with the statute. The dissent relies on *Forsyth* and *Sutherland* and claims that the majority improperly relies on dicta in *Douds* to support its holding. *McGruder v. State*, 2014 Tex. App. LEXIS 9022 (Tex. App.—Waco August 14, 2014, no pet.).

c. Cell Phone-Related Search Warrants

Law enforcement must generally secure a search warrant before conducting a search of a cell phone.

Riley v. California; U.S. v. Wurie, 134 S. Ct. 2473 (2014)

Riley was stopped by a police officer for driving with expired registration tags. In the course of the stop, the officer also learned that Riley's license had been suspended. The officer impounded Riley's car, pursuant to department policy, and another officer conducted an inventory search of the car. Riley was arrested for possession of concealed and loaded firearms when that search turned up two handguns under the car's hood. An officer searched Riley incident to the arrest and found items associated with the "Bloods" street gang. He also seized from Riley's pants pocket a "smart phone" (a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and internet connectivity). The officers took Riley's phone and searched through his messages, contacts, videos, and photographs. Based in part on the data stored on Riley's phone, the officers charged him with an unrelated shooting that had taken place several weeks prior to his arrest.

At trial, Riley moved to suppress all the evidence the officers had obtained during the search of his cell phone on the grounds that the search violated his 4th Amendment rights. The trial court rejected this argument and held that the search was legitimate as a search incident to arrest. He was convicted and appealed. The court of appeals affirmed, holding that the 4th Amendment search incident to arrest doctrine permits the police to conduct a full exploratory search of a cell phone (even if it is conducted later and at a different location) whenever the phone is found near the suspect at the time of arrest. The California Supreme Court denied Riley's petition for review.

Chief Justice Roberts delivered the opinion of the Court, concluding that a warrant is required to search a cell phone. After an arrest, law enforcement may search the area within the person's immediate control. The purpose of such a search is to discover and remove weapons and prevent destruction of evidence. Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone poses a danger to no one.

Although possible evidence stored on a phone may be destroyed with either remote wiping or data encryption, a warrantless search is unlikely to make much of a difference: Cell phone data is

vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed. Remote wiping can be prevented by disconnecting the phone from its network, removing its battery, or placing it in a Faraday bag. Modern cell phones are not just another technological convenience; for many Americans they hold the privacies of life.

Justice Alito wrote an opinion concurring in part and concurring in the judgment. He opines that the rationale in *Chimel v. California*, 395 U.S. 752 (1969) (officer safety and the preservation of evidence being the sole reasons for allowing a warrantless search incident to arrest) is flawed and should not be a part of the Court's continuing analysis of such searches. He agreed that we should not mechanically apply the rule used in the pre-digital era to the search of a cell phone. Many cell phones now in use are capable of storing and accessing a quantity of information, some highly personal, that no person would ever have had on his person in hard-copy form. However, in trying to find a balance between law enforcement and privacy issues, he expressed concern that the majority opinion creates anomalies (e.g., law enforcement can look at photos in a wallet but not in a cell phone). Congress and state legislatures may need to consider new laws that draw reasonable distinctions based on categories of information or perhaps other variables.

Commentary: Although exigent circumstances and consent remain valid exceptions to the search warrant requirement, in light of *Riley*, magistrates should anticipate a lot more applications for search warrants for cell phones.

A cell phone owner has both a subjective and reasonable expectation of privacy in his or her cell phone. An arrestee normally has an expectation of privacy in the contents of his or her cell phone that is being temporarily stored in a jail property room.

State v. Granville, 423 S.W.3d 399 (Tex. Crim. App. 2014)

A cell phone belonging to Granville was taken from him after being arrested and jailed for Disruption of Transportation (Section 37.126, Education Code). While the phone was within official custody, a school resource officer employed by the Huntsville Police Department, having nothing to do with the arrest or any investigation into the disruption charge, acquired it in order to search for evidence of a purportedly different crime, taking a picture of a student urinating in a urinal at school the day before. Without a search warrant, the officer went to the jail, took Granville's cell phone from the property room, turned it on, and began scrolling through it for the picture in question. It was eventually discovered on the device, which led to Granville's indictment for Improper Photography or Visual Recording (Section 21.15, Penal Code).

Defense counsel's motion to suppress the photographs was granted by the trial court. The State appealed the suppression of evidence. The court of appeals held that a person has a general, reasonable expectation of privacy in the data contained in, or accessible by, his or her cell phone, but went on to assess the effect of the defendant's incarceration upon this expectation. The court of appeals concluded that nothing nullified Granville's reasonable expectation of privacy in the phone searched or allowed the officer to act without a search warrant.

The Court of Criminal Appeals in an 8-1 decision, written by Judge Cochran, affirmed the decision of the court of appeals and ruling by the trial court. The Court, like the court of appeals, rejected the State's argument that no expectation of privacy exists in a jail setting. First, the State failed to distinguish between a search incident to arrest and a search of an arrestee's personal property that has been inventoried and placed in storage. Second, arrestees still retain some level of a privacy interest in

personal effects or belongings taken from them after arrest. Third, the Court rejected the State's request to disavow *Oles v. State*, 993 S.W.2d 103 (Tex. Crim. App. 1999). In *Oles*, the Court found no reasonable expectation of privacy in pants taken from the defendant when jailed but, nonetheless, recognized that people in jail have a diminished expectation of privacy. Like the court of appeals, the majority noted a major difference between surfaces and spaces within clothing and data hidden within electrical components contained in a cell phone.

A cell phone is not like a pair of pants or a shoe. Given modern technology and the incredible amount of personal information stored and accessible on a cell phone, a citizen does not lose his reasonable expectation of privacy in the contents of his cell phone merely because that cell phone is being stored in a jail property room. The school resource officer in this case could have seized Granville's phone and held it while he sought a search warrant, but, even with probable cause, he could not activate and search the contents of an inventoried cellular phone without a search warrant.

In a concurring opinion, Presiding Judge Keller compared the cell phone to sealed packages containing film. By analogy, because the package required further manipulation before law enforcement could ascertain its contents, Granville had a subjective expectation of privacy.

Judge Keasler dissented because the record did not support finding that Granville had either a subjective expectation of privacy of a cell phone held in police storage nor standing to challenge law enforcement.

Commentary: Unlike *Riley v. California* (described above and decided June 25, 2014), *Granville* (decided February 26, 2014) did not involve a search incident to arrest. Unlike *Flowers v. State*, discussed below, the search of the cell phone was not consensual. Neither was the search in *Granville* a search due to exigent circumstances, nor one involving property found in a jail cell. Instead it was one conducted incident to jailing for evidence of a crime distinct from that underlying the owner's arrest.

The Court of Criminal Appeals opinion neither contradicts nor expands upon the pre-trial detainee/Class C misdemeanor rationale offered by the court of appeals (i.e., Granville was a pretrial detainee for a Class C misdemeanor (an offense not punishable by incarceration) who was likely to be released quickly and thus entitled to greater constitutional protection than a convicted individual).

Beyond the holding, this case is likely to particularly resonate with readers because of some of the ancillary, historical facts of the case. First, the case involved a school resource officer (a relatively new type of peace officer). Without a doubt, school-based law enforcement has substantial interplay with municipal and justice courts in Texas. Second, the school resource officer in this case overreached by failing to procure a search warrant. Last, but not least, Granville was initially arrested for Disruption of Transportation, a fine-only offense that until recently was frequently filed in municipal and justice costs. True to the adage that timing is everything, if the allegations against Granville had occurred on or after September 1, 2013, Granville would not have been arrested or deprived of his cell phone because as a high school student, he would have been categorically excluded from being able to commit the offense of Disruption of Transportation.

Although the defendant had a constitutional reasonable expectation of privacy in his cell phone while being interviewed, because the scope of the defendant's consent gave the officers a legal right to access the cell phone's call history list, the police officers could seize additional evidence in plain view.

Flowers v. State, 438 S.W.3d 96 (Tex. App.—Texarkana 2014, pet. ref'd)

The U.S. Supreme Court decision in *U.S. v. Jones* (2012), which characterized placement of a GPS tracking device as a 4th Amendment search does not apply to seizure of cell tower records from a third party without a warrant.

Ford v. State, 2014 Tex. App. LEXIS 9159 (Tex. App.—San Antonio August 20, 2014, no pet.); *Barfield v. State*, 416 S.W.3d 743 (Tex. App.—Houston [14th Dist.] 2013, no pet.)

Commentary: In both of these cases the prosecution obtained cell tower records by subpoena, not a search warrant. It is important to distinguish between the content of communications (i.e., a phone conversation or text, where third-party providers act as a conduit for the content) and data collected and stored by the third-party provider for business purposes (e.g., cell tower location or routing information). The records of third-party providers which reflect a caller's location information via cell tower data are simply business records memorializing the transaction. Although Article 18.21, Section 5A of the Code of Criminal Procedure does contemplate the use of a warrant to obtain customer data, the authority to issue such a warrant is limited to one district judge in each of the administrative judicial regions appointed by the Presiding Judge of the Court of Criminal Appeals.

2. Reasonable Suspicion

An uncorroborated call to 911 relating eyewitness observations of reckless driving was sufficiently reliable to provide reasonable suspicion for a traffic stop.

Navarette v. California, 134 S. Ct. 1683 (2014)

A California Highway Patrol officer received a call from a dispatcher regarding a 911 call. The dispatcher stated that a motorist reported that she had been run off the road within the previous five minutes. The caller gave the license plate number to the dispatcher who broadcasted the information. Within 15 minutes, a patrol officer had located the truck and followed it for about five minutes. Although he observed no erratic driving, the officer initiated a traffic stop. As law enforcement approached the truck, they smelled marijuana, and a search of the truck revealed 30 pounds of it. The police arrested the driver, Lorenzo Navarette. Navarette and his brother moved to suppress the evidence, and both the magistrate and the Superior Court denied the motion. Navarette pleaded guilty, and the California Court of Appeal affirmed; the California Supreme Court declined petition for review.

This according to the majority was a close case. The Court was divided 5-4. Justice Thomas delivered the opinion of the Court in which Chief Justice Roberts, Justice Kennedy, Justice Breyer, and Justice Alito joined. The Court held that under the totality of the circumstances in this case, it was sufficient to provide law enforcement with reasonable suspicion that the driver of the reported vehicle had run another vehicle off of the road. This made it reasonable for the office to execute a traffic stop.

Justice Scalia, joined by Justice Ginsburg, Justice Kagen, and Justice Sotomayor, dissented, opining that while the majority opinion does not explicitly adopt such a departure from our normal 4th Amendment requirement that anonymous tips must be corroborated and purports to prior cases, such as *Florida* v. *J. L.*, 529 U.S. 266 (2000), and *Alabama* v. *White*, 496 U.S. 325 (1990), readers should "be not deceived." *Navarette* at 1692. "The Court's opinion serves up a freedom-destroying cocktail

consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that a single instance of careless or reckless driving necessarily supports a reasonable suspicion of drunkenness." *Id*. at 1697. "Law enforcement agencies follow closely our judgments on matters such as this, and they will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop. This is not my concept, and I am sure would not be the Framers', of a people secure from unreasonable searches and seizures. I would reverse the judgment of the Court of Appeal of California." *Id.*

Commentary: The ruling in this decision is based on such specific facts and circumstances that law enforcement would be wise not to read too much into the holding. The value of this case is that it offers a basis of comparison rather than a pronouncement of a new rule. With this said, the decision appears to be inconsistent with *Martinez v. State*, 348 S.W.3d 919 (Tex. Crim. App. 2011). Now we will have to see if Texas appellate courts believe that *Martinez* has been overruled.

Under Article 2.122 of the Code of Criminal Procedure, federal investigators, including those employed by Immigration and Customs Enforcement (ICE), have the powers of arrest, search, and seizure in regard to felonies under Texas law. Reasonable suspicion existed for this particular ICE employee to detain the defendant because facts known to him raised a potential for drug activity or criminal acts against children or law enforcement—felony offenses under Texas law.

Guerra v. State, 432 S.W.3d 905 (Tex. Crim. App. 2014)

A person who legitimately borrows a vehicle has standing to challenge a search of that vehicle, but no longer has an expectation of privacy in it if he or she abandons the vehicle, as in this case when the defendant took flight while officers walked him to the patrol car to await a K-9 unit.

Matthews v. State, 431 S.W.3d 596 (Tex. Crim. App. 2014)

The court also found that the defendant's continued detention to wait for the K-9 unit was reasonable where officers received an anonymous tip, were able to corroborate details of that tip, and considered the location, time of night, and the defendant's suspicious behavior.

Shining a high-beam spotlight onto a person sitting in a parked vehicle, parking the police car to partially block the movement of the vehicle, using a loud authoritative voice to ask, "what's going on," and demanding identification constitutes a detention. On remand, the court of appeals found these facts to constitute reasonable suspicion for that detention.

Johnson v. State, 414 S.W.3d 184 (Tex. Crim. App. 2013)

An investigative detention, which implicates 4th Amendment protections, "occurs when a person yields to the police officer's show of authority under a reasonable belief that he is not free to leave." *Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010). Whether an interaction constitutes an encounter or a detention depends on "whether a reasonable person in the citizen's position would have felt free to decline the officer's requests or otherwise terminate the encounter." *Id*. Here, a reasonable person would not have felt free to leave or decline the officer's requests, according to the Court, in light of the officer's approach, show of authority, and commands.

This case was reversed and remanded to the court of appeals to determine whether reasonable suspicion supported the detention. *Johnson v. State*, 2014 Tex. App. LEXIS 9316 (Tex. App.—Houston [14th Dist.] August 21, 2014, no pet.). The court of appeals found the officer's actions in response to a 30-minute-old 911 call from an identified resident and after observing a running car parked in the area in a manner typical of a getaway car in the officer's experience with a driver matching the description given, when properly viewed in terms of the totality of the circumstances, gave rise to reasonable suspicion.

An anonymous tip did not provide reasonable suspicion to stop a car when the tipster said he had witnessed the occupant selling merchandise out of the car in a city with a mobile food vendor ordinance which prohibits selling merchandise from a vehicle without a permit.

Pineda v. State, 2014 Tex. App. LEXIS 8824 (Tex. App.—San Antonio Aug. 13, 2014, no pet.)

Commentary: This occurred in Boerne. The prosecution argued that the officer had reasonable suspicion to believe that Pineda had violated a Boerne city ordinance that makes it unlawful for any peddler, solicitor, or vendor to engage in the business of selling, displaying, or offering for sale of any food, beverages, goods, merchandise, or services of any kind within the city without first obtaining a permit from the City Manager or his duly authorized representative as provided for in the chapter. The problem for the prosecution, according to the majority opinion, was that there was no link between the anonymous tip and Pineda which suggested that he was selling merchandise without a permit.

Citing *Dershweiler v. State*, 348 S.W.3d. 906 (Tex. Crim. App. 2011), Justice Barnard dissented. The fact that Pineda had packed up and moved along when the tipster confronted Pineda for selling in a parking lot provided a reasonable basis to conclude he did not have a permit, which made the stop legal.

Officers had reasonable suspicion to detain a defendant smoking in his car in the middle of the night in an area known to have a high level of narcotics use and the officers smelled marijuana emanating from the vehicle. The resulting contraband that fell out of the defendant's pocket was admissible at trial despite the fact that the cigar he was smoking was later shown not to contain marijuana.

Broussard v. State, 434 S.W.3d 828 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd)

The fact that the defendant was smoking a "Kush" cigar that, according to the defendant smells like incense, did not mean the officers did not smell or reasonably believe they smelled marijuana emanating from the vehicle. Also, presenting to the jury the officer's testimony that the cigar recovered from the vehicle smelled like tobacco and the crime lab analyst's testimony that synthetic forms of marijuana like the cigar have a fruity smell did not raise a fact issue regarding whether the officers smelled marijuana warranting a jury instruction under Article 38.23 of the Code of Criminal Procedure. There was no evidence before the jury that officers did not smell marijuana.

Reasonable suspicion existed to detain where a citizen-informer met police at the defendant's house, showed officers drug paraphernalia and marijuana plants in the house, identified the defendant's vehicle stopping in front of the house, and told officers the defendant was a convicted felon with guns in his car and was threatening to kill people. A subsequent search of defendant's vehicle was proper under the automobile exception where a clear jar containing marijuana was visible to officers in the back seat.

Barnes v. State, 424 S.W.3d 218 (Tex. App.—Amarillo 2014, no pet.)

Reasonable suspicion to stop a vehicle existed where an officer observed the vehicle move out of its lane for several hundred feet and testified that crossing the center line could be an indicator of someone falling asleep, intoxicated, or overmedicated.

Miller v. State, 418 S.W.3d 692 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd)

It was reasonable for the trial court to conclude that the officer did not stop the vehicle solely for failing to maintain a single lane. Evidence that the driver's behavior affected the safety of other motorists, an element of Section 545.060 of the Transportation Code, was not necessary because there is no requirement that a particular statute is violated in order to give rise to reasonable suspicion. The dissenting opinion disagreed that the officer possessed knowledge of specific and articulable facts sufficient to justify the stop because nothing aside from briefly straddling the lane divider indicated intoxication.

3. Probable Cause

The "controlled buy" between a confidential informant and a knowing participant provided probable cause for the magistrate issuing the search warrant.

Moreno v. State, 415 S.W.3d 284 (Tex. Crim. App. 2013)

A controlled buy occurs when a cooperating witness or an undercover peace officer purchases contraband, typically a controlled substance, from a criminal suspect. In this case, a magistrate issued a warrant to search Moreno's house for crack cocaine based on an affidavit detailing a controlled buy in which police used a reliable confidential informant to purchase narcotics through an unknown third party. The third party was not aware of the police operation. However, because there was no information on the credibility or reliability of the unknowing third party, Moreno argued that the magistrate could not have concluded that there was probable cause to believe that the crack cocaine came from Moreno's house. Because the Court of Criminal Appeals concluded that the affidavit provided a substantial basis for the magistrate to find probable cause, it affirmed. Within the four corners of a sworn affidavit, magistrates are not expected to make probable cause determinations based off of hard certainties, only probabilities.

4. Exclusionary Rule

The federal "independent source doctrine," which allows evidence to be admitted that was initially discovered during an unlawful search but later lawfully through an independent source is applicable in Texas and does not violate the Texas exclusionary rule.

Wehrenberg v. State, 416 S.W.3d 458 (Tex. Crim. App. 2013)

The "independent source doctrine" is not an exception to the exclusionary rule, but rather an acknowledgment that challenged evidence which is obtained independent of tainted information need not be excluded because there is no causal connection between the former and the latter. In this case, the first search of a home in which methamphetamine was being "cooked" occurred without a search warrant. Evidence from that search was suppressed. However, evidence subsequently obtained with a

search warrant from a magistrate within hours of the first search was not suppressed because the underlying affidavit relied on information from an informant but did not rely on information from the warrantless entry. Under Article 38.23 of the Code of Criminal Procedure, the evidence seized in the subsequent search was not deemed to not have been obtained in violation of the law.

A search warrant issued on the basis of information independent of a prior illegal sweep of a residence was valid. Costs listed in a JIMS Cost Bill Assessment provided a sufficient basis for imposing court costs.

Davila v. State, 2014 Tex. App. LEXIS 7912 (Tex. App.—Houston [1st Dist.] July 22, 2014, no pet.)

The defendant raised two very different issues on appeal: (1) whether evidence should have been suppressed when obtained by a search warrant issued after an illegal sweep of his residence, and (2) whether the record supported imposing $294 in court costs.

First, the trial court did not err in admitting the evidence. Relying on the recent case, *Wehrenberg v. State*, 416 S.W.3d 458 (Tex. Crim. App. 2013), which found the federal independent source doctrine compatible with Article 38.23 of the Code of Criminal Procedure, the court found that none of the information used to obtain the search warrant came from the illegal sweep of the house. Because the affidavit in support of the warrant included sufficient information to determine a confidential informant's reliability and credibility, was sufficient for a magistrate to conclude there was probable cause to search the residence, and contained sufficient allegations independent of any tainted information, the evidence collected was pursuant to a properly-granted search warrant and did not necessitate suppression.

Second, the court found that under established precedent from its own court, the computer screen printout from the Harris County Justice Information Management System (JIMS) Cost Bill Assessment meets the requirements of Article 103.001 of the Code of Criminal Procedure. Based on the costs listed in this printout, the record contained a sufficient basis for imposing the court costs. In its analysis, the court cited the recent cases: *Johnson v. State*, 423 S.W.3d 385 (Tex. Crim. App. 2014), and *Cardenas v. State*, 423 S.W.3d 396 (Tex. Crim. App. 2014).

Evidence seized pursuant to a search warrant was not excludable under the Texas exclusionary rule, even though the affidavit was based solely on information gathered by a police officer investigating undercover outside his jurisdiction, because the officer did not violate any rights of the defendant, who, therefore, lacked standing.

Halili v. State, 430 S.W.3d 549 (Tex. App.—Houston [14th Dist.] 2014, no pet.)

There is no support for the proposition that all evidence gathered by an officer outside the officer's jurisdiction must be disregarded under the Texas exclusionary statute. The court contrasts this with the usual scenario where officers find evidence while conducting illegal warrantless arrests outside their jurisdiction. To have standing, the evidence must be obtained in violation of the defendant's rights under *Chavez v. State*, 9 S.W.3d 817 (Tex. Crim. App. 2000). The court looks at whether the evidence would be obtained in violation of the law had the officer acted purely in a private capacity. Here, the officer observed information in the defendant's game room that he could have had he acted in a purely private capacity. He was essentially a business invitee at the time he observed the gambling devices, not illegally infringing upon the defendant's privacy or property interests.

5. Exceptions to the Warrant Requirement

If a person objects to police making a warrantless search of his residence, and the person is lawfully removed, law enforcement may subsequently search with the consent of the remaining co-occupant.

Fernandez v. California, 134 S. Ct. 1126 (2014)

While investigating a violent robbery, police officers observed a person run into an apartment building, and heard screams coming from an apartment. They knocked on the apartment door, which was answered by Roxanne Rojas, who appeared to be battered and bleeding. When the officers asked her to step out of the apartment so that they could conduct a protective sweep, Fernandez came to the door and objected. Suspecting that he had assaulted Rojas, the officers removed Fernandez from the apartment and placed him under arrest for domestic violence. He was then identified as the perpetrator in the earlier robbery and taken to the police station. An officer later returned to the apartment and, after obtaining Rojas' oral and written consent, searched the premises, where he found several items linking Fernandez to the robbery. The trial court denied Fernandez 's motion to suppress that evidence, and he was convicted. The California Court of Appeal affirmed, holding that because Fernandez was not present when Rojas consented to the search, the exception to permissible warrantless consent searches of jointly occupied premises that arises when one of the occupants present objects to the search, *Georgia v. Randolph*, 547 U.S. 103 (2006), did not apply. Herefore, Fernandez's suppression motion had been properly denied.

In a 6-3 decision, in an opinion written by Justice Alito, the Court held that under *Georgia v. Randolph*, a person's objection to a search of a residence is not effective unless he is physically present. As soon as he is removed, his objection is also removed.

Justice Thomas concurred that the holding was proper under *Randolph*, although *Randolph* was improperly decided because a warrantless search of a residence should be valid whenever any resident gives consent, because co-occupants assume the risk that a roommate might permit a search. Justice Scalia echoed Justice Thomas' contention that the Court's opinion was a correct application of the improperly decided *Randolph*, but wrote separately to explain how property law does not give a co-tenant the right to admit visitors over another co-tenant's objection.

Justice Ginsburg, dissenting, joined by Justice Kegan and Justice Sotomayor, opined that this case called for a straightforward application of *Randolph*. Instead of adhering to the search warrant requirement, the majority opinion creates an avenue for law enforcement to bypass the 4th Amendment even when they have ample time to secure the approval of a neutral magistrate.

Commentary: As you may recall, last year the Court of Criminal Appeals considered the application of *Randolph* to the warrantless search of an automobile. *State v. Copeland*, 399 S.W.3d 159 (Tex. Crim. App. 2013) (holding that the driver's consent to search was valid even when a co-owner passenger objected). *Fernandez* bolsters the reasoning in *Copeland*, and to paraphrase Justice Ginsburg, shrinks to petite size the Court's holding in *Randolph*.

Insufficient justification existed for searching the interior of a vehicle where officers observed what they mistakenly believed to be a prohibited weapon, removed the defendant from the vehicle and placed him in handcuffs, and gave no testimony that either officer believed they were in harm's way.

State v. Avans, 2014 Tex. App. LEXIS 8818 (Tex. App.—San Antonio August 13, 2014, no pet.)

Although the scope of a *Terry* search has been extended to the passenger compartment of an automobile, an officer may not conduct a protective search of a detainee's vehicle unless the officer possesses a reasonable belief, based on specific and articulable facts, that the detainee may pose a danger to the officer or to others.

A warrantless installation of a GPS device, authorized by court order before the decision in *Jones*, is nevertheless an illegal search, and neither a traffic stop for speeding based on information obtained from the device nor consent to search the vehicle given during the traffic stop served to attenuate the taint of the illegal search.

State v. Jackson, 435 S.W.3d 819 (Tex. App.—Eastland 2014, no pet.)

From the GPS device, officers learned that the defendant had left town, stopped in Mesquite for two hours, and drove back toward home. The GPS device also indicated the defendant was steadily driving in excess of the speed limit. Believing the defendant to be returning from obtaining methamphetamine, officers informed a county deputy that the defendant was headed to his county and speeding, who in turn waited on the defendant and pulled him over after confirming he was driving 3-4 miles in excess of the speed limit. Within a few minutes of the stop, the deputy asked for and obtained consent to search the vehicle and quickly found methamphetamine in the trunk. Weighing most heavily in the court's decision to affirm the suppression of the meth was that without the GPS, officers would not have had reasonable suspicion to believe he possessed meth in the vehicle and the traffic stop and consent were too closely connected to the officers' use of the device to attenuate the taint of the illegal search.

Commentary: Article 18.21, Section 14 of the Code of Criminal Procedure only authorizes district court judges to order the installation of a mobile tracking device.

Officers conducted an illegal search while attempting to transfer a set of keys belonging to an arrestee as a courtesy by standing in a flowerbed and looking in a kitchen window, through which they discovered contraband.

Sayers v. State, 433 S.W.3d 667 (Tex. App.—Houston [1st Dist.] 2014, no pet.)

The court declined to create a "courteous officer" exception or extend the community caretaking exception to include situations in which officers observe criminal activity while performing courteous acts for recent arrestees. Here, officers had arrested a woman near the home who asked them to give her keys to individuals inside the home to avoid impoundment of her vehicle. Officers approached the kitchen window by stepping in a flowerbed and viewed the defendant standing next to an individual handling contraband. Citing *Florida v. Jardines*, 133 S. Ct. 1409 (2013), the court found the flowerbed located directly under a window on a different side of the house from the front or back door with no path leading to it to be curtilage and outside the license granted by custom to private citizens. This was an illegal search.

An anonymous tip that a man was assaulting a female at a residence, possibly with a weapon, combined with the evasive actions of the man upon opening the door constituted reasonable belief that entering the home was immediately necessary to protect or preserve life or avoid serious injury under the emergency doctrine. Upon entry, the contraband in plain view was

within the scope of the officers' search because they were in the room where the man told officers they would find the woman.

Shadden v. State, 431 S.W.3d 623 (Tex. App.—Amarillo 2014, pet. ref'd)

C. 5th and 6th Amendment

1. *Miranda* Warnings

A defendant's recorded statements made in a patrol car while officers executed a search warrant of his residence were not inadmissible under *Miranda* or Article 38.22 of the Code of Criminal Procedure.

Gardner v. State, 433 S.W.3d 93 (Tex. App.—Houston [1st Dist.] 2014, no pet.)

The defendant was not in custody for the purposes of *Miranda* or Article 38.22 of the Code of Criminal Procedure where there was no show of force, actual physical restraint, or deprivation of privacy in interviewing the defendant twice in the patrol car while officers executed a search warrant. Officers repeatedly told the defendant he was free to leave when he requested a lawyer and when he demanded a lawyer, they terminated the interview. Weighing most heavily was the fact that officers did not arrest the defendant until several weeks later and left immediately after executing the search warrant.

Also, probable cause existed to obtain the search warrant where the affidavit outlined the officer's extensive experience and specialized training in investigating internet crimes against children and in identifying individuals suspected of those crimes through the use of a nationally recognized database and specialized software programs. The affidavit also detailed specific files and confirmed that a computer using an IP address assigned to the defendant's home contained images of child pornography and that someone at that address had used software and file sharing methods commonly used among child pornographers.

Partial corroboration of a statement under Article 38.22, Section 3(c) of the Code of Criminal Procedure does not create an exception to *Miranda* warnings.

Hutchison v. State, 424 S.W.3d 164 (Tex. App.—Texarkana 2014, no pet.)

Partial corroboration under Section 3(c) does provide an exception to the writing or recording requirement in Section 3(a), but not an exception to anything else in Article 38.22. An exception to *Miranda* for partially corroborated statements has not been recognized by the U. S. Supreme Court, and is unlikely to be. The court also held that a jury instruction on possession by multiple persons is not improper merely because the party proposing the instruction did not affirmatively introduce evidence on joint possession. The source of evidence does not trigger an instruction. Also, evidence establishing that the defendant had access to a house and bedroom where contraband was discovered was legally sufficient.

An oral admission made by a shoplifter to an officer was not required to be recorded in order to be admissible under Article 38.22 of the Code of Criminal Procedure because the shoplifter was not in custody, but merely held for investigative detention at the time the statement was made.

Ard v. State, 418 S.W.3d 256 (Tex. App.—Houston [14th Dist.] 2013, no pet.)

The defendant was stopped by a loss prevention manager just after exiting the store and agreed to return to the store with him, voluntarily following him to the loss prevention office where she turned over the merchandise and waited until a police officer arrived. Factors contributing to the determination that the investigative detention did not evolve into custody included: the brevity of the detention (five minutes), no show of force, the necessity of investigation because the officer did not witness the theft, and minimal restriction of physical freedom. Though the officer gave the defendant *Miranda* warnings, the mere recitation of *Miranda* warnings does not communicate an officer's intent to arrest. Also irrelevant was the officer's testimony that if the defendant had left, he would have arrested her, as this was not communicated to her. The only manifestation of probable cause occurred when she confessed to the police officer. She was arrested immediately after the confession. It was at that point that she was in custody. Article 38.22 explicitly excepts statements that do not stem from custodial interrogations from the requirement that they be properly recorded to be admissible.

2. Double Jeopardy

Double jeopardy barred retrial where the State declined to move to dismiss the case before the jury was empaneled and sworn and subsequently declined to "participate" in the case, even though the judge "dismissed" the charge in lieu of calling it an acquittal.

Martinez v. Illinois, 134 S. Ct. 2070 (2014)

The State had 12 witnesses, two of which were repeatedly summonsed and absent, resulting in numerous continuances. When it became clear that those two witnesses would not be appearing and the judge was going to proceed with swearing in the jury, the prosecutor told the judge that the State would not be participating in the trial, a statement the prosecutor repeated in lieu of an opening statement. Defense counsel moved for a directed verdict of not guilty because the State did not intend to present any evidence, which the court granted. On appeal, the Illinois Appellate Court held that jeopardy never attached and the Illinois Supreme Court affirmed.

The Court reiterated that the rule that jeopardy attaches when the jury is empaneled and sworn is a bright-line rule. The State had a chance to move to dismiss the case before that happened, but declined to do so. The trial court acquitted the defendant, which cannot be reviewed without putting a defendant twice in jeopardy. The fact that the trial court referred to its action as a dismissal is immaterial. Acquittal encompasses any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense.

3. *Batson* Challenges

***Snyder v. Louisiana*, 552 U.S. 472 (2008), is not implicated where a prosecutor responds to a *Batson* challenge with his or her perceptions of demeanor as an explanation, and the trial judge finds that the State offered race-neutral reasons for exercising strikes.**

Blackman v. State, 414 S.W.3d 757 (Tex. Crim. App. 2013)

The court of appeals erred in concluding *Snyder* governed the case by misinterpreting the prosecutor's explanations to include non-demeanor-based reasons, and thus, erred to conclude the trial court made no ruling on the demeanor-based explanations. The court of appeals failed to identify a pre-textual

explanation and erred in shifting the burden of persuasion to the State; that burden remained with the opponent of the peremptory challenge. It should have evaluated, as the dissent below did, whether the trial court's finding—that the explanations based on demeanor were genuine—was erroneous. The Court concluded the trial court's finding was not erroneous. Nothing was offered to discredit the sincerity of the prosecutor's perceptions.

Demeanor is once again found to be a valid, race-neutral justification for striking jurors and such a determination by a trial court is not required to be in the record under *Snyder v. Louisiana*, 552 U.S. 472 (2008).

United States v. Thompson, 735 F.3d 291 (5th Cir. 2013), *cert. denied*, 2014 U.S. LEXIS 3807 (May 27, 2014)

Batson's second step in analyzing whether a prosecutor uses peremptory challenges in violation of the Equal Protection Clause requires the prosecutor to offer a race-neutral basis for the strike. Here, the prosecutor justified its decision solely on observations of demeanor during voir dire, consistently found by the 5th Circuit to be race-neutral. *Batson*'s third step requires courts to determine whether or not the prosecutor is telling the truth in his or her assertion that the challenge is not race-based. In *Snyder*, the prosecutor gave two race-neutral explanations (one based on demeanor and one unrelated to demeanor) and the Court found the record ambiguous as to whether the trial judge made a determination concerning demeanor. The trial judge allowed the challenge without explanation. Thompson urged that *Snyder* should be extended to this situation where only one justification is given—demeanor—and the trial judge, though crediting the prosecutor's justification, makes no findings on the record. Despite disagreement among the circuits on the extent to which *Snyder* imposes an affirmative duty on the trial court to make record findings where the prosecutor has offered only a demeanor-based justification, the 5th Circuit agrees with the 11th Circuit that such a duty would undercut the Supreme Court's repeated observation that *Batson*'s third step depends on a determination of the prosecutor's credibility.

4. Right to Counsel

Preventing a defendant's counsel from asking proper questions during voir dire is no longer an error of constitutional dimension per se.

Easley v. State, 424 S.W.3d 535 (Tex. Crim. App. 2014)

The trial judge prohibited defense counsel from discussing different legal standards of proof and contrasting them with the beyond-a-reasonable-doubt standard in criminal trials. The court of appeals found this to be error, but harmless. The Court affirmed, overruling a line of cases that broadly conclude that every restriction on counsel's voir dire presentation per se violates an accused's right to counsel. The proper harm analysis is to review the error under Rule 44.2(b) of the Texas Rules of Appellate Procedure.

A pre-trial competency examination of a child victim in camera without the presence of the defendant or any attorneys did not constitute a 6th Amendment violation of the defendant's right to counsel because the defense counsel's subsequent opportunities to challenge the child witness rendered the hearing a non-critical stage.

Gilley v. State, 418 S.W.3d 114 (Tex. Crim. App. 2014), cert. denied, 2014 U.S. LEXIS 5031 (October 6, 2014)

The defendant was able to participate in the examination by submitting questions for the judge to ask the child victim and the defense counsel was given the opportunity to review a transcript of the examination and cross-examine the child witness during trial.

5. Ineffective Assistance of Counsel

Counsel's failure to request the hearing assistance guaranteed by Article 38.31 of the Code of Criminal Procedure, knowing his client was deaf, fell below an objective standard of reasonableness.

Ex Parte Cockrell, 424 S.W.3d 543 (Tex. Crim. App. 2014)

Despite being aware of his client's hearing impairment, counsel did not request an interpreter or special equipment to assist him in understanding the proceedings. After his sentencing, new counsel filed a motion for new trial and complained of ineffective assistance of counsel in an application for a post-conviction writ of habeas corpus. Concluding that Mr. Cockrell met the definition of "deaf" in Article 38.31(g)(1), the majority found that it was the trial counsel's responsibility to ensure that Mr. Cockrell's constitutional rights were not violated, and counsel wholly failed to do this.

Judge Keller dissented, disagreeing with the Court because (1) it misconstrued Article 38.31 to provide any remedy other than an interpreter, which would not have helped because Mr. Cockrell does not understand sign language, (2) it failed to give deference to the habeas court, and (3) it misread the record concerning some significant facts.

Commentary: The Court discusses the duty of the trial judge to appoint an interpreter when made aware of a hearing impairment, which wasn't pertinent in an ineffective assistance of counsel case, but would have been an issue had Mr. Cockrell complained that the judge failed to appoint an interpreter. Judges and counsel alike can benefit from reading this case.

6. Confrontation Clause

The 6th Amendment Confrontation Clause was not violated when out-of-court statements of a domestic violence victim were admitted by the trial court because the victim left the state, giving no contact information, to escape the defendant who asked her to deny the assault had occurred, abused her, and tried to prevent her from leaving the apartment.

Tarley v. State, 420 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2013, no pet.)

Under the doctrine of forfeiture of wrongdoing, a defendant may not assert a confrontation right if his deliberate wrongdoing resulted in the unavailability of the declarant as a witness. The trial court could reasonably infer from the evidence presented that the defendant's second assault of the victim was deliberately designed to intimidate her to keep her from testifying. A witness did not have to testify that his wrongdoing caused the witness' unavailability.

7. Right to an Interpreter

The record does not have to contain a dialogue between the trial judge and the defendant to constitute a waiver of the right to an interpreter as long as it otherwise reflects that a waiver occurred.

Garcia v. State, 429 S.W.3d 604 (Tex. Crim. App. 2014)

In this case, the majority concluded there was evidence that the trial counsel informed the court and the prosecutor that the defendant did not want an interpreter (albeit in an off-the-record bench conference). Although the evidence was conflicting, the trial judge could have determined that the defendant voluntarily and knowingly waived the appointment of an interpreter because he knew he had a right to one, understood his lawyer's reasons for waiving the right, and agreed with his lawyer.

Judge Alcala, in a dissenting opinion, agreed that the actual statements are not a prerequisite to finding a waiver occurred, but disagreed that the record in this case established a waiver. According to the dissent, the record conclusively shows that counsel did not want an interpreter for his own reasons and urged the defendant to forego his right to an interpreter without fully explaining the nature of the right at stake and the possible consequences of waiving that right. The trial court then compounded the problem by failing to verify that the waiver was being made freely and voluntarily.

D. 14th Amendment

When the information sought by an imprisoned individual relates only to the amount that it would cost to obtain trial and appellate transcripts for use in preparing an application for a writ of habeas corpus, application of Section 552.028 of the Government Code to deny the prisoner access to that information unconstitutionally infringes on his constitutional right to have access to the courts.

In re Bonilla, 424 S.W.3d 528 (Tex. Crim. App. 2014)

An inmate wrote two letters to the court clerk asking for information about the cost to buy his trial and appellate transcripts. The clerk declined the requests in accordance with his office policy outlined in a written standard operating procedure that adopts the provisions in Section 552.028 of the Government Code.

Article I, Section 12 of the Texas Constitution declares that "the writ of habeas corpus is a writ of right, and shall never be suspended." An applicant will usually get only one bite at the "habeas-corpus apple" because Article 11.07, Section 4 of the Code of Criminal Procedure precludes a court from considering the merits of or granting relief based on a subsequent application unless the application contains sufficient specific facts establishing one of the two limited exceptions to the one-bite rule. With no right to appointed counsel, an indigent inmate, either alone or possibly with the help of a "jailhouse lawyer," family member, or friend, must obtain any records necessary to prepare and file his application for a writ of habeas corpus. In all likelihood, an applicant will need to obtain and review his trial and appellate transcripts to ensure that he considered the entire record so that he may present all his claims at what will likely be his first and only "bite." The first step to obtaining a transcript is to find out how much it costs. By refusing to tell the inmate how much it would cost to purchase a transcript, the clerk cut off the ability to prepare and present a complete application for a writ of habeas

corpus. Furthermore, even if the indigent inmate found a family member or friend to request the information on his behalf, the clerk's policy would have withheld that information from anyone other than an attorney who was acting as an agent for an inmate.

Commentary: This was an instance where the court held on too tightly to information. Here, the clerk was following a written policy that tracked the language of Section 552.028 of the Government Code. However, that statute does not say that a court shall not or may not accept or comply with a request for information from an inmate. Courts should make sure that any adopted policies, especially those regarding release of information, do not run afoul of due process.

Bad faith, not negligence, is the standard for showing a due course of law violation by the State regarding its loss or destruction of evidence in a criminal prosecution.

Jones v. State, 437 S.W.3d 536 (Tex. App.—Texarkana 2014, no pet.)

The defendant relied upon a Waco Court of Appeals case holding the Texas Constitution's Due Course of Law Clause provides greater protections than the Federal Due Process Clause and puts forth a negligence standard in lieu of the federal bad-faith standard. That case was reversed by the Court of Criminal Appeals for lack of preservation and eight other Texas courts of appeals have held that both clauses provide the same protection. Here, an officer was incorrect in her belief that Wal-Mart would save video footage from the parking lot for more than 30 days, but did request it, and others in the district attorney's office made follow-up inquiries into the existence of a video recording. This did not amount to bad faith.

E. Separation of Powers

The 45-day time frame provided for in Section 402.010, Subsection (b) of the Government Code is a constitutionally intolerable imposition on a court's power to enter a final judgment and a violation of separation of powers. Subsection (a), requiring the court to send notice to the Attorney General in actions challenging the constitutionality of a statute of this state, is rendered unenforceable without (b), so it cannot be severed and is, therefore, also invalid.

Ex Parte Lo, 424 S.W.3d 10 (Tex. Crim. App. 2014)

The State filed a motion for rehearing raising, among others, the ground that the Court erred by finding 33.02(b) unconstitutional without first providing notice to the Attorney General under Section 402.010 of the Government Code. This opinion ensued. The Court has previously found legislative interference with judgments to be unconstitutional: i.e., a statute barring a trial court from entering a bond forfeiture judgment until 18 months after the date of the forfeiture in a felony case and nine months in a misdemeanor case. See, *State v. Matyastik*, 811 S.W.2d 102 (Tex. Crim. App. 1991). Though Section 402.010 imposed a much shorter 45-day restriction, the Court indicates that no attempt at interference with a core judicial power such as entering final judgment will be tolerated. The Court discusses the unconstitutionality of the notice requirement standing alone in a footnote, calling it an unusual provision in light of the Attorney General's limited authority in criminal cases and lack of authority to appear in criminal cases before the Court of Criminal Appeals. According to the Court, the legislative history suggests the drafters were either unaware of this limited authority or never intended it to apply in criminal cases at all. After this case, 402.010 won't apply in criminal cases.

The Court also noted that Subsection (a) standing alone violates separation of powers because it attempts to impose a useless duty that falls outside of and is unrelated to any judicial functions and powers of this Court. Judge Keller opined in her concurrence that legislatively imposed deadlines on the entry of final judgment, similar to legislative imposed deadlines on prosecutorial action, violate the Separation of Powers Clause because: (1) the remedy for failing to meet the deadline prevents a court from performing a core judicial function; (2) there is no conflicting, let alone superior, constitutional interest; and (3) the courts have not contractually submitted to the deadline, as is the case, for example, when a prisoner is obtained pursuant to the Interstate Agreement on Detainers.

Commentary: Not to bury the lead, but this opinion resulted from the State's response to the Court granting PDR and holding Section 33.02(b) of the Penal Code, barring sexually explicit online solicitation of a minor, facially unconstitutional. Nothing in this opinion changes that holding.

F. Constitutionality of Legislation

Amendments to Section 38.04(b) of the Penal Code by Senate Bill 1416 (82nd Legislature) did not violate the "single-subject rule" of the Texas Constitution because the provisions in the bill have the same general subject, criminal penalties for offenses involving motor vehicles, and have a mutual connection in the intent to better protect law enforcement and the public from actors who evade arrest.

Ex Parte Jones, 2014 Tex. Crim. App. LEXIS 763 (Tex. Crim. App. June 14, 2014)

As enrolled and enacted, Senate Bill 1416 included five sections that: (1) amended Section 46.01 of the Penal Code to provide a definition of what constitutes a tire-deflation device, (2) amended Section 46.05 of the Penal Code to make a tire-deflation device a prohibited weapon, (3) amended Section 38.04 of the Penal Code to elevate the punishment range for first-time offenders evading arrest in a motor vehicle and to provide for penalties for offenses where a tire-deflation device is used while an actor is in flight, and (4) and (5) provided for an effective date of September 1, 2011. Subsequent to the adoption of the bill by the Legislature, the caption was made to conform to the substance of the bill that was passed; the caption specifically mentioned penalties for evading arrest in a motor vehicle. The court concluded that because the penalties for the offenses described in the bill pertain to criminal offenses related to motor vehicles, they have a single subject, and because each of these offenses relates directly or indirectly to the offense of evading arrest, they have a mutual connection to one another, meeting the requirements of the single-subject rule. The challenger here put too much emphasis on the title of the bill and asked the court to adopt a germaneness test that focuses on the title, which the court declined to do.

II. Substantive Law

A. International Property Maintenance Code

The City's adoption of the International Property Maintenance Code (IPMC) required the State to allege in the complaint that notice had been given pursuant to Section 107 of the IPMC. The accused was entitled to notice of violations of a municipal code before his subsequent violations could be convictions.

State v. Cooper, 420 S.W.3d 829 (Tex. Crim. App. 2013)

Cooper was charged by complaint of two criminal offenses under the Plano Property Maintenance Code: (1) not maintaining the exterior of a structure in good repair and in a structurally sound manner and (2) not supplying hot and cold running water to plumbing fixtures in a house. The complaints were filed in the Plano Municipal Court, which at the time was not a court of record. Each complaint subsequently resulted in a conviction for a Class C misdemeanor and fines were imposed following a bench trial. Cooper appealed the judgments of the municipal court. Both cases were appealed, trial de novo, to Collin County Court at Law No. 2. Cooper moved to dismiss both complaints for failure to state an offense. The county court granted both motions.

The State appealed to the Dallas Court of Appeals, which, in a published opinion, held that the county court did not err by granting the defendant's motion to dismiss the complaints. The court opined that although the complaints tracked two specific provisions of the IPMC adopted by the City of Plano, neither of the provisions alone created an offense. The court of appeals agreed with Cooper that the offense for violating a provision of the IPMC is defined by Section 106.3, which states that a person failing to comply with a notice of violation served under Section 107 "shall be deemed guilty of a misdemeanor." As notice of the violation was not alleged, the court found the complaints failed to allege an element of the offense. Individual provisions of the code cannot be read in isolation of other sections dealing with violations (Section 106) and notice and order (Section 107).

Judge Womack, in a unanimous decision by the Court of Criminal Appeals, affirmed the judgment of the court of appeals. While the court of appeals, focusing on individual provisions, concluded that the provisions taken as a whole required notice, it is not necessary to address the issue so broadly. The State argued that Section 6-45 constitutes a separate penal provision in addition to the original offense, Section 106.3. The record is clear both complaints alleged violations of Section 6-46 (incorporating the original prosecution clauses) not Section 6-45. The City left the notice requirements in the text of the code and charged Cooper under those provisions. Indeed, it explicitly amended (rather than deleted) the section on the requirements for a prosecution. Since it did, the Court is left to enforce the words of the ordinance rather than an unexpressed intent the city wishes the Court would infer. This opinion and the opinion of the court of appeals in no way limit a home-rule city from creating and enforcing municipal ordinances or limit its methods of prosecution. However, the Court will not guess at what a city intended to do with its codes. The Court will enforce the plain language of the code as adopted.

Commentary: This is the first time the Court of Criminal Appeals has considered the criminal law implications of adopting an international code. In 2013, we noted that *Cooper* was one of those rare cases where municipal law and criminal law intersect. Model codes, prefabricated public policy—the legislative equivalent of "Shake and Bake"— are a common and convenient option for city councils (and to a lesser degree, county commissioners courts) seeking to avoid "reinventing the wheel." As the Court acknowledged, to date, both the Texas Legislature and at least 301 Texas cities have adopted at least one the many codes promulgated by the International Code Council. Such codes give local governments the ability to adopt more thorough and well-researched codes at lower costs to their taxpayers. However, *Cooper* begs a fundamental question: do local governments adopting such model codes know what all they entail and the implication of their adoption?

Amici urged the Court to grant the State's petition in order to address more generally the adoption of international codes as adopted by municipalities and enforced under the Code of Criminal Procedure. While the Court acknowledged the invitation to explore the practical interplay between procedural and substantive criminal law and code violations promulgated from international code, the Court declined

the invitation. Consequently, important questions posed in this case remain unanswered. The Dallas Court of Appeals opinion in *Cooper*, 396 S.W.3d 603 (Tex. App.—Dallas 2012, pet. ref'd), by Justice Jim Moseley offered a much more robust and comprehensive analysis of the legal issues. A Court of Criminal Appeals opinion of equal breadth could have proven blistering and indirectly triggered a tsunami of *Cooper*-related appeals from municipal courts throughout the state.

The *Cooper* opinion by the Court of Criminal Appeals should serve as a stern reminder to Texas cities that adopt generic codes that local intent will not supersede plain language. While the Court makes it clear that the decision was not intended to impede the ability of a home-rule city to create and enforce municipal ordinances or its methods of prosecution, city councils and city attorneys, take note: the Court "will not guess at what a city intended to do with its codes." *Cooper* at 832.

B. Penal Code

The phrase, "repeated telephone communications," in Section 42.07(a)(4) of the Penal Code (harassment) does not require the communications to occur within a certain time frame in relation to one another and a facially legitimate reason for the communication does not negate per se an element of the statute.

Wilson v. State, 2014 Tex. Crim. App. LEXIS 963 (Tex. Crim. App. September 17, 2014)

The evidence in this case included six voicemails left over a period of 10 months. The Court found that the statute's use of "repeated" simply speaks in terms of the number of telephone communications; it does not attempt to define the required frequency of the communications or temporal proximity of one communication to another. The Court found that resolving the question presented requires going no further than that one telephone call will not suffice.

Judge Keller, in her concurring opinion, joined by Judge Johnson, quoted herself in a previous case dealing with this statute, where she said that "[t]he mischief this statute can create is enormous." The message of the statute, according to the concurrence is this: "If you have any disagreements with your neighbor, and you have called her on the telephone once, do not ever call her on the telephone again, or you will be exposed to criminal liability." Even worse, they opined, because the statute is not limited to calls made to someone's home phone or even to a personal phone, the "only one phone call" rule applies to any phone conversation, anywhere—including a phone call made to a public official at his government office.

Judge Cochran, in a concurring opinion, alleged that this interpretation invites a constitutional vagueness and overbreadth challenge to the statute.

A defendant is not entitled to an instruction on voluntary possession under Section 6.01 of the Penal Code on the basis that he or she claims a lack of knowledge of the forbidden nature of the thing possessed because this claim goes to the mens rea.

State v. Ramirez-Memije, 2014 Tex. Crim. App. LEXIS 958 (Tex. Crim. App. September 17, 2014)

The defendant received and delivered a credit-card skimming device, but claiming he did not know what it was or what information it contained, he requested a jury charge regarding a voluntary act under Section 6.01 of the Penal Code. The Court opined that the defendant's testimony concerning lack of knowledge goes to the mens rea (required state of mind) of intent to harm or defraud, upon

which the jury was properly instructed with language defining intent and knowledge found in Section 6.03 of the Penal Code. Section 6.01 covers actus reus (the physical component of an offense) and requires that a person voluntarily engage in an act, omission, or possession. The defendant knowingly received the skimming device and knew that he was transferring the device. This satisfies the requirement of a voluntary act under Section 6.01.

Testimony by the property owner of what his insurance company paid him was sufficient to prove pecuniary loss in a criminal mischief case under either a damage or destruction theory. Testimony by the property owner of what it would cost to replace a fast-food restaurant was sufficient to prove the cost of replacement.

Campbell v. State, 426 S.W.3d 780 (Tex. Crim. App. 2014)

The defendant was convicted of arson and criminal mischief for burning down an Arby's restaurant. Under Section 28.06(a)(1)-(2) of the Penal Code, if the property is destroyed, the pecuniary loss is either the fair market value of the property at the time and place of the destruction or, if that cannot be ascertained, the cost of replacing the property within a reasonable time after the destruction. If the property is damaged, the pecuniary loss is the cost of repairing or restoring the damaged property within a reasonable time after the damage occurred.

With respect to criminal mischief by destruction, an owner's testimony estimating the value of the property is generally sufficient evidence of the fair market value of the property in terms of the cost to replace the property, even without a specific statement as to the cost of replacement. At trial, the owner testified that he had considered rebuilding the property for Arby's or another fast-food restaurant, but the cost to do so was approximately $1,000,000. This was sufficient evidence, according to the Court.

With respect to criminal mischief by damage, the Court has held that an insurance adjuster's testimony about payment to the owner is sufficient to prove the cost of repair. For cost of repair, the State does not have to present expert testimony, but a lay opinion must be supported by other evidence. Here, the owner of the building and property testified, without objection, that the property was insured, and that the insurance company considered the total loss of the property to be "somewhere around $400,000," which covered damage to the building. This was not his lay opinion, according to the Court, but the type of unobjected-to hearsay testimony that the Court has held sufficient to prove the cost of repairs (pecuniary loss).

A conviction for criminal mischief can be legally sufficient even when there is no direct evidence that property damage was caused by a person's intentional act.

Carrizales v. State, 414 S.W.3d 737 (Tex. Crim. App. 2013)

Commentary: This unanimous opinion by Judge Cochran is notable for three reasons. First, it explains the history and role of the corpus delecti rule while clarifying that its modern application is limited to instances where there is a need for independent evidence to support an extrajudicial confession. Second, prosecutors often have no choice but to utilize circumstantial evidence to establish identity and intent. Third, this case shows how a prosecution can successfully utilize the "doctrine of chances" in the context of a legal sufficiency challenge. This is another opinion by Judge Cochran where history, law, and application artfully merge into an opinion where she demonstrates her ability to convey her voice in a written opinion. Judge Cochran is not seeking reelection to the Court of

Criminal Appeals and will retire in January. Her contribution to Texas criminal jurisprudence is significant and certain to be missed.

Evidence was legally insufficient to prove beyond a reasonable doubt that the appellant, a justice of the peace, convicted of Official Oppression, knew that arrests stemming from allegations of Failure to Attend School were "unlawful."

Palacios v. State, 2014 Tex. App. LEXIS 8313 (Tex. App.—Corpus Christi - Edinburg July 31, 2014, no pet.)

Commentary: The offense of Official Oppression (Section 39.03(a)(1), Penal Code) occurs when a public servant acting in an official capacity intentionally subjects another to arrest that the public servant knows is unlawful. The prosecution and conviction of Hidalgo County Justice of the Peace, Mary Alice Palacios, for official oppression was widely discussed throughout Texas among municipal judges and justice of the peace. Media attention surrounding the case, in part, prompted TMCEC in AY 2013 to revisit the mechanics of what is euphemistically referred to as arrest laws governing JNAs (juveniles now adults).

It stands to reason that when Texas made the decision to criminally enforce truancy (i.e., Failure to Attend School) (Section 25.094, Education Code), it authorized judges to criminally enforce school attendance related orders. Cases involving children who either fail to appear in court or who fail to satisfy the judgment of the court by the time they become adults have long been recognized as problematic for municipal and justice courts. (See, Ryan Kellus Turner, "Juveniles Now Adults: Unanswered Questions in Trial Courts of Limited Jurisdiction," *Municipal Court Recorder* (February 2003) at 13). The JNA provisions in Chapter 45, passed into law during the 78th Regular Legislature (H.B. 2319), struck a balance between protecting the legal interests of youth and holding youth accountable by ending "surprise birthday parties" for JNAs. While the legislative history of H.B. 2319 is not addressed by the court of appeals, the JNA provisions are at the crux of this case.

The opinion by the Corpus Christi Court of Appeals reversing and rendering a judgment of acquittal for Judge Palacios is significant and a worthy read for a number of reasons. First, in terms of the big picture, it is of precedential value because it addresses a host of statutes in Chapter 45 of the Code of Criminal Procedure pertaining to juveniles that, until now, have not been the subject of case law (e.g., Article 45.041. Judgments, Article 45.045. Capias Pro Fine, Article 45.046. Commitments, Article 45.048. Discharged from Jail, Article 45.05. Contempt: Juveniles, and Article 45.060. Unadjudicated Children, Now Adults; Notice of Reaching Age of Majority; Offense). Second, for better (if you are a judge) or worse (if you are concerned about abuses of power by judges), the opinion illustrates the uphill climb a prosecutor faces when accusing a public official statutorily authorized to order an arrest with unlawfully ordering an arrest. (Yes, there is a distinction.) The State must prove that the acts resulting in arrest are either criminal or tortious. Knowing the law is not tantamount to knowing that an arrest is "unlawful." What matters is that whether a judge criminally or tortiously abuses his office as a public servant. A mistake is not an unlawful act. Third, a substantial portion of this opinion consists of trial testimony excerpts that are laden with teachable moments for prosecutors and judges.

While exonerating Judge Palacios from criminal wrongdoing, the opinion contains testimony that, if true, suggests disturbing practices occurred in the Hidalgo County Precinct 4, Place 2 (e.g., an adult defendant being required to post $10,000 in bail to secure his freedom for offenses occurring when the defendant was a child).

The court of appeals' discussion lends itself to discussing a lot of familiar questions in municipal and justice courts. In terms of continuing jurisdiction, what is the legal distinction between a judge accusing a child of contempt and a judge *referring* a matter to juvenile court and *transferring* a case from criminal court to juvenile court? Is every writ that results in an arrest an arrest warrant? What is a "birthday letter?" Is continuing obligation to appear distinct from other non-appearance crimes? While the prosecution appeared woefully ill-prepared at trial and on appeal to answer such questions, luckily for Judge Palacios, the court of appeals was ready and able to put such issues into their proper context.

It is disturbing to believe that as a consequence of a justice of the peace's failure to understand the JNA provisions of Chapter 45 that children were improperly arrested. Yet, in this instance, the prosecution of the justice of the peace is equally disturbing in light of an appellate court opinion which suggests that the district attorney misunderstood the same provisions. This case makes clear, in terms of legal sufficiency, the challenge prosecutors face on appeal when allegations rely primarily on determination of questions of law.

Text messages and video calls are considered "telephone communications" for the purposes of Section 42.07(a)(4) of the Penal Code prohibiting harassment by telephone communication.

Perone v. State, 2014 Tex. App. LEXIS 4078 (Tex. App.—Houston [14th Dist.] April 15, 2014, no pet.)

Answering a question of first impression, the court found that text messages are a type of written communication that can be exchanged between various types of devices, including two cell phones. The sender initiates the message by entering it into the device and sending it. The message is later transmitted to the recipient's device. According to the court, if text messages are exchanged between two telephones, they are communications between telephones, and thus are telephone communications under Section 42.07(a)(4). FaceTime, used in this case, is an application that allows individuals to make video calls from telephones or other electronic devices. Accordingly, because the communications in this case were between telephones, they are telephone communications under Section 42.07(a)(4). The court did not address the extent to which text messages or video calls may constitute "electronic communications" under Section 42.07(a)(7).

The offense of Bail Jumping/Failure to Appear (Section 38.10, Penal Code) is not a continuing offense. Accordingly, the statute of limitations for the offense is calculated from the day the defendant fails to appear.

State v. Ojiaku, 424 S.W.3d 633 (Tex. App.—Dallas 2013, pet. ref'd)

Allegations in a notice of intent to sue a city for retaliation, discrimination, religious persecution, and torture did not constitute tampering with a governmental record under Section 37.10(a)(2) of the Penal Code because the State failed to prove knowledge of falsity and intent that the notice be relied upon as a government document.

Fox v. State, 418 S.W.3d 365 (Tex. App.—Corsicana 2013, no pet.)

Mr. Fox and others from an organization called the House of Israel church planned to purchase property in Jacksonville, Texas. He and other church members had become locally infamous, described by the police chief as being an offshoot of the Republic of Texas. After the church purchased the property, police executed three search warrants. Fox was subsequently arrested three times over the

course of seven months on nine charges, including barratry, but none resulted in a conviction. After this rather bizarre series of events, Fox resolved to sue the City of Jacksonville under the Texas Tort Claims Act. The notice document he created to this end, filed with the court, and delivered to multiple city employees is the subject of this case.

School district boards of trustees adopting policies allowing designated employees to carry handguns on school premises or government meetings do not violate Sections 46.03 or 46.035 of the Penal Code. A school board may designate such employees in addition to a school marshal under 37.0811 of the Education Code.

Tex. Atty. Gen. Op. GA-1051 (4/17/14)

Section 46.03 of the Penal Code prohibits carrying a firearm on school premises, but expressly excepts a person carrying pursuant to "written regulations or written authorization of the institution." A person commits an offense under Subsections 46.035(b) and (c) of the Penal Code when the handgun is carried "under the authority of Subchapter H, Chapter 411 (handgun statutes) of the Government Code" in certain prohibited places. The Attorney General reasons that when a person is authorized by other law, such as a school board's written regulations, that person is not carrying a handgun under the handgun statutes. The opinion goes on to say that such authorization does not conflict with House Bill 1009, which authorized a school district to appoint a licensed, trained employee as a school marshal who is also authorized to carry a concealed handgun on school premises. The school district is not limited, according to the opinion, to appointing either a school marshal or a designated employee, but may do both.

Commentary: School safety and guns are increasingly weighty topics. Recognizing the vital importance of school safety, this opinion could have stopped at authorizing school board policies designating concealed handgun license (CHL) holders to carry handguns on school premises as an exception to Section 46.03.This opinion arguably falls apart on its analysis of Section 46.035 of the Penal Code. First, a school board's written policies are not law. The request for opinion stated that typical policies require designated employees to have a CHL. If a person has a CHL, then that person *is* carrying a handgun under the handgun statutes and thus, violates Section 46.035 if that person carries in a prohibited place. There is no exception in Section 46.035 for persons carrying pursuant to "written regulations or written authorization of the institution" as in Section 46.03. If a school board's policy does not require a CHL, what authority does a school board have to permit an unlicensed person to carry a weapon? Even if Section 46.035 can be construed to grant a school board the authority to permit either an unlicensed person or a licensed person violating Section 46.035 on school premises, how does this authorization extend to meetings of a governmental entity?

C. Transportation Code

Under Section 547.302 of the Transportation Code, vehicles must display required headlights in *two separate instances*, the first being when it is nighttime, and the second being when light insufficient or atmospheric conditions are unfavorable so that a person or vehicle on the highway is not clearly discernible at a distance of 1,000 feet ahead.

State v. Gammill, 2014 Tex. App. LEXIS 3541 (Tex. App.—Dallas April 1, 2014, no pet.)

This interpretation of the statute was reached by the court despite the statute's use of the conjunction "and." Both instances do not have to exist for an offense to occur.

A commercial vehicle operator was properly assessed a fine of $250 for failure to wear a seatbelt. The Federal Motor Carrier Regulation, adopted by the State of Texas, which created a fine-only offense with a fine in excess of the seatbelt offense in the Transportation Code, was not *in pari materia*. Thus, the punishment imposed did not violate due process.

Garrett v. State, 424 S.W.3d 624 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd)

Commentary: Title 49, Part 392, Section 392.16 of the Federal Motor Carrier Safety Regulations (Regulation 392.16) prohibits a commercial motor vehicle, equipped with a seat belt assembly at the driver's seat, from being driven unless the driver is restrained by the seat belt. Regulation 392.16 has been adopted as a state rule by the director of the Texas Department of Public Safety. Section 644.051(c) of the Transportation Code provides that the director may adopt all or part of the federal regulations by reference. 37 Texas Administrative Code Section 4.11(a) reflects that the director has adopted Regulation 392.16.

The last notable *in pari materia* issue to originate from a municipal court had to do with the offenses of Failure to Appear and Violate Promise to Appear. See, *Azeez v. State*, 248 S.W. 3d 182 (Tex. Crim. App. 2008). *Azeez* is frequently cited in Texas criminal case law. Similar to *Azeez*, Garrett made an *in pari materia* challenge to his punishment stemming from a traffic offense. However, the case had a different outcome. The doctrine of *in pari materia* is a rule of statutory construction that seeks to carry out the Legislature's intent. Statutes are *in pari materia* when they deal with the same general subject, have the same general purpose, or relate to the same person or thing or class of persons and things. The Court of Criminal Appeals has made clear that the statutes' purposes are the most significant factor. The *in pari materia* doctrine arises where one statute deals with a subject in comprehensive terms and another law deals with a portion of the same subject in a more definite way. The Court of Criminal Appeals has determined statutes to be *in pari materia* where one provision has broadly defined an offense, and a second has more narrowly hewn another offense, complete within itself, to proscribe conduct that would otherwise meet every element of, and hence be punishable under, the broader provision. It has also made clear, however, that the occurrence of like or similar phrases, or even of similar subject matter, in laws enacted for wholly different ends will not justify applying the rule.

An individual who chooses to establish financial responsibility by making a deposit of at least $55,000 with the county judge under Section 601.123 of the Transportation Code establishes such responsibility for one vehicle, unless a deposit is made for each additional vehicle, and for other drivers if such drivers are listed under Subsection 601.054(a) of the Transportation Code.

Tex. Atty. Gen. Op. GA-1068 (6/25/14)

The language, "for *that* vehicle," in Section 601.051 and "*the* motor vehicle" in 601.123(a) suggests that a deposit under 601.123 applies to a specific vehicle. Regarding multiple drivers, Subsection 601.054(a) permits an owner of a vehicle to provide evidence of financial responsibility for another person if the other person is an operator employed by the owner or a member of the owner's immediate family or household. A person not on that list is independently responsible.

Whether the term, "traffic citation," for the purposes of Section 720.002 of the Transportation Code includes traffic warning citations depends on whether a court adopts a narrow definition of "citation" as in Chapter 703 of the Transportation Code or a more expansive interpretation of Section 720.002.

Tex. Atty. Gen. Op. GA-1056 (5/7/14)

If a court employs the definition of "citation" in Chapter 703, also known as the Nonresident Violator Compact, a warning likely does not include the element of an order requiring the motorist to respond, and thus, would not be subject to the prohibition in Section 720.002 (on quotas). A court could also interpret the word "any" in Section 720.002 to broadly encompass any type of citation, including a warning. Under any interpretation of the statute, a quota on warnings that is effectively used to implement a quota on traffic citations in the true sense is in violation of Section 720.002.

D. Family Code

A justice of the peace may not grant a waiver of the 72-hour waiting period before a marriage ceremony under Section 2.204 of the Family Code because justice courts are not courts "with jurisdiction in family law cases" for the purposes of that statute.

Tex. Atty. Gen. Op. GA-1053 (4/28/14)

Section 2.204 of the Family Code authorizes five categories of judges to grant a waiver of the 72-hour waiting period. This is compared in a footnote to the 18 categories of judges authorized to conduct marriage ceremonies. The only category in Section 2.204 that justices of the peace could possibly fall into is "a court with jurisdiction in family law cases." The Attorney General points only to justice courts' jurisdiction over truancy cases when a juvenile court waives its original jurisdiction and finds that mere Title 3 jurisdiction in truancy cases falls short. Cited as support, Section 24.601(b) excludes truancy from the definition of "family law matters" and Section 25.0002 of the Government Code excludes cases and proceedings under Title 3 of the Family Code from the definition of "family law cases."

Commentary: The opinion does not address Class C Misdemeanors in the Family Code over which a justice court (and municipal court) has jurisdiction (i.e., Sections 2.012, 2.206, 2.207, 2,405, 8.209, 33.02(g)).

E. Firearms and Domestic Violence

When a defendant is convicted under a state's misdemeanor assault law of "intentionally or knowingly causing bodily injury" to anyone in a class of people outlined in 18 U.S.C. Section 922(g)(9), the assault constitutes a "misdemeanor crime of domestic violence" under that federal statute and prohibits the possession of a firearm.

United States v. Castleman, 134 S. Ct. 1405 (2014)

Recognizing that firearms and domestic violence are too often a deadly combination, the U.S. Congress forbade the possession of firearms by anyone convicted of "a misdemeanor crime of domestic violence." 18 U.S.C. Section 922(g)(9). In 2001, Castleman was charged in a Tennessee court with having "intentionally or knowingly caused bodily injury to" the mother of his child, in violation of Tennessee law. He pleaded guilty. In 2008, federal authorities learned that Castleman was selling firearms on the black market. A grand jury in the Western District of Tennessee indicted him on two counts of violating Section 922(g)(9).

Castleman moved to dismiss his indictment under 18 U.S.C. Section 922(g)(9), which forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence." He argued that his previous conviction for intentionally or knowingly causing bodily injury to the mother of his child did not qualify as a "misdemeanor crime of domestic violence" because it did not involve "the use or attempted use of physical force" under 18 U.S.C. §921(a)(33)(A)(ii). The trial court agreed, reasoning that physical force must entail violent contact and that one can cause bodily injury without violent contact (e.g., poisoning). The court of appeals affirmed on different grounds.

In reversing and remanding the judgment of the court of appeals, Justice Sotomayor, writing for the Court, opined that the requirement of "physical force" in the federal definition of domestic violence is satisfied by the degree of force that satisfies a common-law battery conviction, which requires only "offensive touching."

Justice Scalia, concurring in part and concurring in the judgment, wrote separately because the Court's opinion bypasses a narrower interpretation. Precedent, text, and common sense all dictate that the term "physical force," when used to define a "misdemeanor crime of domestic violence," requires force capable of causing physical pain or bodily injury. By using a broader interpretation, the Court treats any offensive touching, no matter how slight, as sufficient to constitute an offense.

Justice Alito wrote a separate opinion concurring in the judgment, joined by Justice Thomas, in which he argued that the reasoning in the majority opinion purports to rely on the reasoning in *Johnson v. United States,* 559 U.S. 133 (2010*),* but because the majority opinion in this case holds that force does not need to be violent, it is an improper application of the precedent.

Commentary: Municipal and justice courts in Texas should anticipate more assault trials when complaints allege family violence. While the underlying offense in this case, which occurred in Tennessee, would have been classified as a Class A misdemeanor in Texas, under *Castleman*, a conviction for a Class C misdemeanor assault against a family or household member could be the basis for a federal firearms prosecution.

III. Procedural Law

A. Code of Criminal Procedure

1. Bail and Bond

A court of appeals does not have jurisdiction to consider an interlocutory appeal of a pretrial motion for bond reduction because a rule of appellate procedure cannot bestow jurisdiction or enlarge the rights of litigants beyond those provided in the constitutions or a statute. There is no constitutional or statutory authority granting the courts of appeals jurisdiction to hear interlocutory appeals regarding excessive bail or the denial of bail.

Ragston v. State, 424 S.W.3d 49 (Tex. Crim. App. 2014)

Article 17.151 of the Code of Criminal Procedure (Release Because of Delay) requires release on personal bond if the State is not ready to proceed to trial without consideration of the safety of either victims or the community.

Ex parte Gill, 413 S.W.3d 425 (Tex. Crim. App. 2013)

Commentary: The Gill brothers were arrested and charged with murder. Bail was set at $1,000,000 but it was reduced to $100,000 and $50,000. However, 90 days after being arrested, neither had been formally charged. After a habeas petition was filed in district court, the judge denied release on the grounds that the rules for fixing the amount of bail in Article 17.15 of the Code of Criminal Procedure allowed for consideration of community safety and that Article 17.151 violated the separation of powers doctrine. The court of appeals affirmed the trial court's determination. The Court of Criminal Appeals reversed the court of appeals, noting that Article 17.151 does not unduly interfere with the judge's exclusive role of hearing and considering evidence. The judge in an Article 17.151 hearing decides from the evidence whether the State is ready for trial, determines the length a defendant has been in custody, and considers the Article 17.15 rules in determining whether to issue a personal bond or to set an amount of bail to effectuate the accused's release. It is also within the judge's discretion to consider whether to impose additional conditions of bond under Article 17.40, and if so, the nature of those conditions. The Court of Criminal Appeals shared the Legislature's concern that a judge would be able to order the indefinite detention of an uncharged accused on an offense the State is not ready to bring to trial on the basis of his criminal history, the nature of the alleged offense, or that he might present a danger to the victim or the community. To this end, Article 17.151 is not a separation of powers problem but rather a remedy to prevent potential indefinite detentions. To the degree that previous case law reached a different conclusion, those cases are disavowed.

2. Pre-Trial Motions/Issues

A judge was not disqualified under Article 30.01 of the Code of Criminal Procedure as an injured party where the judge was a customer of the electric company from which the defendant allegedly misappropriated fiduciary property, committed first-degree felony theft, and laundered money.

Fuelberg v. State, 2014 Tex. App. LEXIS 7675 (Tex. App.—Austin July 16, 2014, no pet.)

The issue in addressing disqualification under Article 30.01 or recusal under Section 18(b)(1) of the Rules of Civil Procedure is: would a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge and the case, have a reasonable doubt that the judge is actually impartial? The court found that there was evidence in the record that the judge did not actively participate in the class-action suit brought against the electric company and the defendant, that his interest in this case was indistinguishable from that of the other 225,000 customers, that any resident in the coverage area had to purchase his or her electricity from the company, and that the judge stood to gain $5.00 at most from any restitution that he ordered in this case in addition to the approximately $18 he received under the terms of the class-action suit. Here, it was reasonable to conclude that a reasonable person would not doubt the judge's ability to remain impartial.

The court also found a factual basis for the judge's order of restitution even though the amount was more than the upper limit of the punishment for the offenses of which the defendant was convicted. In its restitution analysis, the court cites the following recent cases: *Campbell v. State*, 426 S.W.3d 780 (Tex. Crim. App. 2014), and *Hanna v. State*, 426 S.W.3d 87 (Tex. Crim. App. 2014).

Commentary: Also notable in this case, the defendant put on expert testimony from a professional pollster to attempt to establish that a reasonable person would doubt the judge's impartiality. The pollster conducted a random survey in Bandera, giving the participants hypothetical facts resembling

those in this case and asking if they would have concerns about the judge being fair and unbiased. The court emphasized that the "reasonable person" standard is a legal standard, and evidence derived from survey results attempting to ascertain public opinion related to judicial bias is not controlling. The court went on to say that although the opinion of the average person is related to the opinion of the hypothetical reasonable person, the terms are not synonymous, and public polling is not a substitute for an appropriate legal analysis of the reasonable person standard. The judge here was lucky not to be at the mercy of the poll, which found that 70.6% of those polled had concerns about the judge being fair and unbiased.

An indictment tolled the statute of limitations even though the State would not have been able to prove the enhancement, and for that reason, filed a motion to dismiss the indictment.

Klemisch v. State, 437 S.W.3d 628 (Tex. App.—Amarillo 2014, no pet.)

The defendant was indicted in May 2009 for an offense committed on or about April 13, 2009. The indictment alleged the offense was enhanced. In June 2011, the defendant filed a motion to quash the indictment and dismiss the prosecution for lack of jurisdiction, alleging the enhancement was meritless. The State filed a motion to dismiss the prosecution, and the case was dismissed on June 9, 2011. In May 2012, the State charged the defendant in a lower court with a lesser degree offense and included a tolling paragraph. The defendant argued that the original court never acquired jurisdiction over the initial case filed in 2009 because the State would not have been able to prove the enhancement allegation.

The court disagreed, finding that because it is the presentment of an indictment or information to a court charging a person with commission of an offense that gives the court jurisdiction over the cause, whether the State could prove the enhancement allegation is irrelevant. The 2009 indictment alleged the type of offense that vests that particular court with jurisdiction to hear the case. Under Article 12.05(b) of the Code of Criminal Procedure, the time during the pendency of the May 2009 indictment is not included when computing the two-year limitations period.

Judicial decisions involving pre-trial discovery of material evidence are subject to mandamus because such decisions are ministerial and not discretionary.

In re Hartman, 429 S.W.3d 680 (Tex. App.—Beaumont 2014, no pet.)

Generally, a trial court's acts involving discovery under Article 39.14 of the Code of Criminal Procedure are discretionary and not subject to a writ of mandamus, but decisions involving pretrial discovery of evidence that is exculpatory, mitigating, or privileged are not discretionary. Deciding whether something is discoverable is within the discretion of the court, but if evidence sought is material to the defense (it makes the difference between a conviction and an acquittal), the court must permit discovery. Because decisions involving material evidence are thus, ministerial, such decisions are subject to mandamus.

3. Trial

Inclusion of definitions in the jury charge where the terms were undefined in the Penal Code constituted an improper comment on the weight of the evidence under *Kirsch v. State*, 357 S.W.3d 645 (Tex. Crim. App. 2012), because the definitions focused the jury's attention on the specific type of evidence that would support a finding of the contested element of penetration.

Green v. State, 434 S.W.3d 734 (Tex. App.—San Antonio, pet. granted)

Under Article 36.14 of the Code of Criminal Procedure, the court is required to give the jury a written charge "setting forth the law applicable to the case" and "not expressing an opinion as to the weight of the evidence." *Kirsch*, 357 S.W.3d at 651. Because the court, on this record, could not say with "fair assurance" that the charge error did not have an "injurious effect or influence in determining the jury's verdict," it concluded that inclusion of the definitions of "penetration" and "female sexual organ" in the jury charge resulted in some harm.

Justice Chapa, in her concurrence, opined that if not constrained by *Kirsch*, she would conclude the definitions were both proper and necessary and were not comments on the weight of the evidence, urging the Legislature to adopt statutory meanings. Part of the definition given in the charge, "[t]ouching beneath the fold of the external genitalia constitutes penetration of the female sexual organ within the meaning of the aggravated sexual assault statute," Justice Chapa opines, does not comport with the common and ordinary understanding of the words "penetration" and "female sexual organ."

Commentary: The Court of Criminal Appeals granted the State's PDR on September 17, 2014.

4. Restitution

Restitution may be ordered to a person who is not a "victim" named in the charging instrument.

Hanna v. State, 426 S.W.3d 87 (Tex. Crim. App. 2014)

Judge Cochran, writing for the Court, opined that for purposes of the restitution statute, a "victim" is any person who suffered loss as a direct result of the criminal offense. As stated in Section 42.037(k) of the Code of Criminal Procedure, the burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the prosecuting attorney. The phrase, "as a result of the offense," includes the notion of both actual and proximate causation. The damage must be a "direct" result of the defendant's criminal offense—that is, the State must prove, by a preponderance of the evidence, that the loss was a "but for" result of the criminal offense and resulted "proximately, or foreseeably, from the criminal offense.

Presiding Judge Keller, dissenting, agreed with the Court's analysis of Article 42.037, but disagreed with its application in this case. The circumstantial evidence in this case was sufficient to prove the defendant was the direct cause of the harm.

Commentary: This is a significant decision with likely broad implications for all criminal trial courts. Granted, "victimless crimes" are not victimless if the offense caused the harm. Nonetheless, it is a safe bet that many criminal law practitioners and judges for the last 15 years have operated under the assumption that restitution requires a victim named in the charging instrument. The Court concedes that its opinion in *Cabla v. State*, 6 S.W.3d 543 (Tex. Crim App. 1999), could be interpreted as meaning either individuals alleged in the charging instrument or, more generally, individuals alleged and proven to be victims of the criminal offense at the restitution hearing. In *Hanna*, the Court clarifies that the latter interpretation is the correct one and the former was merely dicta.

Could *Hanna* prove to be a slippery slope for municipal and justice courts? The Court concedes the possibility. The majority attempts to make its decision on public policy grounds specific to DWI. The Court explains that judicially enacting a flat prohibition against restitution in DWI cases could have deleterious effects, such as giving prosecutors an incentive to charge DWI defendants with additional counts of intoxication assault or criminal mischief solely to preserve the right to request restitution for an accident victim. Although the Court acknowledges a valid countervailing public policy concern that allowing restitution for DWI damages could "open the floodgates for restitution in a wide swath of 'victimless' offenses—perhaps even thousands of dollars' worth of restitution for collisions caused by Class C jaywalking offenses." The Court leaves "those legitimate concerns to another day as DWI, unlike many other 'victimless' offenses, clearly has the purpose of preventing and deterring death and damages to persons and property by intoxicated drivers on our highways." *Hanna* at 96.

5. Probation

When a judge acknowledged on the record that an indigent defendant would have trouble paying for a SCRAM device but admonished the defendant to "work with probation" to resolve those matters, that dialogue was not sufficient to satisfy the requirement that a judge "consider" a defendant's ability to pay before imposing monetary conditions of probation.

Mathis v. State, 424 S.W.3d 89 (Tex. Crim. App. 2014)

Commentary: Judge Cochran, writing for a plurality of the Court, opined that this case was about the old adage that "you can't get blood from a turnip." The metaphorical turnip, Mathis, who was on probation for sexual assault, was ordered to pay $23,736.19 over the span of 10 years (an average of nearly $200.00 a month). Above and beyond this amount, he also was ordered to pay for a SCRAM (secure continuous remote alcohol monitor) device and monitoring. It roughly costs $300 per month. While the Court acknowledges *Bearden v. Georgia*, 461 U.S. 660 (1983) (holding that a court cannot revoke probation for a failure to pay a fine or make restitution absent evidence and findings that the probationer willfully failed to pay and that alternative forms of punishment would be inadequate to meet the State's interests), the Court's focus centers on whether the judge sufficiently considered Mathis' ability to pay for the SCRAM device in accordance with Article 42.12, Section 11(a) of the Code of Criminal Procedure. The larger issue, the potential constitutional boundary of imposing technology-related costs on indigent defendants, is left looming. Assuming arguendo that Article 42.12 (Community Supervision) and Article 45.051 (Deferred Disposition) are the same, imagine a scenario where a truant child is ordered as a condition of probation to pay the full costs of GPS monitoring.

The trial court did not err in denying the defendant's oral motion for deferred disposition or a deferral under the driving safety course (DSC) statute when he declined to answer whether he held a commercial driver's license.

Hassan v. State, 2013 Tex. App. LEXIS 13308 (Tex. App.—Houston [14th Dist.] Oct. 29, 2013, no pet.)

A holder of a commercial driver's license is not eligible for either deferred disposition (Article 45.051, Code of Criminal Procedure) or DSC (Article 45.0511, Code of Criminal Procedure).

Although testimony at trial showed that Hassan was driving a taxi cab when he was cited, he declined in municipal court to answer when asked by the judge if he had a commercial driver's license. Hassan asserted that he was punished for electing to remain silent in violation of his constitutional right not to

testify. The court of appeals opined that requiring a defendant to answer an inquiry about probation status is not a "classic penalty situation" in which a party is threatened with punishment after asserting a privilege against self-incrimination. See, *Minnesota v. Murphy*, 465 U.S. 420, 436 (1984); *Chapman v. State*, 115 S.W.3d 1, 8 (Tex. Crim. App. 2003). Hassan was not asked to incriminate himself, but instead to establish that he qualified for deferred disposition or DSC. His 5th Amendment right against self-incrimination was not implicated as he contends on appeal.

The court of appeals rejected Hassan's attempt to equate the denial of deferred disposition to an increase in the penalty for an offense and found *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that facts used to increase an offense's penalty beyond a statutory maximum must be submitted to a jury), inapplicable to the facts of this case. First, a deferral of guilt and placing a defendant on probation is not a conviction. *Price v. State*, 866 S.W.2d 606, 611 (Tex. Crim. App. 1993). Such deferrals are equated with community supervision, an arrangement in lieu of the sentence, not part of the sentence. *Speth v. State*, 6 S.W.3d 530, 532 (Tex. Crim. App. 1999). Second, deferred disposition, like deferred adjudication, is therefore, not a form of punishment (punishment is assessed only after deferred adjudication probation is revoked. See generally, *Walker v. State*, 557 S.W.2d 785, 786 (Tex. Crim. App. 1977) (holding that on revocation of deferred adjudication probation, trial court may assess punishment greater than term of original probation). Moreover, deferred disposition is discretionary, not a matter of right.

The trial court was unable to determine if appellant qualified for deferred disposition or DSC, and the court exercised its discretion to deny deferred disposition. Contrary to appellant's assertion, the complaint is not required to contain an allegation, and the State is not required to prove, that appellant does not qualify for deferred disposition or DSC in a complaint (Article 45.019, Code of Criminal Procedure).

Commentary: This case has quite a procedural history for a case involving a Class C misdemeanor. It began in the Houston Municipal Court. The first time before the court of appeals, the court held that Hassan had established a prima facie case of racial discrimination pursuant to his *Batson* challenge, reversed the decision of the county court at law, and remanded the case to the municipal court for a new trial. On discretionary review, the Court of Criminal Appeals reversed the court of appeals' judgment, holding that appellant had failed to demonstrate a prima facie case of racial discrimination as raised in his *Batson* issues. See, *Hassan v. State*, 369 S.W.3d 872, 878 (Tex. Crim. App. 2012). This time, on remand, in accordance with the high court's directive, the court of appeals considered appellant's remaining issues.

Although deferred disposition is not deferred adjudication, they are similar. See, Ryan Kellus Turner, "Deferred Disposition is not Deferred Adjudication," *The Recorder* (August 2002). At times, in this opinion, the court of appeals appears to use the two terms interchangeably. Despite arguably conflating deferred disposition and deferred adjudication and overstating their similarities, this is a significant appellate decision for municipal and justice courts because it ties Article 45.051 and Article 45.0511 to case law governing deferred adjudication and community supervision (Article 42.12, Section 5, Code of Criminal Procedure).

6. Venue

Because venue is not an element of the offense, failure to prove venue does not implicate sufficiency of the evidence, nor does it require acquittal.

Schmutz v. State, 2014 Tex. Crim. App. LEXIS 121 (Tex. Crim. App. Jan. 29, 2014)

Failure to prove venue is not structural or constitutional error. Accordingly, it is subject to review for harm by using the standard for non-constitutional errors described in Texas Rule of Appellate Procedure 44.2(b). The State's failure to prove venue as alleged was harmless because the record failed to show that the defendant's substantial rights were affected by the venue of his trial.

Commentary: *Black v. State*, 645 S.W.2d 789 (Tex. Crim. App. 1983) (holding that when venue is made an issue at trial, failure to prove venue constitutes reversible error) is overruled. In overruling *Black*, the Court cites *State v. Blankenship*, 170 S.W.3d 676 (Tex. App.—Austin 2005, pet. ref'd) in which the appellant, whose case began in the Austin Municipal Court (a court of record), complained that the State had failed to prove venue and relied on Article 45.019(c) of the Code of Criminal Procedure ("A complaint filed in municipal court must allege that the offense was committed in the territorial limits of the municipality in which the complaint was made."). The court of appeals in *Blankenship*, after conducting a harm analysis, found that the failure to prove venue was non-constitutional harmless error. Dissenting, Judge Meyers opined that the venue concept was dealt an undeserved blow from the majority with the holding that venue error is subject to a harm analysis rather than automatic acquittal.

B. Rules of Civil Procedure

A judge should have been recused where he gave every indication of accepting a plea agreement, but before the sentencing hearing, met ex parte with the victim's family and associates and listened to their concerns about the plea agreement, and subsequently rejected the plea agreement. A reasonable member of the public would have doubt as to the judge's impartiality.

Duffey v. State, 428 S.W.3d 319 (Tex. App.—Texarkana 2014, no pet.)

The court noted, however, that the judge did not have the opportunity to confirm the content of the ex parte discussion or to assure that nothing at the meeting influenced his decision. The subpoena for the judge to testify was quashed.

C. Health and Safety Code

The statutory deadline in Section 821.022(b) of the Health and Safety Code for a hearing to determine whether an animal has been cruelly treated is not jurisdictional. Therefore, the fact that the justice court failed to hold such a hearing within 10 calendar days of the date the warrant was issued did not deprive either the justice court or the county court on appeal of jurisdiction.

In re Brehmer, 428 S.W.3d 920 (Tex. App.—Fort Worth 2014, no pet.)

The court's reasons for its finding included: (1) that the plain language of the statute didn't contain explicit language indicating that a failure to comply would deprive a court of jurisdiction; (2) at least one court has stated that the statute's primary goal is protecting the welfare of animals, and (3) that holding these deadlines to be jurisdictional would leave a decision vulnerable to collateral attacks long

after the completion of the proceedings, even after the animal has a new owner or has been humanely destroyed. Here, the justice court held a hearing 12 days after the warrant was issued.

Commentary: Texas statutes are fraught with deadlines that are silent as to the consequence for failing to meet them. For example, under Article 23.05 of the Code of Criminal Procedure, a capias shall be issued not later than the 10th business day after the date of the court's issuance of forfeiture or order permitting surrender of the bond. What happens if it is issued later than that? The Houston Court of Appeals (14th District), in an unpublished opinion, similarly found that nothing in Article 23 suggested that failing to issue a capias within ten days is a defense to liability. To the contrary, Article 22.13 lists the exclusive grounds upon which a surety may be exonerated from liability for forfeiture of a bond, and the failure to comply with Article 23.05 is not one of them. *Todd v. State*, 2011 Tex. App. LEXIS 1472 (Tex. App.—Houston [14th Dist.] March 1, 2011, no pet.) (mem. op., not designated for publication). When faced with a motion based on a deadline, look to see if the Legislature provided for a consequence or a remedy within the statute, chapter, or code (or elsewhere). If explicit language cannot be found, look at the remedy sought (i.e., dismissal for lack of jurisdiction) and use the framework for that remedy as a guide.

D. Mistrial

Whether a juror accessing information on a smart phone concerning a case constitutes a mistrial depends on the individual facts of each case: admonishments given to the juror; his or her own statements concerning impact on deliberation, ability to disregard, and willingness to follow the court's direction to decide the case based solely on the evidence; and type of information obtained.

Brooks v. State, 420 S.W.3d 337 (Tex. App.—Texarkana 2014, no pet.)

During a break in voir dire, one of the panelists pulled up an article about the victim's family on his smart phone. After the judge informed the jurors it was improper to privately seek out information about a case from sources including the internet, the juror informed the court he had already done such research. During a discussion in chambers, the juror stated that he would still be able to be fair and impartial and that he had not reached any decision about guilt or innocence. Defense counsel requested a mistrial, which was denied. Because this involved a single juror who did not relay any information from his search to other jurors and was instructed not to do so, a showing of actual bias was required to grant a mistrial. Applying a recent and unpublished Houston court of appeals' analysis to determine harm in a similar case (*Benson v. State*, 2013 Tex. App. LEXIS 1706 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd)), the court found that there was evidence the juror could disregard the information obtained from his phone and any potential impact on the determination of guilt would be minimal.

E. Evidence

Personal pressures, such as a fear of inclement weather or concern about a child's illness, are not "outside influences" under Texas Rule of Evidence 606(b). Accordingly, juror testimony about these issues is not admissible to attack the verdict.

Colyer v. State, 428 S.W.3d 117 (Tex. Crim. App. 2014)

Except for two narrow exceptions, Rule 606(b) prohibits post-verdict juror testimony to impeach a verdict, the most important exception being that of "an outside influence" that is "improperly brought

to bear" upon a juror. External events or information, unrelated to the trial, which happen to cause jurors to feel personal pressure to hasten or end deliberations are not "outside influences" because those pressures are caused by a juror's personal and emotional reaction to information that is irrelevant to the trial issues. Such events and information are not "improperly brought to bear" upon the juror because the juror himself decided to hasten deliberations based on information having nothing to do with the trial.

F. Appellate Procedure

Failure of defense counsel to call a known exculpatory witness and declining to allege ineffective assistance of counsel to underlie a motion for new trial left the court with no valid legal claim upon which to base its grant of a new trial.

State v. Thomas, 428 S.W.3d 99 (Tex. Crim. App. 2014)

Though the trial court may grant a motion for new trial on a basis not listed in Rule 21.3 of the Texas Rules of Appellate Procedure, the court cannot grant a new trial "unless the defendant shows that he is entitled to one under the law." The trial court's discretion to grant a motion for new trial "in the interest of justice" is not "unbounded or unfettered." Generally, if there is a "valid legal claim" in a motion for new trial, a court will not abuse its discretion by granting it. But here, it would be a miscarriage of justice to grant a new trial on the basis of evidence that the defense chose not to introduce, especially when defense counsel immunized himself from testifying about his strategy by explicitly declining to allege ineffective assistance of counsel. Defense counsel could have presented a valid legal claim, but did not do so.

The Court amends the Texas Rules of Appellate Procedure (TRAP) to set limits on the length of post-conviction habeas corpus pleadings.

Ex Parte Walton, 422 S.W.3d 720 (Tex. Crim. App. 2014)

Charles Ray Walton filed a writ of habeas corpus 328 pages long, 138 pages of which related to his first ground. He also filed motions to supplement this memorandum. The Court, finding this excessive, and in order for it to address the thousands of similar claims, amends Rule 73.1 and 73.2 of the TRAP. The restrictions and the form now required are found in Rule 73.1. Non-compliant applications may be dismissed under Rule 73.2.

IV. Court Administration

A. Court Costs

In the last year, the number of court cost-related appeals has proliferated. As detailed in our analysis of the 14th Court of Appeals opinion in *Johnson v. State*, the trilogy of court costs opinions handed down by the Texas Court of Criminal Appeals between 2009 and 2011 has proven to be a precursor for a continuing saga of court cost-related case law. (Ryan Kellus Turner, "Costs Payable? *Johnson v. State* and its Implications on Local Trial Courts of Limited Jurisdiction in Texas," *The Recorder* (March 2013)). Commentators who question the merits of such appeals or who indirectly minimized court cost-related arguments must be unaware of exactly how big of a deal court costs are in Texas.

Because the Court of Criminal Appeals decision in *Johnson* is seminal, the following cases are summarized in chronological order.

A bill of costs does not need to be presented to the trial court before costs can be imposed upon conviction.

Johnson v. State, 423 S.W.3d 385 (Tex. Crim. App 2014)

A unanimous Court of Criminal Appeals reformed the judgment of the trial court to include court costs which had been deleted by the court of appeals. This opinion, written by Judge Hervey, is intended to afford future litigants a "roadmap" to questions regarding court costs. Two primary holdings: (1) the basis of court costs need not be preserved at trial to be raised for the first time on appeal; and (2) a record on appeal can be supplemented with a bill of costs. The Court, in this instance, also held that the document in the supplemental clerk's record, a printout from a computer titled, "J.I.M.S. COST BILL ASSESSMENT" (which contained an itemized listing court costs and was certified), was in fact a bill of costs. The court of appeals erred when it failed to consider it as a supplemental bill of costs. Finally, and perhaps most importantly, the court rejected the argument that Article 103.001 of the Code of Criminal Procedure creates an evidentiary sufficiency requirement that a bill of costs must be present in the record to support a particular amount of court costs.

Commentary: Albeit an imperfect analogy, if courts are in the "business" of dispensing justice, defendants, as "customers," should be entitled to an itemized receipt, signed by the merchant. Judgment forms in municipal and justice courts typically have separate fields for the fine amount and the amount of court costs. The problem with including a fixed amount of court costs, rather than stating that the defendant is also required to pay all applicable court costs, is that the amount of court costs owed may be more than the amount stated at the time the judgment is entered (e.g., increase due to the assessment of a time payment fee, increase because of the issuance of a capias pro fine). In *Johnson*, the Court of Criminal Appeals acknowledges the dynamic nature of court costs. In light of *Johnson*, perhaps it is time to carefully examine the content of judgments and avoid stating fixed amounts.

As of date, *Johnson* has been cited more than 100 times by Texas appellate courts. The Court of Criminal Appeals decision in *Johnson* affirms the observation we made last year regarding Article 103.001. The statute does not require the preparation of a bill of costs in every criminal conviction. Rather, in each of its iterations, the Code of Criminal Procedure has stated that court costs are not payable until a written bill is either (1) *produced* or (2) *ready to be produced*. In the age of automation and "print on demand," satisfying this legal requirement is often as simple as pointing and clicking. Although Article 103.001 provides that defendants are entitled to a bill of costs containing a description and amount of each court cost and reflecting how individual court costs are included in the total court costs, relatively few defendants will request that it be *produced*. While the implications of *Johnson* are more evident in municipal courts of record than non-record municipal courts or justice courts, it is the responsibility of all criminal trial courts in Texas to make sure that it is *ready to be produced*. Technology makes this possible.

Supplementing the record on direct appeal with a bill of costs does not violate due process.

Cardeneas v. State, 423 S.W.3d 396 (Tex. Crim. App. 2014)

Failure to appeal the imposition of court costs on a deferred sentence waived any subsequent challenge to the imposition of court costs after adjudication.

Perez v. State, 424 S.W.3d 81 (Tex. Crim. App. 2014)

In a concurring opinion by Judge Alcala, joined by Presiding Judge Keller, Judge Hervey, and Judge Cochran, four members of the Court explain that although Perez was "unable to challenge the $203 in court costs because of his legal slumber, there are at least five avenues for an alert defendant who believes that the court costs imposed are erroneous or should not be collected: (1) challenge the imposition of court costs on direct appeal; (2) seek to correct any error in the costs per Article 103.008 of the Code of Criminal Procedure; (3) an appellant who is assessed court costs after expiration of the period of time for a direct appeal or a challenge under Article 103.008 could obtain relief through a petition for mandamus (citing *In re Daniel*, 396 S.W.3d 545, 549 (Tex. Crim. App. 2013), treating a habeas writ as a writ for mandamus when the record showed Daniel had no adequate remedy by appeal because the bill of costs was sent to him years after the judgment was rendered and the record showed a clear entitlement to relief); (4) an appellant could lawfully decide not to pay court costs until a written bill is "produced" or "ready to be produced" per Article 103.001 of the Code of Criminal Procedure; and (5) pursue a civil remedy.

Commentary: *Cardeneas* and *Perez* indirectly beg a fundamental question rooted in *Johnson*. In non-record municipal courts and in justice courts: if the only reason a defendant wants to appeal is because the trial court has improperly assessed court costs, what is the best avenue for the defendant? In her concurring opinion in *Johnson*, Judge Cochran wrote separately to opine that the issue was best addressed on direct appeal. But is direct appeal really an option in non-record criminal courts? It is hard to fathom since a direct appeal from a non-record court results in a trial de novo. Furthermore, as matter of twisted irony, defendants appealing from non-record courts are required to post an appeal bond at least twice the amount of the fines and costs payable to the State of Texas. (Article 45.0425(a), Code of Criminal Procedure). Avenue 2, move to correct costs within one year after the final disposition of the case, seems more plausible. Avenue 3, mandamus, seems plausible (although impractical and improbable). Avenue 4 seems most likely. Accordingly, courts need to be aware that this is a lawful option for defendants and safeguards need to be put in place to prevent enforcement of judgments after a request for a bill of costs has been made. What specific civil remedy would be available to either a municipal or justice court defendant under Avenue 5?

The $133 court cost assessed per Section 133.103(a) of the Local Government Code (Consolidated Court Costs) is not unconstitutional on its face and does not violate the separation of powers clause of the Texas Constitution in that the cost requires the judicial branch to perform an executive function by collecting a tax.

Salinas v. State, 426 S.W.3d 318 (Tex. App.—Houston [14th Dist.] 2014, pet. granted)

Justice Boyce, joined by Justice Busby, opined that because Salinas conceded that two of the items funded by the Consolidated Court Cost (specifically, the judicial and court personnel training fund and the fair defense account), and because the comptroller could directly reallocate all of the Consolidated Court Cost to those two funds under the principle of severability and the Code Construction Act, Salinas' facial attack failed to establish that Section 133.102(a)(1) always operates unconstitutionally as a tax or that it must be deleted in its entirety from the trial court's judgment.

Justice Jamison dissented, claiming that it was incorrect for the majority to inject inapplicable severability rules into the statute. Section 133.102 requires $133 to be gathered and distributed according to specified percentages. Because the statute cannot be salvaged by severing constitutionally-funded programs from those not properly funded, the statute is facially unconstitutional even if certain of the listed programs could be constitutionally funded through court costs assessed against criminal defendants. As stated, under the Court of Criminal Appeals opinion in *Ex parte Carson*, 143 Tex. Crim. 498, 159 S.W.2d 126 (1942), none of the 14 items funded under Section 133.102 constitute a cost necessary or incidental to the trial of a criminal case. These are therefore not legitimate items to be assessed against criminal defendants. Justice Jamison would hold that Section 133.102 is unconstitutional and the $133 must be deleted from the trial court's judgment.

Commentary: In *Ex parte Carson*, the Court found unconstitutional a state law creating a single court cost to fund the Harris County Law Library. Is *Carson* still good law? Good question. A lost has changed in Texas and in Texas case law since 1942. *Carson* predates the modern era of court costs in Texas. Notably, when *Carson* was handed down, court costs were considered punitive. However, in *Weir v. State*, 278 S.W.3d 364 (Tex. Crim. App. 2009), the Court of Criminal Appeals declared that court costs were not punitive but rather a recoupment of the costs of judicial resources. Thus, it is fair to question whether *Carson* is still good case law. The Consolidated Court Cost provides funds for: (1) abused children's counseling; (2) crime stoppers assistance; (3) breath alcohol testing; (4) Bill Blackwood Law Enforcement Management Institute; (5) law enforcement officers standards and education; (6) comprehensive rehabilitation; (7) operator's and chauffeur's licenses; (8) criminal justice planning; (9) an account in the state treasury to be used only for the establishment and operation of the Center for the Study and Prevention of Juvenile Crime and Delinquency at Prairie View A&M University; (10) compensation to victims of crime fund; (11) emergency radio infrastructure account; (12) judicial and court personnel training fund; (13) an account in the state treasury to be used for the establishment and operation of the Correctional Management Institute of Texas and Criminal Justice Center Account; and (14) fair defense account.

On September 17, 2014, the Court of Criminal Appeals granted review on its own motion as to the following question: "Whether the 14th Court of Appeals decision that the 'appellant failed to satisfy his burden to show that the statute is invalid in all possible applications because he has not established what the funds designated in [Texas Local Government Code] Section 133.102(e) actually do' is erroneous in light of clear precedent from this court in reviewing facial challenges to the constitutionality of a statute."

Because of the potentially broad implications of *Salinas*, it is likely to receive more attention than prior court cost cases from the Court of Criminal Appeals. TMCEC will report further developments.

Defendants appealing from municipal courts of record are not subject to county court costs resulting from convictions in county court; however, appeals from non-record municipal courts that result in convictions will incur such costs.

Tex. Atty. Gen. Op. GA-1063 (6/3/14)

The request for opinion asked 10 questions concerning assessment of court costs, responsibility of directing such costs to the Comptroller, jail credit, and fees. According to the opinion, a court is not authorized under Articles 42.03 or 45.041 of the Code of Criminal Procedure to give a defendant credit for time served after the sentence has been imposed. Also, Article 102.011 of the Code of Criminal

Procedure authorizes a court to assess a separate fee for each arrest warrant issued, but likely does not authorize a fee for commitment or release from jail after the conclusion of the case.

Commentary: Questions left unanswered: Is any part of the court costs directed to the county when collected from a defendant who appeals to county court from a municipal court of record, which affirms the conviction, or appeals from a non-record court and is convicted in county court? Is the city or county responsible for collecting the court costs under each of those circumstances and directing the costs intended for the State Comptroller? How are court costs assessed in a single case with convictions on multiple counts? Look for legislation addressing some of these unanswered questions in the next legislative session.

Pretrial intervention program funds collected under Article 102.0121 of the Code of Criminal Procedure may be used for a particular purpose only if that purpose constitutes an expense of the county or one of the listed attorney's offices, and only if it relates to a defendant's participation in a pretrial intervention program.

Tex. Atty. Gen. Op. GA-1039 (1/27/14)

Whether a particular purpose relates to a defendant's participation in a pretrial intervention program, such as "refurbishing courthouse facilities, training staff, and purchasing office supplies," as mentioned by the request for opinion, is a determination for the commissioners court to make. **Commentary:** Note that a city attorney is not listed in Article 102.0121 as an attorney authorized to collect this fee.

The requirement in Section 51.608 of the Government Code that a court cost be the amount established under the law in effect on the date the defendant is convicted does not run afoul of the constitutional prohibition on ex post facto laws.

Tex. Atty. Gen. Op. GA-1034 (1/2/14)

The United States and Texas Constitutions both prohibit a law enacted after a crime has been committed that increases the punishment for the crime. However, court costs generally do not constitute punishment and therefore generally do not implicate prohibitions on ex post facto laws. A court would likely conclude that Section 51.608 does not violate such prohibitions.

Commentary: Section 51.608 applies to a district, county, or statutory county court, however this could be instructive in analyzing similar court costs collected in municipal courts.

B. Employment Law

A former municipal court clerk's allegations of "ticket fixing" failed to sufficiently explain how Article 32.02 of the Code of Criminal Procedure (Dismissal by State's Attorney) applied to her "whistle blower" allegation.

City of S. Houston v. Rodriguez, 425 S.W.3d 629 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)

V. Local Government

A. Code Enforcement

Subsections 361.0961(a)(1) and (3) of the Health and Safety Code prohibit city ordinances banning or restricting single-use plastic bags if adopted for solid waste management purposes and ordinances assessing fees on replacement bags regardless of purpose.

Tex. Atty. Gen. Op. GA-1078 (8/29/14)

Two questions arise in construing Subsection 361.0961(a)(1). First, is a single-use plastic bag a "container" under the statute? A single-use plastic bag is a container under the plain meaning of the statute and the available legislative history. Second, was an ordinance banning or restricting the use of such bags adopted for "solid waste management purposes" under the same statute? Whether a specific city's single-use plastic bag ordinance was adopted for solid waste management purposes is a fact question for the court to decide. Subsection (a)(3) does not limit its prohibition regarding an ordinance's purpose. Because a single-use plastic bag is a container, an ordinance may not assess a fee on replacement bags.

B. Dual Office Holding

Subject to a determination by the Commission on Judicial Conduct, a justice of the peace is not prohibited by statute or the common law from simultaneously serving as a court-appointed investigator.

Tex. Atty. Gen. Op. GA-1030 (12/3/13)

The request for opinion pointed to specific provisions in the Texas Constitution, Government Code, Occupations Code, the Code of Judicial Conduct, and the common law doctrine of incompatibility as possible prohibitions to a sitting justice of the peace also serving on a list of private investigators who could be appointed to felony cases when a defendant is indigent. Leaving the ethical determination to the Commission, the opinion first found the constitutional provision inapplicable to justices of the peace and the doctrine of incompatibility inapplicable because an investigator is not an "officer." Section 27.001 of the Government Code, according to the opinion, outlines the duties and responsibilities of justices of the peace, but does not ban such persons from serving as investigator in all felony cases as there is no inherent conflict between the two positions. The Private Security Act in Chapter 1702 of the Occupations Code merely prohibits a justice of the peace who is licensed as a private investigator from suggesting any connection to state or county government while acting as an investigator.

VI. Juvenile Justice

Amendments to Article 44.2811 of the Code of Criminal Procedure by Senate Bills 393 and 394 and House Bill 528, enacted by the 83rd Texas Legislature, do not irreconcilably conflict because taken together they establish three separate, independent conditions for confidentiality of juvenile records in misdemeanor cases; whereas, even though under the amendments by the same bills to Article 45.0217 and Section 58.00711 of the Family Code some records will be required to be withheld under the House Bill, but not the Senate Bills, those bills do not irreconcilable conflict because such withholding does not violate the Senate Bills.

Tex. Atty. Gen. Op. GA-1035 (1/2/14)

This opinion also states that H.B. 528 does not make live courtroom proceedings confidential and a docket is subject to the confidentiality statutes to the extent that it is a "record" or a "file" under Articles 44.2811 and 45.0217 of the Code of Criminal Procedure. A court will look to the common meanings and context to make that determination.

Commentary: This opinion was highly anticipated. Please refer to Ryan Turner's article in *The Recorder* (January 2014), "Making Sense of GA-1035: Attorney General Opines Conflicts Between Recent Juvenile Confidentiality Amendments Are Not Irreconcilable," for a full discussion. The conflicts between S.B. 393/394 and H.B. 528 are detailed in the August 2013 issue of *The Recorder*.