Case Law and Attorney General Opinion Update
TMCEC Academic Year 2013

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The following decisions and opinions were issued between the dates of October 1, 2011 and October 1, 2012.

I. Constitutional Issues

A. 1st Amendment

The Texas Open Meeting Act does not violate the 1st Amendment rights of governmental officials.

Asgeirsson v. Abbott, 2012 U.S. App. LEXIS 20068 (5th Cir. September 25, 2012)

City officials from Alpine, Arlington, Wichita Falls, Bellmead, Heath, Hurst, Joshua, Leon Valley, Pflugerville, Rockport, Sugar Land, and Whitesboro sued seeking a declaration that Section 551.144 of the Government Code, part of the Texas Open Meetings Act (TOMA), (1) violates the 1st Amendment because it is a content-based restriction on political speech, (2) is unconstitutionally vague, and (3) is overbroad. The trial court concluded that Section 551.144 is constitutional. The city officials appealed.

The officials claimed that Section 551.144 is content-based because it applies only to speech regarding public policy over which the governmental body has supervision or control, but the 5th Circuit Court of Appeals found that TOMA is a content-neutral time, place, or manner restriction. In affirming the judgment of the trial court, the court of appeals rejected the officials' proposed test that eliminated consideration of the government's motivating purpose.

Section 551.144 does not apply to government officials because of any hostility to their views. Rather, the prohibited private speech by government officials lessens government transparency, facilitates corruption, and reduces confidence in government. Allowing the public access to government decision-making fosters transparency. TOMA burdens the ability to speak by requiring disclosure, but it does not aim to suppress underlying ideas or messages. If Section 551.144 were not a content-neutral time, place, or manner restriction, it would be subject to exacting scrutiny, but because it is content-neutral, intermediate scrutiny is the appropriate standard of review. TOMA is neither overbroad nor unconstitutionally vague.

B. 4th Amendment

1. Strip Searches

Strip searches, as part of regular jail intake procedures, do not violate the 4th or 14th Amendment even when an individual is arrested for a non-indictable offense.

Florence v. Board of Chosen Freeholders of the County of Burlington, et al., 132 S. Ct. 1510 (2012)

Florence was arrested during a traffic stop by a New Jersey state trooper who checked a statewide computer database and found a bench warrant issued for Florence's arrest after he failed to appear at a hearing to enforce a fine. Florence was initially detained in the Burlington County Detention Center and later detained in the Essex County Correctional Facility, but was released once it was determined the fine had been paid.

At the first jail, Florence, like every incoming detainee, had to shower with a delousing agent and was checked for scars, marks, gang tattoos, and contraband as he disrobed. Florence claims that he also had to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. At the second jail, Florence, like other arriving detainees, had to remove his clothing while an officer looked for body markings, wounds, and contraband, had an officer look at his ears, nose, mouth, hair, scalp, fingers, hands, armpits, and other body openings, had a mandatory shower, and had his clothes examined. Florence claims that he was also required to lift his genitals, turn around, and cough while squatting. He sued in district court alleging 4th and 14th Amendment violations, arguing that persons arrested for minor offenses cannot be subjected to invasive searches unless prison officials have reason to suspect concealment of weapons, drugs, or other contraband. The trial court granted him summary judgment, ruling that "strip-searching" non-indictable offenders without reasonable suspicion violates the 4th Amendment. The court of appeals reversed.

The U.S. Supreme Court disagreed with the trial court's ruling. Writing for the majority, Justice Kennedy explained that correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities. Persons arrested for minor offenses may be among the detainees processed at these facilities. Correctional officials have a significant interest in conducting a thorough search as a standard part of the intake process. Persons arrested for minor offenses may be dangerous criminals and may try to smuggle prohibited items into jail. Classifiying of inmates by their current and prior offenses before an intake search can be difficult. In the same vein as the Court's opinion in *Atwater v. City of Lago Vista,* 532 U.S. 318 (2001) (holding that arresting a person for a fine-only offense does not by itself violate the 4th Amendment), the administration of local jails and the safety of jail administrators necessitates strip searches.

Chief Justice Roberts concurred, noting the possibility of an exception to the Court's holding. Florence was arrested on a warrant rather than for committing a traffic offense. Justice Alito also similarly concurred to emphasize the limits of the Court's holding. The Court held that jail administrators may require all arrestees who are committed to the general population of a jail to undergo a visual strip search not involving physical contact by corrections officers. However, it is not always reasonable to conduct a full strip search of an arrestee, and the Court does not address whether it is reasonable in this case.

Justice Breyer dissented, along with Justices Ginsberg, Sotomayor, and Kagan. The dissenters opined that such a search should only be allowed where the corrections officers have a reasonable basis for thinking a particular arrestee may present a danger to other detainees or members of the jail staff.

2. Technology

Attaching a GPS tracking device to a suspect's vehicle by means of trespass requires a warrant.

United States v. Jones, 132 S. Ct. 945 (2012)

In 2004, the FBI and local law enforcement began investigating Jones, a local night club owner, for cocaine trafficking. Agents obtained a warrant to place a GPS device on Jones' jeep, but installed the device one day after the warrant expired. A federal trial court in Florida ruled that Jones' 4th Amendment protection against unreasonable search and seizure was not violated, but the court of appeals overturned Jones' conviction. The Government appealed to the U.S. Supreme Court for a determination of whether interference with either a reasonable expectation of privacy or a property interest protected by the 4th Amendment for the purpose of gathering information constitutes a search under the 4th Amendment.

Justice Scalia, writing for a four-judge plurality/five-judge majority, opined that the installation of the GPS tracking device underneath a suspect's car amounted to a search because the FBI had committed a trespass. The Framers of the Constitution were focused on private property rights and intrusion by the Government. While the Court had recently transitioned from an exclusively property-based approach to a privacy-based inquiry in determining whether a search occurred, such cases supplemented rather than replaced the common law trespassory test. The test, set out by Justice Scalia to determine whether a search exists for purposes of the 4th Amendment, looks at whether there is either an invasion of a reasonable expectation of privacy or an invasion of a constitutionally significant property interest (person, house, paper, or effect) for the purpose of gathering information. In this case, the FBI had committed the common law tort of trespass to chattels so the conduct constituted a search under the 4th Amendment. Under different facts, different precedent could apply. However, in this instance, even with technology playing a prominent role, the common law trespassory test sufficed.

Justice Sotomayor concurred. She joined Scalia's opinion to make the interference with a constitutionally significant property interest a search under the 4th Amendment. However, she also noted that this approach may be inapplicable when a physical intrusion is not necessary to conduct surveillance. In such cases, the privacy-interest analysis would become the dominating test, and she would hold, along with a four-judge contingent led by Justice Alito, that long-term GPS monitoring may interfere with a person's expectation of privacy. She observed that in the digital age, the Court may need to reconsider whether an individual has no expectation of privacy in information voluntarily disclosed to third parties.

Justice Alito, joined by Justices Ginsberg, Kagan, and Breyer, wrote the other concurring opinion rejecting Justice Scalia's adoption of an additional property-interest inquiry. The concurrence would have instead analyzed whether the long-term monitoring of the movements of the vehicle interfered with Jones' reasonable expectation of privacy. Justice Alito noted that the common law trespassory rule had been condemned and abandoned. By focusing on the installation of the device in its discussion of trespass, the plurality opinion overlooked the real issue: the long-term monitoring of the vehicle. Justice Alito opined that while short-term monitoring did not constitute a violation, the long-term monitoring in this case violated a reasonable expectation of privacy.

Commentary: So, take note law enforcement. A search warrant is required when tracking a suspect by GPS after attaching a GPS device to the suspect's vehicle, even though the suspect's movements are public and viewed by eye. This decision not only alters the Court's expectation of privacy analysis, but is likely to have an influence on other electronic law enforcement data collection techniques. Other than putting daylight between this opinion and older "beeper" decisions, this case leaves for another day whether a warrant would be required to place the GPS on the car monitoring the car's travels with it for a long period of time. This opinion is essentially only about standing, i.e., whether there was a search that implicated the 4th Amendment. In Texas, the interference with either privacy or property interests establishes standing for Article 38.23 of the Code of Criminal Procedure, the Texas exclusionary rule. *Wilson v. State*, 311 S.W.3d 452 (Tex. Crim. App. 2010)

An officer's warrantless search of defendant's phone was not lawful where defendant was a pre-trial detainee whose stay in jail for a Class C misdemeanor would be of short duration, the search was potentially invasive, there was no nexus between the cell phone and the crime for which defendant was jailed, and there was no evidence suggesting that the phone and its contents posed any risk to the jail's penalogical interests.

State v. Granville, 373 S.W.3d 218 (Tex. App.—Amarillo 2012, pet. granted)

A cell phone belonging to Granville was taken from him after being arrested and jailed for causing a disturbance at his school. While the phone was within official custody, an officer, having nothing to do with the arrest or any investigation into the disturbance, 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 of the 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 cell phone, but went on to assess the effect of defendant's incarceration upon this expectation. The appellate court rejected the prosecutor's argument that no expectation of privacy in a jail setting has been recognized. The Court of Criminal Appeals has held otherwise, finding that arrestees still retain some level of a privacy interest in personal effects or belongings taken from them after arrest. Significant to the court's decision was the fact that Granville was a pre-trial detainee for a Class C misdemeanor (an offense not punishable by incarceration) who was likely to be released quickly. Accordingly, Granville was entitled to greater constitutional protection than a convicted individual.

Comparing this case to *Oles v. State*, 993 S.W.2d 103 (Tex. Crim. App. 1999), where the Court of Criminal Appeals found no reasonable expectation of privacy in pants taken from defendant when jailed, the court noted a major difference between surfaces and spaces within clothing and data hidden within electrical components contained in a phone. Ultimately, the court concluded that nothing in these circumstances nullifies defendant's reasonable expectation of privacy in the phone searched, or allowed the officer to act without a warrant. This was not a search incident to arrest, one undertaken due to exigent circumstances, or one involving property found in a jail cell, but instead was one conducted incident to jailing for evidence of a crime distinct from that underlying the owner's arrest.

Commentary: While it is unclear if Granville was arrested for disorderly conduct or disruption of class, Justice Brian Quinn of the Amarillo Court of Appeals writes an otherwise memorable opinion. He utilizes references to Star Trek in explaining how the cell phone morphed into the smart phone. The alleged victim in this case was autistic. In rejecting the State's contention that probable cause existed because the victim, being autistic, lacked the capacity to consent to having his photograph taken, the court cautions others from asserting such baseless conclusions (after identifying a few famous individuals with autism spectrum disorder). The Court of Criminal Appeals granted petition for discretionary review on October 10, 2012.

3. Arrest Warrants

The four-corners rule only applies to the affidavit supporting a warrant, not the face of the arrest warrant listing the authority for a justice of the peace to issue the warrant.

Black v. State, 362 S.W.3d 626 (Tex. Crim. App. 2012)

Black filed a pre-trial motion to suppress the methamphetamine seized from his person, contending that the original stop that led to his arrest was conducted without a valid warrant. The day after the jury was selected, but before the trial itself had begun, the trial court conducted a pre-trial hearing on the motion. At the hearing, the State elicited testimony from the undercover peace officer who conducted surveillance at Black's home. After Black drove away from his home, the undercover officer confirmed that there were active warrants for Black's arrest and requested that a uniformed officer in a marked police car stop and arrest Black. After the traffic stop, it was discovered that Black did not have a driver's license. Black was arrested on the basis of the outstanding warrants and for driving without a license. During a search incident to arrest, a metal cigarette tin was discovered in the pocket of Black's shorts containing several baggies of methamphetamine.

At the conclusion of the suppression hearing, defense counsel argued that the arrest warrants proffered by the prosecution in justification of Black's stop were invalid because the supporting documentation had not been executed until after the issuance of the warrants themselves. Both warrants were signed by Pat Jacobs, a Johnson County Justice of the Peace. One warrant authorized Black's arrest for the offense of driving with expired license plates. Although this warrant was signed on April 19, 2007, the police officer's affidavit in support of the warrant was not executed until May 1, 2007. The other warrant authorized Black's arrest for Failure to Appear (FTA). This warrant was also signed by Judge Jacobs on April 19, 2007. The complaint in support of the FTA warrant was sworn out by a court clerk and was "filed" on April 19, 2007. However, the jurat, also signed by Judge Jacobs, was dated April 20, 2007. Defense counsel argued that, because the sworn documentation for both warrants post-dated the warrants, the warrants could not legally support the initial stop that led to his arrest. At the conclusion of argument, the trial court announced that it would deny Black's motion to suppress.

On the second day of trial, the State, over the objection of defense counsel, was allowed to "reopen" and supplement the motion to suppress record. Outside the jury's presence, the trial court permitted the State to elicit testimony from Judge Jacobs, the justice of the peace who signed the FTA warrant. Judge Jacobs testified that she was present on the date Black failed to appear, that the offense of FTA occurred in her view, and that she issued the FTA warrant on the basis of this personal knowledge. At every stage, the appellant objected to this supplementation of the motion-to-suppress record. The trial court never expressly ruled on those objections. In the findings of fact and conclusions of law that the State subsequently prepared, the trial court concluded that, because the FTA occurred in Judge Jacobs' presence, the warrant that she issued

for the appellant's arrest was expressly authorized under Article 45.103 of the Code of Criminal Procedure.

Affirming the court of appeals, the Court of Criminal Appeals, in an opinion by Judge Price, joined by seven members of the Court, opined that a trial court can, but is not required to, resolve a motion to suppress in a pre-trial hearing pursuant to Article 28.01 of the Code of Criminal Procedure. Furthermore, Article 36.02 of the Code of Criminal Procedure restricts a trial court's discretion to reopen a hearing on a suppression motion only to the extent that it prohibited further evidence of any kind, once the parties concluded their arguments of the trial itself. Accordingly, in this case, the trial court had discretionary authority to reopen the hearing, even mid-trial, to allow the State to present additional evidence. Additionally, the court of appeals did not err in going beyond the face of a warrant and relying on Judge Jacobs' testimony at the reopened hearing as sufficient to establish probable cause to issue appellant's arrest warrant per Article 45.103 for FTA and did not err in denying a motion to suppress the fruit of that arrest.

Judge Meyers dissented because he did not agree that the law allows an appellate court to consider evidence outside the suppression hearing without the consent of both parties (which was lacking in this case). The dissent opined that to do so would allow the State to bolster inadequate warrants with information that should not factor into the probable cause determination of the warrant.

Commentary: According to data from the Office of Court Administration, municipal judges and justices of the peace (judges of local trial courts of limited jurisdiction) annually issue more misdemeanor and felony warrants than all other Texas courts combined. In addition to the warrant provisions in Chapter 15 of the Code of Criminal Procedure, there are some unique arrest provisions in Chapter 45 of the Code of Criminal Procedure (the chapter governing municipal and justice courts). This case provides insight into the interplay between Chapters 15 and 45. This case is significant for two reasons. First, under certain circumstances, the Court nods approval to judges reopening evidentiary hearings on motions to suppress and to entertaining the testimony of a local trial court judge to substantiate probable cause. Second, although Article 45.103 only applies to justices of the peace, the rationale relating to extrinsic sources of probable cause may apply to other provisions in Chapter 45. (Does anyone know why there is no provision similar to Article 45.103 applicable to municipal judges?) While the Court has stated that the source of probable cause for a capias pro fine (Article 45.045) stems from a judgment, *Jones v. State*, 119 S.W.3d 766 (Tex. Crim. App. 2003), it has not addressed probable cause determinations under Article 45.014 (Warrant of Arrest). Although the Court did utilize an extrinsic source determination of a Class C misdemeanor warrant issued by a municipal judge in *State v. Martin*, 833 S.W.2d 129 (Tex. Crim. App. 1992), the warrant in *Martin* was issued pursuant to Article 15.04 (Article 45.014 was not enacted until 1999).

Recently, Mark Goodner detailed the four-corners rule and the scope of its application in Texas law. (See, Rounding the Corners: Criminal Application of the Four-Corners Rule, *The Recorder* (June 2012) at 16.) Goodner explains that the application of the rule in the context of search

warrants is clearer than it is in arrest warrants. This case delineates circumstances where an arrest warrant affidavit is presented to a magistrate from circumstances where a justice of the peace is statutorily authorized to issue an arrest warrant without an arrest warrant affidavit.

The 4th Amendment does not require that a magistrate personally administer an oath to an officer before the officer swears to the facts in his complaint and no Texas case definitively answers whether Article 15.03(a)(2) of the Code of Criminal Procedure imposes such a requirement. Evidence obtained pursuant to an arrest warrant based on an improperly sworn complaint may, nonetheless, be admissible under the good faith exception.

Flores v. State, 367 S.W.3d 697 (Tex. App.—Houston [14th Dist.] 2012)

Assuming without deciding that Article 15.03(a)(2) of the Code of Criminal Procedure requires a magistrate to personally administer the oath before the affiant swears to the facts asserted in his complaint, the trial court could have nonetheless determined that defendant's custodial statement was admissible under Article 38.23(b) of the Code of Criminal Procedure because the facts supported a finding that the officer acted in objective good-faith reliance on the warrant when he arrested defendant. The officer testified that he followed standard procedure in attesting to his complaint and obtaining the warrant and the warrant contained language indicating that the complaint was made under oath.

4. Search Warrants

A search warrant affidavit contained insufficient particularized facts about the defendant's alleged possession of cocaine where there was no substantial basis for crediting a first-time confidential informant's hearsay statement because officers failed to corroborate the tip except to confirm the defendant's address.

State v. Duarte, 2012 Tex. Crim. App. LEXIS 1180 (Tex. Crim. App. September 12, 2012)

The tip was not a statement against interest, was not consistent with information provided by other informants, was not coupled with an accurate prediction of the defendant's future behavior, and lacked a particular level of detail. The informant, who was facing criminal charges of his own, merely told the officer that he saw the defendant at his home on a particular date in possession of cocaine. The court declined to equate the reliability of a first-time, unnamed informant with that of a named citizen-informant.

County court-at-law judges in their capacity as magistrates do not have authority to issue blood search warrants for execution in another county.

Sanchez v. State, 365 S.W.3d 681 (Tex. Crim. App. 2012)

Article 1.23 of the Code of Criminal Procedure specifically lists the judicial positions that have statewide authority to issue writs and process throughout the State of Texas. It includes the judges of the Texas Court of Criminal Appeals, justices of the Texas Supreme Court, justices of the courts of appeals, and judges of the district courts. Statutory county court judges are omitted.

Commentary: The State had two primary arguments: (1) the execution of the search warrant was legal because it was issued within the same administrative judicial region, and (2) a blood warrant is more akin to an arrest warrant (which may be executed statewide). It is not surprising that the Court rejected these two arguments in light of past case law construing both the Texas Constitution and statutory law. What is surprising, however, is that some people reportedly construe this case to implicitly limit the authority of municipal judges to issue search warrants to the territorial limits of the municipality in which the judge has trial court jurisdiction.

This case affirms the judgment of the court of appeals, which relied, in part, on *Gilbert v. State*, 493 S.W.2d 783 (Tex. Crim. App. 1973). *Gilbert* addressed the authority of a municipal judge in Hedwig Village (which is located in Harris County) to issue a search warrant to be executed outside Hedwig Village, but still within Harris County. Although *Sanchez* does not cite *Gilbert*, the Court of Criminal Appeals says nothing in this opinion that is inconsistent with *Gilbert*. Municipal judges are not magistrates for their municipality. Rather, a municipal judge is a magistrate for any county in which his or her municipality is located. Ostensibly, this case can be asserted for the proposition that under Article 18.01 of the Code of Criminal Procedure, municipal judges do not have authority to issue a search warrant for execution in a county in which a portion of their city is not located.

A search warrant affidavit, though imprecise as to the time of the events, nevertheless sufficiently supports the issuance of a search warrant where it suggests a continuing criminal operation.

Jones v. State, 364 S.W.3d 854 (Tex. Crim. App. 2012)

The majority found that the affidavit permitted the magistrate to infer a definite outer limit for when the events giving rise to probable cause took place and that the “controlled buy” combined with the previous information from at least two informants that drugs were being sold from the address were sufficient to establish probable cause that a continuing drug business was being operated from the residence. The concurring opinion found the majority’s meticulous parsing of the language of the affidavit troubling and concluded that a police affiant who is unable to persuade a neutral and detached magistrate of probable cause in the wake of such imprecision should not hope to rely on the imagination of subsequent reviewing courts to bail him out. The dissent was concerned by the majority’s inference of a continuing criminal operation and believed the theory should not be inferred, but clearly stated within the four corners of the affidavit. The dissent further believes the affidavit here failed to provide a time frame to support a standard probable cause finding and did not demonstrate an ongoing criminal operation.

The magistrate had insufficient probable cause to issue a search warrant for blood draw where the search warrant affidavit failed to note the time of the stop.

Crider v. State, 352 S.W.3d 704 (Tex. Crim. App. 2011)

The court of appeals held that the search warrant affidavit established probable cause to believe that evidence of intoxication would be found in defendant's blood, even though the officer did not specify when during the prior day he had stopped defendant. The Court of Criminal Appeals disagreed. Judge Cochran, joined by six other members of the Court, opined that the affidavit was insufficient to show probable cause and that that the seizure violated the 4th Amendment. While there was probable cause to believe that defendant was intoxicated at the time he was driving, nothing in the four corners of the affidavit suggested how much time passed between the last moment of driving on the date of the stop and the moment the magistrate signed the search warrant at 1:00 a.m. the following morning. Blood alcohol content dissipates with the passage of time; thus, the longer the time period between the stop and the signing of the warrant, the less likely evidence of intoxication will be found in defendant's blood. While, based off of the information contained in the search warrant affidavit, it could have been a single hour, it also could have been as long as 25 hours.

Judge Womack, joined by Presiding Judge Keller, dissented. Judge Womack neither accepted the court of appeals' premise that there was an uninterrupted sequence of events nor that the magistrate could infer that the officers would not wait to submit an affidavit, nor did he support the Court's exclusive focus on blood alcohol content to the exclusion of controlled substances. Because the defendant had shown some signs of intoxication and had consumed at least some alcohol, there was still the fair probability that some evidence of intoxication could be found in the defendant's blood. He reiterated that this case did not require a decision as to whether there was probable cause under these circumstances, but rather whether the magistrate had a substantial basis for determining that probable cause existed.

Commentary: Just when you thought the three-year trend of blood warrant cases involving a peace officer's failure to state the time the suspect is believed to have operated a motor vehicle while intoxicated had reached a crescendo, along comes *Crider*. At first glance, readers may mistakenly assume that the Court is deviating from its unanimous opinion in *State v. Jordan, 342 S.W.3d 565 (Tex. Crim. App. 2011)* (holding a blood warrant is not presumptively invalid when the affidavit contains the date but not the time that led the officer to conclude the defendant had committed a DWI). As discussed in last year's commentary to *Jordan*, the Court resolved a conflict in opinions between two intermediate appellate courts stemming from differing methods of interpreting blood warrant affidavits. See, *The Recorder* (December 2011) at 11. Judge Cochran aptly describes *Crider* as the "bookend" case to *Jordan.* (Coincidentally, the search warrants in *Jordan* and *Crider* were both issued within 24 hours of each other in June 2008.)

Judge Cochran does a good job of explaining how the Court's opinion is wholly consistent with its ruling in *Jordan*. She does so by comparing the facts in the affidavits. In *Jordan*, the affidavit

did not list the time of the stop, but did list that it occurred on June 6th. This, combined with the fact that the magistrate (an Austin municipal judge) signed the warrant at 3:54 a.m. on June 6th, made it reasonable for the magistrate to infer that there would still be alcohol in the defendant's blood. Judge Cochran explained that the same inference cannot be deduced from the *Crider* affidavit because the crime was alleged to have occurred on June 6th and the search warrant was signed by a Collin County Magistrate on June 7th. An entire day could have passed between the time of the offense and the time the peace officer obtained a search warrant for blood.

It is important to appreciate that at the time of Crider's trial, there was no precedent in Texas governing staleness in blood searches (a fact noted by the trial judge). Presumably, contemporary law enforcement instruction pertaining to blood warrants emphasizes a key point reduced to a footnote in *Jordan*: the better practice is for affiants to specify the times of critical events described so that magistrates have more precise information with which to determine probable cause. By the same token, absent other information that allows the time of critical events to be reasonably inferred, Texas magistrates should expect affiants to specify the times of critical events when determining the existence of probable cause.

Making an oath over the telephone does not invalidate a search warrant because neither the 4th Amendment nor Article 18.01(b) of the Code of Criminal Procedure requires a face-to-face meeting between an officer and a judge.

Clay v. State, 2012 Tex. App. LEXIS 2298 (Tex. App.—Waco March 21, 2012)

The court found that the personal familiarity of the officer and the judge with each other's voice provided strong indicia of truthfulness, trustworthiness, and reliability so as to call upon the officer's sense of moral duty to tell the truth.

Commentary: While the 4th Amendment does not require a face-to-face confrontation between the magistrate and the affiant, and Article 18.01 requires an oath, but not a signature, whether it is the act of swearing that is essential to the validity of the affidavit, as the court holds, remains to be seen.

Is this case at odds with *Hughes v. State*, 334 S.W.3d 379 (Tex. App.—Amarillo 2011) and *Aylor v. State*, 2011 Tex. App. LEXIS 3274 (Tex. App.—Tyler Apr. 29, 2011), discussed last year? Yes. (See, *The Recorder* (December 2011) at 10). The Texas Court of Criminal Appeals granted the defendant's petition for discretionary review on June 27, 2012. Stay tuned!

A search warrant affidavit articulating probable cause for a search of a particular address does not justify execution of a search warrant on a neighboring residence.

Bonds v. State, 355 S.W.3d 902 (Tex. App.—Fort Worth 2011)

The trial court erred by denying Bonds' motion to suppress. The affidavit failed to establish a nexus between the things to be seized and the place actually searched. The affidavit did not state that the officer observed the informant enter the residence actually searched, failed to indicate where the controlled buy between the defendant and the confidential informant occurred, and didn't include any facts establishing probable cause to search any residence other than the residence next door to the residence actually searched (i.e., 401 Baker Street is not 422 Cowan).

Commentary: Petition for discretionary review was granted by the Texas Court of Criminal Appeals on March 28, 2012.

Failure to provide a copy of the affidavit with the search warrant did not render the search invalid under either the 4th Amendment or Article I, Section 9 of the Texas Constitution given that: (1) the affidavit was signed by a magistrate and a peace officer, the return was signed by the peace officer, and both were filed with the clerk; (2) the return stated that officers seized drugs and drug paraphernalia; (3) it was undisputed that the affidavit and warrant were presented together to the magistrate; (4) nothing showed that officers ran afoul of the particularity requirement by failing to present the affidavit when the search was conducted; and (5) the omission caused no prejudice at trial.

Greene v. State, 358 S.W.3d 752 (Tex. App.—Fort Worth 2011)

While, generally, only a judge of a municipal court of record or a county court who is an attorney licensed by the State of Texas may issue warrants under Article 18.02(10) of the Code of Criminal Procedure, an exception exists for a county that does not have a judge of a municipal court of record who is an attorney licensed by the state, a county court judge who is an attorney licensed by the state, or a statutory county court judge, and any magistrate may then issue a search warrant under Article 18.02(10) or (12).

Proctor v. State, 356 S.W.3d 681 (Tex. App.—Eastland 2011)

Defendant merely mentioned in his brief that the issuing magistrate was not a licensed attorney, but did not offer any evidence in support of the motion to suppress. When no objection is made, a presumption exists that the judge acted properly in the regular discharge of his duties. Defendant did not overcome this presumption.

Commentary: Proctor was convicted of aggravated sexual assault of a child. The search warrant and affidavit for mere evidence was sufficiently particular because, in addition to identifying semen and sexual toys as the subjects of the search, the warrant stated that the assault took place

in Proctor's bedroom, stated that a vibrating sex toy and pornographic movie were retrieved by Proctor from his drawer, and stated where on the bedroom floor Proctor's semen landed.

5. Exclusionary Rule

The discovery of an outstanding arrest warrant in between an illegal traffic stop for a tail light violation and the seizure of contraband served as an intervening event sufficient to attenuate the taint of the initial stop.

State v. Mazuca, 2012 Tex. Crim. App. LEXIS 697 (Tex. Crim. App. May 23, 2012)

The Court looked at a line of Texas cases and other jurisdictions' assessment of the three attenuation factors from *Brown v. Illinois*, 422 U.S. 590 (1975). The behavior of the arresting officers, although unlawful at the outset, was not so purposeful and flagrant that it outweighed the discovery of the defendant's outstanding arrest warrants prior to discovery of the contraband.

Judge Meyers dissented, opining that the practical effect of the opinion is to encourage law enforcement to illegally stop motorists with the expectation that an arrest warrant will subsequently be discovered to offset the illegal stop. Judge Johnson dissented, opining that the contraband was fruit of the poisonous tree. Presiding Judge Keller and Judge Keasler dissented without written opinion.

6. Consent to Search

Officers violated the 4th Amendment where they obtained oral consent to enter the premises to look for a specific individual, finished looking for the specific individual achieving the ostensible purpose of their entry, then initiated a dog sniff around a van parked in a protected, non-public area of the business premises after defendant refused a further search of his van.

State v. Weaver, 349 S.W.3d 521 (Tex. Crim. App. 2011)

While the majority found that officers had worn out their welcome and lingered beyond the scope of defendant's consent before the initiation of the dog sniff, the dissent believes defendant's 4th Amendment rights were not violated because the dog sniff was not a "search." According to the dissent, nothing in the record suggests that the area was inaccessible to the public, and there is no reason to believe that a person on the street could not have walked up to the so-called loading dock. Therefore, the dissent states, if the record does not reveal whether the parking area was private or public, and that issue is necessary to the proper disposition of the case, then rather than make an "implicit" finding, the court must, under *State v. Elias*, 339 S.W.3d 667 (Tex. Crim. App. 2011), remand the case to the trial court for a fact-finding on the matter. Additionally, defendant had already consented to the officers' presence at the business and never withdrew that consent.

7. Exceptions to the Warrant Requirement

Officers did not violate a family's 4th Amendment rights by entering the home where (1) officers learned at the school that the son was a victim of bullying, was absent from school for two days, and had threatened to "shoot up" the school; (2) where parents behaved unusually in not answering the door or the telephone; and (3) where after answering the door, the mother did not express concern over the investigation of her son and upon being asked if there were guns in the house, she immediately turned around and ran into the house.

Ryburn v. Huff, 132 S. Ct. 987 (2012)

In a per curiam opinion, the Supreme Court found the 9th Circuit's conclusion that the officers really had no reason to fear for their safety or that of anyone else flawed for numerous reasons. First, its determination rested on an account of the facts that differed markedly from the district court's findings. Second, it appears to have taken the view that conduct cannot be regarded as a matter of concern so long as it is lawful. Third, it looked at each separate event in isolation and concluded that each, in itself, did not give cause for concern. Fourth, it did not heed the district court's wise admonition that judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation. Reasonable police officers in the same position could have come to the conclusion that the 4th Amendment permitted them to enter the residence if there was an objectively reasonable basis for fearing that violence was imminent. Here, a reasonable officer could have come to such a conclusion based on the facts as found by the district court.

An officer exercised his community caretaking function where he observed the defendant pull off the highway at 1:00 a.m. in a light traffic area and could have reasonably concluded that the defendant was in need of help due to car trouble, a flat tire, or running out of gas, which is a distress no less significant to the function of an officer as a public servant.

Gonzales v. State, 369 S.W.3d 851 (Tex. Crim. App. 2012)

In evaluating reasonableness in this context, courts have never required an officer to know, with any degree of certainty, the specific distress an individual may be suffering. Instead, the proper analysis under *Wright v. State*, 7 S.W.3d 148, 151 (Tex. Crim. App. 1999) is an objective one, focusing on what the officer observed and whether the inference that the individual was in need of help was reasonable.

C. 5th and 6th Amendment

1. Double Jeopardy

The Double Jeopardy Clause of the 5th Amendment, incorporated by the 14th Amendment, does not bar retrying defendant on two different charges where the foreperson told the court how the jury had voted on each offense, but the jury's deliberations had not yet concluded, and thus lacked the finality necessary to amount to an acquittal on those offenses.

Blueford v. Arkansas, 132 S. Ct. 2044 (2012)

After deliberating for a few hours, the jury reported that it could not reach a verdict. The court inquired about the jury's progress on each offense. The foreperson disclosed that the jury was unanimous against guilt on the charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide. The court told the jury to continue to deliberate. The jury did so, but still could not reach a verdict, and the court declared a mistrial. Chief Justice Roberts delivered the opinion of the Supreme Court, which held (6-3) that the Double Jeopardy Clause does not bar retrying defendant on charges of capital murder and first-degree murder because the jury did not acquit him of capital or first-degree murder. The foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses.

Additionally, before declaring a mistrial because of a hung jury, the court was not required, upon hearing the foreperson's report, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict. As permitted under Arkansas law, the jury's options in this case were limited to two: either convict on one of the offenses or acquit on all. The trial court did not abuse its discretion by refusing to add another option—that of acquitting on some offenses but not others.

Justices Sotomayor, Ginsburg, and Kagan found that the foreperson's announcement in open court that the jury was "unanimous against" convicting defendant of those crimes constituted an acquittal in substance for double jeopardy purposes and would hold that the Double Jeopardy Clause requires a trial judge, in an acquittal-first jurisdiction, to honor a defendant's request for a partial verdict before declaring a mistrial on the ground of jury deadlock.

2. *Miranda* Warnings, Assistance of Counsel

When a prisoner is questioned, the determination of custody for *Miranda* purposes should focus on all of the features of the interrogation; imprisonment, questioning in private, and questioning about events in the outside world are not necessarily enough to create a custodial situation for *Miranda* purposes.

Howes v. Fields, 132 S. Ct. 1181 (2012)

Fields, imprisoned for disorderly conduct, was escorted from his prison cell by a corrections officer to a conference room where he was questioned for between five and seven hours by two sheriff's deputies about sex-related criminal activity he had allegedly engaged in before coming to prison. Fields was not given *Miranda* warnings, but was told more than once that he was free to leave and return to his cell. Fields confessed and was convicted.

The 6th Circuit held that the interview was a custodial interrogation within the meaning of *Miranda*, reasoning that *Mathis* v. *United States*, 391 U.S. 1 (1968), clearly established that isolation from the general prison population, combined with questioning about conduct occurring outside the prison, makes any such interrogation custodial per se. In an opinion delivered by Justice Alito, the Supreme Court reversed (6-3), finding that no precedent clearly establishes such a categorical rule. Instead, the initial step in determining whether a person is in *Miranda* custody is to ascertain, given "all of the circumstances surrounding the interrogation," how a suspect would have gauged his freedom of movement. Contrary to the 6th Circuit holding, service of a prison term, without more, is not enough to constitute *Miranda* custody, questioning a prisoner in private does not generally remove him from a supportive atmosphere and may be in his best interest, and the location of the conduct about which questions are asked neither mitigates nor magnifies the coercive pressure that *Miranda* guards against. The record in this case reveals that respondent was not taken into custody for *Miranda* purposes. Most important, he was told at the outset of the interrogation, and reminded thereafter, that he was free to leave and could go back to his cell whenever he wanted.

Justices Ginsburg, Breyer, and Sotomayor concurred in the finding of no categorical rule, but disagreed with the determination that Fields was not in custody under *Miranda* because he was brought to, and left alone with, gun-bearing deputies against his will and questioned long into the night and early morning. According to the dissent, a statement made to a prisoner that he is free to terminate the interrogation and return to his cell is no substitute for one ensuring that an individual is aware of his rights.

***Miranda* did not apply where the circumstances surrounding defendant's interrogation demonstrated that his statements were voluntary, and there was simply "no nexus" between the inmate's unwarned admission to forgery and his later, warned confession to murder.**

Bobby v. Dixon, 132 S. Ct. 26 (2011)

Defendant and an accomplice murdered a victim in order to steal his car. At a chance encounter at the police station, a detective issued *Miranda* warnings to defendant and then asked to talk to him about the murder, to which defendant declined to answer without his lawyer. Police subsequently arrested defendant for forgery in connection with the murder, but decided not to provide him with *Miranda* warnings before obtaining a confession to the forgery. Later, the accomplice led police to the murder victim's body, claiming that defendant told him where it was. Defendant, upon hearing this, went to the police station to inquire whether a body was found and whether the accomplice was in custody. He told police he had talked to his lawyer and wanted to tell them what happened. Police read defendant his *Miranda* rights and defendant confessed to the murder, but attempted to shift most of the blame on the accomplice.

According to the 6th Circuit, the *Miranda* decision itself clearly established that police could not speak to defendant days after he had refused to speak to them earlier without his lawyer. The United States Supreme Court, in a per curiam opinion, said that was plainly wrong. It was undisputed that defendant was not in custody during his chance encounter with police; therefore, *Miranda* did not apply. The Court has never held that a person can invoke his *Miranda* rights anticipatorily in a context other than custodial interrogation. The circumstances surrounding defendant's interrogation demonstrated that his statements were voluntary, and there was simply "no nexus" between defendant's unwarned admission to forgery and his later, warned confession to murder. Additionally, the 6th Circuit had no authority to issue a writ on the ground that police violated the 5th Amendment by urging defendant to "cut a deal" before his accomplice did so. No holding of the Court suggests, much less clearly establishes, that police may not urge a suspect to confess before another suspect does so.

Defendant voluntarily waived both his 5th and 6th Amendment rights to counsel during custodial interrogation after asking the magistrate for an appointed attorney.

Pecina v. State, 361 S.W.3d 68 (Tex. Crim. App. 2012)

Pecina confessed to Arlington police officers that he killed his wife. The confession was made in a hospital shortly after he was magistrated by Rosalia Maddock, a judge of the Arlington Municipal Court. The trial court denied his motion to suppress the confession. The court of appeals, on remand from the Court of Criminal Appeals, held that Pecina's statements should have been suppressed because he invoked his 5th Amendment right to counsel while being magistrated. The State, for a second time, sought discretionary review, which the Court of Criminal Appeals granted.

In an opinion by Judge Cochran, joined by eight members of the Court, the judgment of the court of appeals was reversed and the trial court's judgment was affirmed. Pursuant to Article 15.17 of the Code of Criminal Procedure, Judge Maddock gave Pecina his warnings in Spanish, after which Pecina said he wanted a lawyer, but also wanted to speak to the police. Judge Maddock later testified that she believed Pecina's decision to speak with the detectives was free and voluntary and there was absolutely no coercion. Afterwards, officers entered and gave Pecina his Miranda warnings in Spanish three separate times. At no time did he invoke his right to an attorney. The Court opined that an objective officer would have found that Pecina voluntarily waived both his 5th and 6th Amendment rights to counsel for purposes of custodial questioning. Because Pecina never invoked his 5th or 6th Amendment rights to counsel during custodial interrogation, the trial court properly denied his motion to suppress his statements made as a result of the police questioning.

In a concurring opinion, Judge Alcala, joined by Judge Johnson, opined that although there was no federal constitutional violation under U.S. Supreme Court precedent, the magistrate's failure to provide an attorney for interrogation after one was requested may violate Article 15.17 of the Code of Criminal Procedure because the magistrate advised appellant of his right to have an attorney for interrogation and he requested one, but none was provided. Such failure may be subject to a harm analysis. Such problems could be avoided if the Legislature amended the Article 15.17 admonishments to include: "If you desire to have an attorney present during police interrogation, you must make that request at the time of questioning."

Judge Price dissented on the ground that the request for court-appointed counsel from Judge Maddock was sufficient to invoke Pecina's 6th Amendment right to counsel and that the Court was wrong to unconditionally posit that magistration is categorically not an interrogation event. "Any reasonably objective viewer would conclude from the peculiar facts of this case that Judge Maddock was acting as a de facto agent of the interrogating detectives," according to the dissent.

Commentary: This is the fourth appellate opinion relating to this case since it began in January 2004. The Fort Worth Court of Appeals affirmed the murder conviction, finding that Pecina initiated contact with the police and waived both his 5th and 6th Amendment rights to counsel. The Court of Criminal Appeals reversed, holding that under *Michigan v. Jackson*, 475 U.S. 625 (1986), Pecina had invoked his 6th Amendment right to counsel when he was magistrated at the hospital. The case was sent back for a harm analysis, *Pecina v. State*, 268 S.W.3d 564 (Tex. Crim. App. 2008). (See, *The Recorder (*December 2009) at 5-6 for summary and commentary.) While the case was pending on remand to the court of appeals, the U.S. Supreme Court overruled *Jackson* in *Montejo v. Louisiana*, 556 U.S. 778 (2009). Nevertheless, the court of appeals held that despite the holding in *Montejo*, the confession should be suppressed because Pecina invoked his 5th Amendment right to counsel by asking for an appointed lawyer.

Two observations: First, in light of *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (presentation before the magistrate —aka "magistration"—marks the initiation of adversarial

judicial proceedings that trigger 6th Amendment protections), you would assume that neither the State nor the Court would refer to what happens at an Article 15.17 "magistration" hearing as an "arraignment." This is especially true since the Court has previously said that what a magistrate does pursuant to Article 15.17 of the Code of Criminal Procedure is not an "arraignment" because of the specific requirements of Chapter 26 of the Code of Criminal Procedure (See *Watson v. State*, 762 S.W.2d 591, 594 (Tex. Crim. App. 1988)). Second, Judge Maddock testified at the suppression hearing that she normally magistrated prisoners at the Arlington City Jail, but that she went to the hospital to magistrate Pecina, as she had done in some other cases, due to the policy of the sheriff's office that it will not transfer a defendant until he has been magistrated. Such transfer policies typically govern when cost and supervision responsibilities shift from a municipality to a county. Judge Price's dissent illustrates why municipal judges performing magistrate duties should give careful thought to the possible accusations and appearances that can result from accommodating such requests (particularly when made by law enforcement).

3. Right to Jury Trial

Any fact that increases a defendant's maximum potential sentence must be found by a jury beyond a reasonable doubt, a guarantee applicable to the imposition of criminal fines.

Southern Union Co. v. United States, 132 S. Ct. 2344 (2012)

In 2008, Southern Union was found guilty by a jury in federal court of knowingly storing mercury without a permit. The maximum fine for such an offense is $50,000 per day. Although the jury did not find the specific dates on which the violation occurred, the trial court imposed a $6 million fine. The court of appeals affirmed the trial court's ruling.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that the 6th Amendment's jury trial guarantee requires that any fact (other than the fact of a prior conviction), which increases the maximum punishment authorized for a particular crime, be proved to a jury beyond a reasonable doubt.

At sentencing, Southern Union objected because the jury had not been asked to determine the precise duration of the violation. Southern Union argued that *Apprendi* required the jury to make a determination beyond a reasonable doubt as to each day the hazardous material was stored because each day increased the maximum fine Southern Union would have to pay.

In a 6-3 decision, the U.S. Supreme Court agreed, ruling that under *Apprendi*, there is no basis for treating criminal fines differently than other punishments. Writing for the majority, Justice Sotomayor stated that some fines are less onerous than incarceration or the death penalty, but where a fine is so insubstantial that the underlying offense is considered "petty," the 6th Amendment right to a jury trial is not triggered and there is no *Apprendi* issue. But not all fines are insubstantial, and not all offenses punishable by fines are petty.

Justice Breyer, joined by Justices Kennedy and Alito, dissented, opining that where a criminal fine is at issue, the 6th Amendment permits a sentencing judge to determine sentencing facts. Such facts are not elements of a crime, but rather are only relevant to determining the amount of the fine the judge will impose. The Framers understood these kinds of facts to be ordinarily a matter for a judge and not a jury (See, *Oregon v. Ice*, 555 U.S. 160 (2009)).

Commentary: This case could have interesting implications in a state like Texas, where the state constitution guarantees criminal defendants, including those accused of fine-only misdemeanors, the right to a jury trial.

4. Public Trial

The defendant's right to a public trial was violated when court proceedings were conducted in the prison chapel.

Lilly v. State, 365 S.W.3d 321 (Tex. Crim. App. 2012)

Lilly, a prison inmate, was charged with assault. After being arraigned in the prison chapel, he moved that subsequent proceedings be conducted publicly at the county courthouse. His motion was denied. Lilly asserted on appeal that the trial court's rejection of his request to have his plea entered in open court violated the 6th Amendment, Article I, Section 10 of the Texas Constitution, and Article 1.24 of the Code of Criminal Procedure. The court of appeals rejected such arguments because there was no evidence that anyone was prevented from attending Lilly's trial or that anyone was dissuaded from attempting to attend the trial because of its location. The court of appeals also opined that conducting court proceedings in the prison chapel did violate the Establishment Clause of the 1st Amendment, but was harmless error because it did not contribute to the defendant's decision to plead guilty.

In an opinion by Judge Hervey, joined by six other members, the Court of Criminal Appeals reversed the court of appeals finding that the appellate court erred in finding that Lilly did not show that the prison chapel was not open to the public. The Court explains that although the right to a public trial is not absolute, and may be outweighed by other competing rights or interests (e.g., interests in security, preventing disclosure of non-public information, or ensuring that a defendant receives a fair trial), such cases will be rare, and the presumption of openness adopted by the U.S. Supreme Court in *Waller v. Georgia*, 467 U.S. 39, 45-48 (1984) must be overcome. To rebut the presumption of openness and to allow closure of an accused's trial, or any part thereof, (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.

Because the Court sustained Lilly's first ground for review and remanded this cause for a new trial, the Court did not address his second claim relating to the Establishment Clause. Presiding Judge Keller concurred, and Judge Meyers dissented without an opinion.

Commentary: Last year, after the *Lilly* decision by the 11th Court of Appeals, I commented that while it is unknown if any municipal court proceedings are being conducted in prison chapels, it has become a time-honored tradition for municipal and justice courts to conduct criminal proceedings from behind bars (See, *The Recorder* (December 2011) at 15). The commentary also referenced an article postulating whether the U.S. Supreme Court decision in *Rothgery v. Gillespie* did not lay a foundation for arguments against the time-honored practice (See, "Jail House Pleas: Is *Rothgery* a Tap on the Shoulder or a 'Fly in the Ointment' of Local Trial Court Expediency," *The Recorder (*August 2010)). The commentary concluded by forecasting that *Lilly* could provide insight to how an appellate court would analyze an appeal challenging a "jail house plea." The Court of Criminal Appeals opinion in *Lilly* provides insight.

There has been a collegial debate among municipal judges regarding whether legislation should be sought expressly authorizing municipal judges and justices of the peace to take pleas in jail for individuals arrested for Class C misdemeanors. Some judges believe that the better course of action is to take a "wait and see" approach. Opponents believe this approach is tantamount to "rolling the dice." Judges favoring legislation believe that it is better to be proactive than reactive. Opponents of this approach believe that legislation only draws more attention to the matter. One thing that appears to be unanimous is that judges, prosecutors, and defense attorneys all recognize the utility and efficiency of taking "jail house pleas" in Class C misdemeanor cases. The bad news is that the Court's opinion in *Lilly* could prove to be more of a "fly in the ointment" than *Rothgery*. The good news is that if legislation is sought, *Lilly* may provide meaningful insight into what exactly it takes to balance the interests of utility and efficiency with 6th Amendment concerns.

The trial court erred in excluding four members of defendant's family from the courtroom during jury selection in violation of his 6th Amendment right to a public trial.

Steadman v. State, 360 S.W.3d 499 (Tex. Crim. App. 2012)

While the trial court identified two interests in closing defendant's voir dire that could override a defendant's right to a public trial in the abstract—jury-panel contamination and courtroom security—it never articulated any substantive "threat" to either of these interests and failed to supply "findings specific enough that a reviewing court can determine" that closure of the courtroom during defendant's voir dire was warranted. Nor did it satisfy the obligation that both *Presley v. Georgia*, 558 U.S. 209 (2010) and *Waller v. Georgia*, 467 U.S. 39 (1984) unequivocally impose upon trial courts "to consider all reasonable alternatives to closure."

Commentary: While the 6th Amendment contains individual rights, it also includes the right of the public to witness *criminal proceedings*. The U.S. Supreme Court decisions in *Presley* and

Waller remind us that *criminal proceedings* consist of more than just *trial*. In *Presley*, jury selection was closed to the public. In *Waller*, a pre-trial hearing was closed to the public. Similarly, *Steadman* and *Lilly* collectively constitute a distinct reminder from the Court of Criminal Appeals. Judges are to refrain from making decisions that directly or indirectly impede public access to court proceedings. Unless a judge has taken extraordinary steps and sought out all possible alternatives, convening court under such circumstances appears ripe for challenge.

5. Batson Challenges

Statistics alone were insufficient to establish a prima facie case of discrimination given the small sample sizes involved.

Hassan v. State, 369 S.W.3d 872 (Tex. Crim. App. 2012)

In a unanimous opinion, the Court of Criminal Appeals reversed the court of appeals by concluding that three strikes distributed across 79 percent of the venire could not be considered a prima facie case of discrimination. The racial composition of the jury corresponded roughly to the racial composition of the venire. Defense counsel's proffer of other circumstances was deemed insubstantial. The Court found that there was no significance to the occupations of the struck venire members, and none appeared to be connected to law enforcement. The Court concluded that the court of appeals erred in finding that defendant had demonstrated a prima facie case. In absence of a prima facie case, the State was not required to advance race-neutral reasons for its strikes.

Commentary: This case began in the Houston Municipal Court. The judgment of the court was affirmed on appeal by Harris County Court at Law Number 14. The venire consisted of 14 people: five African-Americans, two Asian-Americans, three Caucasians, and four Hispanics. The prosecuting attorney exercised peremptory challenges against two African-Americans and one Asian-American. The resulting six-person jury consisted of two African-Americans, one Asian-American, two Hispanics, and one Caucasian. The defendant objected that the State's peremptory challenges were racially motivated because the Asian-American had a low opinion of defense attorneys and one of the African-Americans had a high opinion of police officers. The municipal judge denied defense counsel's request to call the prosecutor to testify regarding the reasons for the strikes. For additional commentary regarding this case and *Batson* challenges and hearings, see *The Recorder* (December 2011) at 16.

6. Ineffective Assistance of Counsel

The Missouri appellate court correctly concluded that defense counsel's failure to inform defendant of two formal plea bargains before they expired denied him effective assistance of counsel, but it failed to require defendant to show that the plea offer would have been adhered to by the prosecution and accepted by the trial court.

Missouri v. Frye, 132 S. Ct. 1399 (2012)

Defendant was charged with driving with a revoked license. Because he had been convicted of the same offense three times before, he was charged, under Missouri law, with a felony carrying a maximum four-year prison term. The prosecutor sent defendant's counsel a letter, offering two possible plea bargains, including an offer to reduce the charge to a misdemeanor and to recommend, with a guilty plea, a 90-day sentence. Counsel did not convey the offers to defendant, and they expired. Less than a week before defendant's preliminary hearing, he was again arrested for driving with a revoked license. He subsequently pleaded guilty with no underlying plea agreement and was sentenced to three years in prison. Seeking post-conviction relief in state court, he alleged his counsel's failure to inform him of the earlier plea offers denied him the effective assistance of counsel, and he testified that he would have pleaded guilty to the misdemeanor had he known of the offer. The Missouri appellate court found that defense counsel had been ineffective in not communicating the plea offers to defendant and concluded that defendant had shown that counsel's deficient performance caused him prejudice because he pleaded guilty to a felony instead of a misdemeanor.

In an opinion delivered by Justice Kennedy, the Supreme Court (5-4) reaffirmed that the 6th Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, and that the two-part test in *Strickland v. Washington*, 466 U.S. 668 (1984) governs ineffective assistance claims in the plea bargain context. As a general rule, defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused. Here, as a result of counsel's deficient performance, the offers lapsed. Under *Strickland*, the question then becomes what, if any, prejudice resulted from the breach of duty. To show such prejudice, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law. Applying these standards here, the Missouri court failed to require defendant to show that the plea offer would have been adhered to by the prosecution and accepted by the trial court.

Dissenting, Justice Scalia, joined by the Chief Justice, Justice Thomas, and Justice Alito, points out serious difficulties created by the "constitutionalizing" of the plea-bargaining process and finds the result inconsistent with the 6th Amendment and decades of precedent.

D. 14th Amendment

1. Recusal and Disqualification

The mere fact that the same judge who signed a search warrant also presided over the subsequent proceedings, including a motion to suppress, is not enough to show the deep-seated favoritism or antagonism that would give defense counsel cause to pursue a recusal motion.

Diaz v. State, 2012 Tex. App. LEXIS 7325 (Tex. App.—Fort Worth August 30, 2012)

Defendant failed to meet his burden of showing by a preponderance of the evidence that counsel's failure to file a recusal motion or to object that the same judge who had signed the blood warrant presided over the suppression hearing and the trial fell below the standard of prevailing professional norms where the trial judge made no comments, remarks, or other indications that would cause defense counsel to think he was biased or subject to recusal.

Although no statute prohibits an interlocal agreement between a school district and a county whereby attendance officers employed by the district would simultaneously serve as juvenile court coordinators in the justice of the peace courts, questions about the propriety of such an arrangement should be addressed by the State Commission on Judicial Conduct.

Tex. Atty. Gen. Op. GA-0912 (2/27/12)

Whether the relationship between the justice of the peace and the attendance officer, in which the attendance officer serves as a "coordinator" for the court, might implicate the Code of Judicial Conduct is a fact issue not addressed by Attorney General opinions.

2. Identification Procedures

The Due Process Clause does not require trial judges to conduct preliminary assessments of the reliability of eyewitness identifications that were made under suggestive circumstances when the circumstances were not created by law enforcement personnel.

Perry v. New Hampshire, 132 S. Ct. 716 (2012)

New Hampshire police received a call reporting that an African-American male was trying to break into cars parked in the lot of the caller's apartment building. When an officer responding to the call asked an eyewitness to describe the man, she pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to a police officer. Perry's arrest followed this identification. The U.S. Supreme Court affirmed (8-1) the state courts' rejection of Perry's argument that suggestive circumstances alone suffice to require court evaluation of the reliability of an eyewitness identification before the jury hears it.

Justice Ginsberg, delivering the opinion, stated that a primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances is to deter law enforcement use of improper procedures in the first place. This deterrence rationale is inapposite in cases like this one where there is no improper police conduct. The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen the evidence for reliability before allowing the jury to assess its creditworthiness. The Court's unwillingness to adopt such a rule rests, in large part, on its recognition that the jury, not the judge, traditionally determines the reliability of evidence. Given the safeguards generally applicable in criminal trials, the introduction of the eyewitness testimony in this case, without a preliminary judicial assessment of its reliability, did not render Perry's trial fundamentally unfair.

Sotomayor, in her dissent, believes the clear rule is that the admission at trial of out-of-court eyewitness identifications derived from impermissibly suggestive circumstances that pose a very substantial likelihood of misidentification violates due process, and disagrees that the rule does not even come into play unless the suggestive circumstances are improperly police-arranged.

II. Substantive Law

A. Culpable Mental States

Section 822.005(a)(1) of the Health and Safety Code is not facially void or void for vagueness because the statute contains objective criteria for determining what conduct is prohibited—a mens rea of criminal negligence and the actus reus of failing to secure a dog—and therefore does not permit arbitrary enforcement.

Watson v. State, 369 S.W.3d 865 (Tex. Crim. App. 2012)

Defendants argued that, by not defining the words "attack" and "unprovoked," the statute failed to provide adequate notice of what conduct was prohibited. The Court of Criminal Appeals found that failure to secure a dog was the conduct prohibited in the statute, and the key word in the statute—"secure"—was defined. Defendants engaged in the proscribed conduct of failing to secure their dogs.

Evidence that defendant made an unsafe lane change while using her cell phone that resulted in a three-car collision was sufficient to support criminally negligent homicide.

Montgomery v. State, 369 S.W.3d 188 (Tex. Crim. App. 2012)

In a unanimous opinion, written by Judge Johnson, the Court of Criminal Appeals held that the evidence was sufficient to support a conviction for Criminally Negligent Homicide (Section

19.05 of the Penal Code) in part because the defendant admitted that using a cell phone distracted her when she made an abrupt lane change and caused a collision.

The Court disagreed with the court of appeals' assertion that the prosecution failed to present legally sufficient evidence that the defendant's conduct and failure to perceive the risk of her conduct (using a cell phone while driving) amounted to a gross deviation from the ordinary standard of care justifying criminal sanctions. The State had no burden to show that driving while using a cell phone was always risky or dangerous. The State was required to and did establish that Montgomery should have been aware of the substantial risk created by her conduct. While the court of appeals focused on the use of the cell phone as the negligent conduct, neither the charging instrument nor jury charge referenced cell phone use. Rather, both documents referred to operation of a motor vehicle and making an unsafe lane change.

The Court dismissed the State's ground for review asserting the court of appeals erred in opining that cell phone use was not morally blameworthy to the degree of justifying criminal sanctions. Cell phone use while driving was not the issue in this case. Whether such behavior is worthy of criminal punishment is a matter for the Legislature. Similarly, the Court dismissed the contention that the court of appeals erred in presuming that negligent acts in a criminally negligent homicide must themselves be illegal. The court of appeals opinion contained no such presumption.

Commentary: On October 11, 2012, the court of appeals affirmed the trial court's judgment assessing Montgomery's punishment at 10 years' imprisonment, probated for 10 years, and a $10,000 fine.

B. Penal Code

Whether a defendant gives a "false" or "fictitious" name within the meaning of the failure-to-identify statute (Section 38.02(b) of the Penal Code) turns on the speaker's intent and the context in which the name is used.

Smith v. State, 363 S.W.3d 761 (Tex. App.—Austin 2012)

Defendant persisted in identifying herself as "Jay Smith" rather than her legal name, Janeen Smith, after being advised by someone she knew to be a peace officer that she was being detained and that she had outstanding warrants. After the peace officer inquired whether "Jay Smith" was the name on her driver's license, defendant answered that it was. The court found that although defendant was not charged with misstating the name on her driver's license, per se, her conduct is nonetheless probative of her intent to deceive the officer regarding her true name and identity.

Eight-liner machines that issue tickets redeemable for items that do not constitute non-cash merchandise prizes, toys, or novelties do not meet the standard for the illegal gambling device exception provided in Section 47.01(4)(B) of the Penal Code, and thus, are illegal.

Tex. Atty. Gen. Op. GA-0913 (2/27/12)

If an eight-liner machine is designed, made, or adapted as anything other than a pure amusement device, the machine cannot meet the requirement of Section 47.01(4)(B) of the Penal Code and is therefore illegal.

C. Transportation Code

An officer lacked reasonable suspicion that defendant was driving illegally on an improved shoulder where defendant used the improved shoulder to pass a slowed car, which was authorized by Section 545.058(a) of the Transportation Code; therefore, defendant's motion to suppress all evidence obtained from the traffic stop prior to his DWI trial should have been granted.

Lothrop v. State, 372 S.W.3d 187 (Tex. Crim. App. 2012)

Merely driving on an improved shoulder is not prima facie evidence of an offense. Thus, if an officer sees a driver driving on an improved shoulder, it appears that driving on the improved shoulder was necessary to achieving one of the seven approved purposes, and it is done safely, that officer does not have reasonable suspicion that an offense occurred. While there may be circumstances in which arguably legal behavior might produce reasonable suspicion of an offense, here, the Legislature explicitly made certain behavior legal. It would violate legislative intent to allow that behavior to serve as the basis of a traffic stop or arrest.

One judge concurred in the opinion solely because there was no testimony in the record to suggest defendant's driving was unsafe.

An officer did not have justification to stop the defendant for failing to signal a lane change where the defendant was forced to merge left after the lane he was in ended.

Mahaffey v. State, 364 S.W.3d 908 (Tex. Crim. App. 2012)

Mahaffey was traveling in the far right lane of SH 198, approaching the bridge dividing Gun Barrel City from Payne Springs. When his lane ended, he was forced to merge left. A police officer stopped Mahaffey for failing to use his turn signal per Section 545.104(a) of the Transportation Code. Mahaffey was subsequently arrested for DWI. The defense filed a motion to suppress, arguing that Mahaffey did not violate Section 545.104(a) because he did not change lanes. Hence, the stop was unjustified.

In an opinion by Judge Alcala, joined by four other members, the Court of Criminal Appeals opined that the highway on which Mahaffey was driving was comprised of clearly marked lanes for vehicular travel and, therefore, was a "laned roadway" per Section 541.302(7) of the Transportation Code. When the clearly marked lanes on that highway ended, so, too, did the corresponding lane. The Court rejected the State's contention that the termination of a lane did not affect whether a driver changed lanes under the signal statute per Section 545.104(a). Changing lanes requires the existence of more than one lane. Mahaffey did not change lanes. The two lanes merged into one. Per Section 545.104(a), a signal is required only to indicate an intention to turn, change lanes, or start from a parked position. No signal is required when the two lanes merged and became one. Thus, the officer failed to articulate specific facts that supported a reasonable suspicion of a violation of Section 545.104(a) and the trial court erred by failing to suppress the evidence obtained as a result of the stop.

Judge Meyers concurred that there were two ways to approach the issue. First, as a practical matter, there was no way to change lanes when one lane ended. The second was to approach the issue in a legal manner. Here, the sign "Lane Ends, Merge Left" provided direction to enter the left lane and did not require a signal because traffic directions do not require a signal.

Presiding Judge Keller, along with Judges Price and Keasler, dissented because the fact that the lane ended required Mahaffey to change lanes. And that required a signal.

Judge Womack dissented without opinion.

Commentary: This is the second time the Court has issued a decision in this case. Previously, the Court held (8-1) that merging into a lane from an ending lane does not require use of a turn signal. *Mahaffey v. State*, 316 S.W.3d 633 (Tex. Crim. App. 2010). See, *The Recorder* (December 2010) at 14. On remand, the court of appeals held that it was reasonable for the police officer to conclude that a traffic violation had been committed even though Mahaffey's vehicle did not cross any lane-dividing lines.

A peace officer had reasonable suspicion to believe that the roadway on which he believed defendant had committed a traffic violation was a parking lot, driveway, or private road.

Meadows v. State, 356 S.W.3d 33 (Tex. App.—Texarkana 2011)

The facts giving rise to this case occurred in Kilgore, Texas. Meadows appealed his conviction for fleeing and DWI, arguing that the trial court erred by failing to grant his motion to suppress because the officer lacked reasonable suspicion to stop him for violating Section 545.423 of the Transportation Code, which prohibits drivers from driving through a "private driveway, parking lot, or business or residential entrance without stopping the vehicle" (i.e., "corner cutting," a Class C misdemeanor).

There was evidence presented at trial that the roadway was a public road, including maps from Google and other internet sites. The court of appeals noted Supreme Court case law holding that formal dedication of a roadway is only one means by which a roadway can become a public thoroughfare. There are other ways, including prescriptive easement (*Allen v. Keeling*, 613 S.W.2d 253, 254 (Tex. 1981)) and implied dedication (*Lindner v. Hill*, 691 S.W.2d 590, 592 (Tex. 1985)).

There were some traffic control devices on the roadway ("no left turn," "one way," and "no right turn"). However, at neither end of the roadway was a yield or stop sign. The officer testified that he was unaware of the signs and that the roadway did not appear as a street on any map used by the Kilgore police department. The surface of the roadway was the same type and pattern as that of the bank's parking lot. Although reasonable minds could differ, the court concluded that the peace officer's basis for believing that a violation had occurred was justified at its inception.

Although there was conflicting evidence as to whether it was a public or private roadway, the officer's prior experience in using the roadway supported reasonable suspicion to believe defendant failed to stop while traversing the roadway. Even though the officer's video camera was turned off for almost a minute, there was evidence that he lost visual contact with defendant for only a few seconds and that by the time he caught up to defendant, defendant had left the roadway, had entered a street, and was turning onto another street.

Commentary: What is interesting about this case is that although the officer had reasonable suspicion to believe a violation of Section 545.423 had occurred, the facts presented on appeal make it unlikely that Meadows would have been convicted of the offense. This is a good example of how rudimentary roadway matter can become entangled in constitutional issues. This opinion also concurred with the holding in *$27,877.00 Current Money of the United States v. State*, 331 S.W.3d 110 (Tex. App.—Fort Worth 2010) (peace officers in a home-rule municipality have countywide jurisdiction to execute a valid search warrant). See, *The Recorder* (December 2011) at 28-29.

Section 551.403(a)(3) of the Transportation Code allows operation of a golf cart on a public highway only if, among other requirements, the golf cart is operated not more than two miles from the location where the golf cart is usually parked and is operated only for the purpose of transportation to or from a golf course.

Tex. Atty. Gen. Op. GA-0966 (9/12/12)

Additionally, "master planned community" is not defined by any Texas statute, but the Texas Supreme Court observed it as a term of art (*Parkway Co. v. Woodruff*, 901 S.W.2d 434, 440 (Tex. 1995)).

Finally, under the statute, a person is operating a golf cart legally if the person is operating a golf cart within the parameters of Subsection (a)(1), (a)(2), or (a)(3) of that section.

Section 502.140(b) of the Transportation Code does not authorize a county to establish a county system for registering a recreational off-highway vehicle (ROHV) or an all-terrain vehicle (ATV) for an individual to operate on a public beach.

Tex. Atty. Gen. Op. GA-0934 (5/18/12)

A county's authority must be express or necessarily implied from its express powers (*City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28-29 (Tex. 2003)). The use of public beaches is generally governed by the Open Beaches Act and the Dune Protection Act. However, no state statute addresses whether the operation of an ATV or ROHV on a public beach by the general public is, per se, lawful or unlawful. It therefore depends on the particular facts and any rules, orders, or ordinances applicable to the particular beach or area of the beach.

III. Procedural Law

A. Code of Criminal Procedure

1. Bail

In the absence of express statutory authority, the use of differential "split" bonds is not a matter of discretion.

In re Tharp, 351 S.W.3d 598 (Tex. App.—Austin 2011)

The Comal County District Attorney filed a petition for writ of mandamus seeking relief from an order of the Comal County District Court allowing a defendant awaiting trial to make bail by depositing into the district court's registry 10 percent of the bail bond amount set by the district court.

The State characterized the district court's action as setting and ordering a differential bond (aka a "split" bond). The court of appeals agreed that the district court lacked the jurisdiction or authority to issue such an order. Article 17.02 of the Code of Criminal Procedure expressly allows a defendant to make a cash deposit in lieu of having sureties sign the bond. Texas statutory law explicitly requires that the cash deposit be in the amount of the bond. By permitting the accused to make bond with a cash deposit equal to 10 percent of the bond amount it had set, the district court exceeded its discretion under Article 17.02. The court of appeals conditionally granted the district attorney's mandamus petition and directed the district court to vacate its order permitting the accused to make bail by depositing 10 percent of the bond amount into the district court's registry.

Commentary: The Austin Court of Appeals joins the Amarillo Court of Appeals (*Professional Bondsmen of Texas v. Carey*, 762 S.W.2d 691 (Tex. App.—Amarillo 1988)) and the Corpus

Christi Court of Appeals (*Castaneda v. Gonzalez*, 985 S.W.2d 500, 502 (Tex. App.—Corpus Christi 1998)) in holding that a trial court has no discretion to set a bond requiring a higher amount for a surety bond and a reduced amount for a cash deposit.

While bail bondsmen may like this opinion, counties (especially in central Texas) that utilize what has come to be known in different parts of Texas as either a "differential bond," "split bond," or "cash component bond" have reason to pause and contemplate the potential consequence of their use. In most locales, such "bonds" are used with implicit blessing of local prosecutors. This case illustrates what happens when a local prosecutor does not acquiesce and raises interesting questions. Will differential bonds ever join cash bonds, personal bonds, and bail bonds as a type of bond expressly authorized by the Code of Criminal Procedure? If such bonds are not authorized by Texas law, can a defendant legally forfeit his or her posted cash components?

A bail bond board has authority to use a felony conviction to suspend or revoke the authorization granted to an attorney under Section 1704.163 of the Occupations Code only if the conviction resulted from conduct involved with the practice of executing a bail bond or acting as a surety.

Tex. Atty. Gen. Op. GA-0971 (9/24/12)

The plain language of Section 1704.163(b) does not authorize the board to suspend or revoke an attorney's authorization under that section for all conduct that would be subject to license suspension or revocation. Instead, an attorney's authorization may be revoked only for conduct involved with the practice of executing a bail bond or acting as a surety that would subject a bail bond surety to license suspension or revocation. The board is also authorized to determine how the attorney may remedy the felony conviction and whether such remedial action has occurred in a given instance.

Commentary: This opinion draws attention to the statutes that contemplate an "attorney bond" not as a type of bond but as a type of *surety* bond.

2. Pre-Trial Motions/Issues

Municipal judges did not violate defendant's rights by denying motions for new trial and motions to dismiss for failure to provide a speedy trial where the judges made their rulings in response to motions defendant filed because rulings on these motions, for purposes of Articles 28.061 and 40.001 of the Code of Criminal Procedure, are functions normally performed by a judge, and the rulings are acts entitled to absolute immunity.

Swain v. Hutson, 2011 Tex. App. LEXIS 10078 (Tex. App.—Fort Worth December 22, 2011)

3. Property Hearings

Defendant is entitled to the return of a full set of original prints made from seized cameras because he filed his motion in the court in which the indictment was presented, which was proper under Article V, Section 12(b) of the Texas Constitution, providing that presentment of an indictment or information to a court vests the court with jurisdiction of the cause.

Shields v. State, 2012 Tex. App. LEXIS 1427 (Tex. App.—Waco February 22, 2012)

Jurisdiction over seized property extends to different courts at different times and for different purposes. For example, under Articles 18.10–18.12 of the Code of Criminal Procedure, the magistrate to whom return of a search warrant was made has authority to issue orders for the seized property's pre-charge or pre-indictment safekeeping and for the property's or person's release before examining trial. Under Article 18.10, the magistrate in the county in which the warrant was issued has jurisdiction over removal of property pre-charge or pre-indictment from the county in which it was seized. Under Article 18.13, the magistrate has authority to discharge the defendant and order restitution of the property taken from him. Under Article 18.18, the court entering the judgment of conviction has authority to order that certain contraband be destroyed or forfeited to the state. If there is no prosecution or conviction following seizure, the magistrate to whom the return was made has jurisdiction over forfeiture proceedings.

Commentary: As amended in 1985, Article V, Section 12(b) of the Texas Constitution provides, in part, that the presentment of an indictment or information vests the trial court with jurisdiction of the cause. However, this constitutional provision does not apply to complaints. *Huynh v. State*, 901 S.W.2d 480, 481 (Tex. Crim. App. 1995). This is how the court in *Ramirez v. State*, 105 S.W.3d 628 (Tex. Crim. App. 2003) determined that defects in complaints are no longer jurisdictional in the traditional sense. If a defendant charged by complaint sought the return of seized property, the magistrate would still be authorized under Chapter 18 to return it (assuming it's not a criminal instrument or prohibited weapon) or possibly under the inherent power in Section 21.001 of the Government Code. Chapter 18 makes no distinction between charging instruments and is not dependent on Article V, Section 12(b) of the Texas Constitution for its application. Ostensibly, if a defendant is charged by complaint, Chapter 18 of the Code of Criminal Procedure governs the return/disposition of seized property.

B. Evidence

The trial court did not err in admitting electronic content from a social networking website where there was sufficient evidence to support a finding that the web pages offered into evidence were created by defendant in satisfaction of Rule 901 of the Texas Rules of Evidence, specifically, numerous photographs of defendant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring, reference to the victim's death

and the music from his funeral, references to defendant's gang, and messages referring to a shooting.

Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012)

C. Appellate Procedure

Defendant did not invoke the jurisdiction of the appellate court by sending a notice of appeal and a motion for extension of time by Federal Express 15 days after the date on which his notice of appeal was due because the mailbox rule in Rule 9.2(c) of the Texas Rules of Appellate Procedure applies by its plain language only to documents sent via the United States Postal Service and does not permit any other type of delivery or private courier system.

Castillo v. State, 369 S.W.3d 196 (Tex. Crim. App. 2012)

Thus, the notice of appeal was filed when it was physically delivered to the clerk of the trial court as provided in Rule 25.2(b) of the Texas Rules of Appellate Procedure, which was one day past the extension deadline in Rule 26.3. The appeal was properly dismissed because the notice was untimely.

Commentary: Apparently, the same rationale would apply in a similar fact pattern under Article 45.013 of the Code of Criminal Procedure, the "mail box" rule applicable to criminal cases in municipal and justice courts.

The court of appeals erred in upholding the trial court's implicit finding that defendant's consent to the search of his residence was voluntary because the court of appeals failed to evaluate all of the evidence that was admitted into the record by the trial court, including a video of the traffic stop.

Tucker v. State, 369 S.W.3d 179 (Tex. Crim. App. 2012)

On remand, the appellate court should view the video in the light most favorable to the trial court's ruling and assume that the trial court made implicit findings that support the denial of defendant's motion to suppress. If the video evidence did not support the trial court's conclusion, the appellate court should reverse.

Because Section 821.025(e) of the Health and Safety Code says that the decision of the county court or county court at law "is final and may not be further appealed," appellant may not appeal to a court of appeals.

Jackson v. State, 2012 Tex. App. LEXIS 2683 (Tex. App.—Houston [1st Dist.] April 5, 2012)

On August 10, 2011, the Harris County Constable's Office seized appellant's dog, pursuant to a warrant for seizure. After a hearing, the justice court found that appellant had cruelly treated or abandoned the dog, and the court divested appellant of ownership. Appellant appealed to the county court, which also found that appellant had cruelly treated the dog and divested appellant of ownership. Appellant appealed to the court of appeals, which dismissed the appeal for want of jurisdiction.

Commentary: The statute means what it says. There are no appeals beyond the county court or county court at law.

IV. Court Administration

A. Court Costs

Under Article 17.02 of the Code of Criminal Procedure, the full amount paid as the cash bail bond must be returned despite Section 117.055 of the Local Government Code's requirement of the deduction of a fee.

Tex. Atty. Gen. Op. GA-0960 (8/17/12)

Article 17.02 of the Code of Criminal Procedure irreconcilably conflicts with Section 117.055 of the Local Government Code. However, because the 2011 legislative amendment to Article 17.02 is the later-enacted provision, a county is no longer entitled to deduct a fee for accounting and administrative expenses from the refund of a cash bail bond. Attorney General Opinions JC-0163 (1999) and GA-0436 (2006) are, thus, superseded.

Commentary: See page 20 of the August 2011 issue of *The Recorder* for a summary and commentary on the 2011 legislative amendment to Article 17.02.

B. Authority to Conduct Marriages

A retired federal judge is not authorized to conduct a marriage ceremony in Texas under Section 2.202(a)(4) of the Family Code.

Tex. Atty. Gen. Op. GA-0948 (6/4/12)

Section 2.202(a)(4) of the Family Code authorizes two groups of retired judges to conduct a marriage ceremony in Texas: those that the term "retired justice or judge of those courts" describes and a "retired justice of the peace." The term "retired justice or judge of those courts" describes only the courts listed before it in Section 2.202(a)(4). A "judge or magistrate of a federal court" is listed after the term "retired justice or judge of those courts." Therefore, the term "retired justice or judge of those courts" does not describe a retired federal judge.

Commentary: Utilizing the same analysis, a retired municipal judge is not authorized to conduct a marriage ceremony.

C. Records Management

The public has a right to access and copy records maintained by county clerks, subject to a county clerk's reasonable rules and regulations.

Tex. Atty. Gen. Op. GA-0915 (3/22/12)

A county clerk's rules regarding the public's access to and copying of records are valid if the rules do not go beyond the statutes providing for access to and copying of records.

V. Local Government

A. Preemption

Key provisions of Arizona's immigration law were preempted by federal law.

Arizona v. United States, 132 S. Ct. 2492 (2012)

In 2010, Arizona Governor Jan Brewer signed S.B. 1070, debatably the broadest anti-immigration bill, into law. The United States challenged, and a district court blocked four controversial provisions, saying they conflicted with established federal law. The trial court's decision was affirmed by an appellate court. Eight U.S. Supreme Court justices agreed to hear what could be a landmark ruling. Justice Kagan recused herself because she was Solicitor General at the time of the Government's challenges. Justice Kennedy was joined by Chief Justice Roberts, Justice Ginsburg, Justice Breyer, and Justice Sotomayor in forming the majority opinion. The judgment of the court of appeals was affirmed in part, reversed in part, and

remanded. The Court struck down three of the four provisions of S.B. 1070. In the majority opinion written by Justice Kennedy, the Court ruled that Sections 3, 5(C), and 6 are preempted by federal law.

The three provisions struck down (1) required legal immigrants to carry registration documents at all times, (2) allowed state police to arrest any individual for suspicion of being an illegal immigrant, and (3) made it a crime for an illegal immigrant to search for a job (or to hold one) in the state. All justices agreed to uphold Section 2(b), the provision of the law allowing peace officers to investigate the immigration status of an individual stopped, detained, or arrested if there is reasonable suspicion that an individual is in the country illegally. However, Justice Kennedy opined that local law enforcement may not detain the individual for a prolonged amount of time for not carrying immigration documents and that racial profiling allegations could be addressed, if necessary, at a later time.

Justice Scalia dissented and said that he would have upheld all four provisions. Justice Thomas likewise would uphold the entire law as not preempted by federal law. Justice Alito agreed with Justices Scalia and Thomas regarding Sections 5(C) and 6, but joined with the majority in finding Section 3 (requiring legal immigrants to carry registration documents at all times) was preempted.

Commentary: In order to attempt to map the boundaries of where local and state law run afoul of the boundaries of federal law in immigration-related matters, this case should be read with *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011) (holding that the State of Arizona's licensing law, aimed at curtailing the employment of undocumented aliens, was not expressly preempted by federal law). For commentary, see *The Recorder* (December 2011) at 27.

B. Municipal Courts and Municipal Judges

The defendant did not forfeit any claim on appeal by failing to challenge the municipal judge's qualifications during the hearing.

Lackey v. State, 364 S.W.3d 837 (Tex. Crim. App. 2012)

In an opinion by Judge Price, joined by four other members, the Court of Criminal Appeals affirmed the decision of the court of appeals. The majority opined that the defendant adequately preserved his complaint regarding the municipal judge's qualifications to act by appointment of the constitutional county judge. The municipal judge was not statutorily qualified to sit as a visiting judge in county court pursuant to Section 26.023 of the Government Code. The municipal judge was neither a retired judge nor a constitutional county judge from another county as required by Section 26.023. By presenting the issue of the municipal judge's authority to preside in the place of the county judge in his motion to set aside the orders on the motions to suppress, both the trial court and the State had notice. Regardless of whether the municipal

judge's orders denying defendant's motions to suppress were void or voidable, the defendant timely challenged them and the constitutional county judge had the authority to rule (and in fact, did rule) on the defendant's motion to set the orders aside.

Presiding Judge Keller concurred because there was nothing in the record establishing that the defendant was notified of the municipal judge's appointment to conduct the suppression hearing in county court. Accordingly, defendant's objection to the municipal judge's qualifications after the hearing was timely.

The dissenting opinion by Judge Hervey, joined by Judges Meyers and Keasler, stated that the orders entered by the municipal judge were voidable and not void and that the defendant failed to preserve error by not objecting to the municipal judge's qualifications at the motion to suppress hearing.

Commentary: While the opinion of the 6th Court of Appeals mentioned that the county court judge's appointee was a municipal judge, it was mentioned merely as an incidental fact. In contrast, the Court of Criminal Appeals opinion places more emphasis on the fact that the appointee was a municipal judge. While the court of appeals was resolute in opining that the authority of a judge to act is jurisdictional and cannot be waived, the dissenting opinion by Judge Hervey makes a compelling case that the Court's inconsistent precedent makes matters as clear as mud. Far from clarifying matters, *Lackey* only underscores divisions in preexisting case law and the limited utility of such cases when squared with fact-specific judicial appointment-qualification issues.

The Texas Constitution does not guarantee the separation of the local legislative, executive, and judicial branches of government. Consequently, an ordinance merging the positions of City Clerk and the Municipal Court Clerk is not unconstitutional.

City of El Paso v. Arditti, 2012 Tex. App. LEXIS 7418 (Tex. App.—El Paso August 31, 2012)

In 2002, the City of El Paso enacted an ordinance that merged the positions of City Clerk and Municipal Court Clerk into the newly created position of Municipal Clerk. Prior to the merger of these positions, the Municipal Court Clerk tracked and recorded the "bench time" of municipal judges for the purposes of planning and analyzing judicial case-load. Subsequent to the enactment of the ordinance, municipal judges entered an order in September 2005 directing that their judicial conduct and bench time not be monitored by a municipal clerk, court clerk, city employee, or any contract employee. The order stated that monitoring elected municipal judges violated separation of powers and that any person disobeying this order would have to show cause as to why they should not be held in contempt.

The City filed suit alleging that the order was void because the judges were without authority to order the City and its employees to refrain from complying with legal mandates imposed by the State of Texas and that the judges' authority was limited when carrying out ministerial duties.

Additionally, the City argued that the order adversely impacted the ability to track the time of the city prosecutors, municipal clerks, and police officers. Among the relief sought, the City requested issuance of a temporary restraining order, a temporary injunction, writs of mandamus, prohibition, an injunction preventing enforcement of the September order, and a declaration that the September order is void and a clear abuse of discretion. Afterward, in March 2006, the municipal judges amended their order and filed a plea to the jurisdiction.

While not finding the initial order to be void, the district court found the order to be an overly broad usurpation of the powers of the executive branch, and that the subsequent order did not rescind the initial order. Section 30.00009 of the Government Code governs clerks and other personnel in municipal courts of record. Citing language in Section 30.00009 mandating the appointment of a "clerk of the municipal courts of record" be achieved by ordinance, the trial court found the merger of the municipal court clerk and city clerk positions to be an unconstitutional separation of powers in violation of Article II, Section 1 of the Texas Constitution. The trial court stayed enforcement of the judgment pending the conclusion of any appeal.

The court of appeals reversed the judgment of the district court because the Texas Constitution does not guarantee the separation of the local legislative, executive, and judicial branches of government. The merger of positions was not unconstitutional and the order entered by the municipal judges exceeded the scope of inherent powers that courts have, which are essential to exercising jurisdiction, administering justice, and preserving the independence and integrity of the judiciary.

Commentary: Separation of powers is alive and well in Texas and this opinion does not provide a new spearhead for municipal governments to impale municipal courts. The notion of separation of powers, as it pertains to municipal courts is, as illustrated by this case, commonly misunderstood. In terms of the Texas Constitution, separation of powers precludes the Legislature and the Governor from encroaching on the powers bestowed on Texas courts. In other words, separation of powers protects municipal judges from Governor Perry overstepping his authority or usurping the authority of municipal judges. It, however, provides no protection from overstepping mayors, council members, city attorneys, or city managers. (This does not mean that local governments cannot adopt something tantamount to separation of powers by charter or ordinance.) When local officials illegally overstep or usurp the judicial powers of a municipal court, typically the better argument is based on judicial independence (regardless if the judge is appointed or elected). (See, Chapter 1 of the TMCEC *Municipal Judges Book* for more information on judicial independence.)

The trial court properly denied the City of Dallas' plea to the jurisdiction after a municipal judge, seeking nomination as a district court candidate, successfully sought a temporary injunction precluding the City from removing her from office as a municipal judge.

City of Dallas v. Brown, 373 S.W.3d 204 (Tex. App.—Dallas 2012)

After Judge Phyllis Lister Brown filed paperwork to become a candidate for the Democratic Party's nomination for the 162nd Civil District Court, the Dallas City Council removed Brown from office as a municipal judge via an ordinance citing Chapter III, Section 17(a) of the Dallas City Charter. In her suit, seeking a declaration that the ordinance removing her from judicial office was invalid, Brown claimed that the charter provision is inapplicable on its face to the Dallas Municipal Court or to a judge appointed to serve on the court and the action of the City Council was ultra vires conduct (i.e., conduct exceeding the authority granted to City Council by the Charter and applicable state law). The court of appeals held that Brown's allegations sufficiently invoked the ultra vires exception to sovereign immunity, so that denial of the plea to the jurisdiction by the trial court was proper. It was not necessary for Brown to prove, at this stage, her ultra vires allegations.

Because Brown's term as municipal judge had ended, the temporary injunction preventing the city from removing her from office no longer served a purpose in preventing any irreparable injury. Thus, the court of appeals dismissed the portion of the appeal challenging the temporary injunction order. The merits of the challenge to the validity of the removal ordinance were not, however, moot. The case was remanded to the trial court for further proceedings.

Commentary: The City of Dallas petitioned the Texas Supreme Court for review of this opinion on October 5, 2012. Other than possibly buying the City time, and postponing further trial court hearings, seeking review by the Texas Supreme Court could have unanticipated consequences for home-rule cities and municipal judges. The City asserts that the court of appeals opinion is wrong in its application of the law and that it not only makes the removal ordinance invalid, it will have an adverse impact on governmental officials across Texas who regularly face allegations of ultra vires acts. (This seems unlikely since the case pertains to the specific language of a Dallas City charter provision as it relates to municipal judges.)

At the heart of this case is the question of whether a "municipal judge" is also a "municipal officer." The preceding question is not yet ripe for consideration by the Supreme Court. If returned to trial, this case may provide pivotal insight into the relationship between municipal courts, municipal government, and the state judicial system. While asserting that municipal judges are municipal officers, the City does not contest that municipal judges are also "state judicial officers." Yet, the City appears convinced that the City Charter (and ordinances), not state law, is the origin of a municipal judge's authority. Judge Brown contends that, as the authority of a municipal judge derives from state law, regardless if she is appointed by the municipality, she is not a municipal officer subject to the "resign to run" provision in the Charter.

C. Code Enforcement

1. Substandard Structures

Unelected municipal agencies cannot be effective bulwarks against constitutional violations in the context of nuisance determinations involving substandard structures. Determination should not be reviewed under a substantial evidence standard, but rather must be considered de novo in a trial court. Using an administrative board to make conclusive judgments about a takings claim fails to properly balance a person's constitutional right to property with the city's interest in abating a nuisance.

City of Dallas v. Stewart, 361 S.W.3d 562 (Tex. 2012)

The City of Dallas (via its Urban Rehabilitation Standards Board (URSB)) found Stewart's house to be a nuisance under Section 214.001(a)(1) of the Local Government Code and ordered its demolition. The URSB denied the owner's request for rehearing. Stewart appealed the decision of the URSB to a district court, but that appeal did not stay the demolition order. After the demolition of her house, the owner brought a suit against the City, alleging an unconstitutional taking and a violation of her due process rights. A jury awarded the owner $75,000 for the destruction of her house.

On appeal, the City argued that the URSB's determination that the house was a nuisance precluded any contrary finding or award by a jury. The court of appeals affirmed the judgment. On review, the Texas Supreme Court held that the URSB's determination that the house was a nuisance, and the affirmance of that decision on review by the URSB, did not preclude the owner's takings claim based on the demolition of that property. Because Stewart was unsuccessful before the URSB, the Court found that she properly asserted her takings claim on appeal to the district court. The Court affirmed the court of appeals' finding that URSB's determination that the building was a nuisance should not be given preclusive effect (under the substantial evidence rule) in the owner's takings case, and that the district court had correctly considered the issue de novo.

The Court opined that takings suits are constitutional suits and must ultimately be decided by a court rather than an agency. Decisions involving constitutional property rights may not finally rest with a panel of citizens untrained in constitutional law.

The City urged rehearing on two grounds. First, failing to accord administrative nuisance determinations preclusive effect would open the floodgates for takings claims. (Takings claims have a 10-year statute of limitations. Consequently, the City claimed property owners would sue to challenge demolitions that occurred any time in the past 10 years.) Second, the City claimed the decision effectively eliminates administrative nuisance abatement because cities lack the resources to file suit to abate every nuisance.

Chief Justice Jefferson, joined by four other members of the Court, opined that such arguments overlook three key facts. First, takings claims must be asserted on appeal from the administrative nuisance determination. A party asserting a taking must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit. Citing its opinion in *City of Dallas v. VSC*, 347 S.W.3d 231 (Tex. 2011), the majority explained that property owners would have to avail themselves of statutory remedies that may moot a takings claim, rather than directly institute a separate proceeding asserting such a claim. Failure to exhaust administrative remedies would preclude an independent takings claim. Second, property owners rarely invoke the right to appeal. The majority speculated that this may be due to the correctness of the nuisance finding, the time and expense involved, the narrow statutory 30-day window for seeking review, or because an unsuccessful appellant must pay the municipality's attorney's fees and costs. Third, and perhaps most importantly, de novo review is required only when a nuisance determination is appealed. Thus, cities need not institute court proceedings to abate every nuisance. Rather, cities must defend appeals of nuisance determinations and takings claims asserted in court by property owners who lost before the agency.

Justice Johnson, dissenting, joined by four members, wrote that when the URSB's finding that that Stewart's property was a nuisance was affirmed by the district court, that should have settled whether Stewart's property was a nuisance and precluded re-litigation.

Commentary: Section 214.0012(f) of the Local Government Code ("[a]ppeal in the district court shall be limited to a hearing under the substantial evidence rule") is still "on the books" and was declared "dead on arrival" by the Texas Supreme Court. On motion for rehearing, concerned municipalities did not get what they wanted (a reversal), but they did get a consolation prize of sorts. The majority opinion's incorporation of its holding in *City of Dallas v. VSC* provides cities a template for making preclusion arguments and should assuage fears of a decade's worth of substandard building takings lawsuits rising up like a zombie apocalypse. More importantly, this opinion is the death sentence on the use of substandard building commissions and boards which many cities feared.

City of Dallas v. Stewart has justifiably occupied a lot of TMCEC's focus in 2012. Since last year's summary of the Supreme Court's initial *Stewart* opinion (See, *The Recorder* (December 2011) at 27-28), TMCEC published two related articles: Scott Houston and Bonnie Goldstein's comprehensive "Q&A: Substandard Building Abatement after City of Dallas v. Stewart," *The Recorder* (June 2012) at 3-12, and Cathy Riedel's contemplative feature, "Civil Jurisdiction in Municipal Court: Evolving or Mutating?," *The Recorder* (June 2012). The opinion was also the focus of a lively panel discussion at the 19th TMCEC Prosecutor Conference (*Stewart v. City of Dallas*–Implications for Municipal Courts).

Many of the tangential municipal-court-related issues remain unclear. In footnote 6 of the *Stewart* opinion, the Court states that the City of Dallas abolished the URSB, replacing it with a system wherein municipal judges make the initial nuisance determination subject to substantial evidence review in district court. The opinion does not address the merits of having preliminary

determinations made in either a municipal court of record or whether a city has the authority to make municipal judges act as an agency appointed by a city to represent the city's interests. However, the question will inevitably reach an appellate court. *Stewart* also does not address whether a judge appointed by a city council, rather than elected by the people, would be viewed in the same negative light as an appointed city board. However, justifiably or not, the majority of the Court appears to view municipal level agencies in a dim light.

Debatably, even where municipal judges are elected, shifting agency functions to a municipal judge impugns the integrity of municipal courts. A municipal court is not akin to a city commission or department, but is part of the state judicial system. The noted absence of separation of powers in municipal government by the Chief Justice and other members of the Court majority sets the stage for others to challenge the propriety of municipal courts conducting such hearings. (The absence of separation of powers in city government in the context of municipal courts is at the crux in *City of El Paso v. Arditti*, 2012 Tex. App. LEXIS 7418 (Tex. App.—El Paso August 31, 2012).) Any subsequent cases challenging the legality of municipal judges conducting substandard building proceedings should hinge on judicial independence (not separation of powers); hence, municipal judges must be independent and the value of such independence should be evidently embraced in the conduct of municipal government (e.g., city managers, city attorneys, council members, and mayors). It bears repeating, a municipality hosts the municipal court (just like the county hosts the county court). Texas law is clear that the municipal courts are part of the state judicial system. Enactments by municipalities, either by charter or ordinance, that call into question the independence of municipal judges only increase the likelihood of legislation requiring all municipal judges to be elected.

The City's failure to comply with Section 214.001 of the Local Government Code was a prerequisite to ordering occupants to vacate a substandard building and denied procedural due process to occupants.

City of Houston v. Carlson, 2012 Tex. App. LEXIS 7046 (Tex. App.—Houston [14th Dist.] August 23, 2012)

Section 214.0012 provides the mechanism by which a property owner may appeal a municipality's order to vacate under Section 214.001. The mechanism is filing in district court a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. A defect in verification under Section 214.0012 is not jurisdictional. Filing a petition under Section 214.0012 within the requisite time period invokes a district court's jurisdiction.

The City deprived occupants of procedural due process when instead of first conducting a public hearing as required by Section 214.001 to determine whether the buildings were substandard, the City issued an order to vacate requiring the occupants to vacate or face criminal penalties, and subsequently sent notice that they had a "right to a hearing" but "no hearing need[ed] to be conducted" if they did not request one.

The City's notices did not warn the occupants that the consequences of inaction might result in them having to vacate their property. Additionally, the administrative hearing, conducted six days before the occupants were ordered to vacate, did not provide the occupants an opportunity to be heard at a meaningful time in a meaningful manner, particularly in light of the fact that the City did not notify them of what they would be required to prove at the hearing.

2. 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.

State v. Cooper, 2012 Tex. App. LEXIS 5951 (Tex. App.—Dallas July 24, 2012)

Cooper was convicted in the Plano Municipal Court of not maintaining the exterior of a structure in good repair and in a structurally sound manner and not supplying hot and cold running water to plumbing fixtures in a house. Cooper appealed both cases for trial de novo to the county court at law and moved to dismiss the complaints for failure to state an offense. The county court granted the motions and the State appealed.

The court of appeals held that the trial court did not err by granting 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.

Commentary: This is 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." However, cases like this beg a fundamental question: do cities adopting such model codes know what all they entail and the implication of their adoption? Do prosecutors and judges?

Complaints in Class C misdemeanor cases, compared to indictments and informations, are simple charging instruments. Normally a complaint merely has to contain sufficient information to allow a defendant to know what offense is being charged, so that the defendant can prepare a defense. Injecting boilerplate language from the IPMC into the legal equation makes this case abnormal, yet remarkable. As a result of adopting the IPMC, a procedural matter (notice) appears to have become fused with a substantive law matter (the offense). Consequently, the complaint

was required to state more than what is normally required in a Class C misdemeanor. It would be interesting to see what that the Court of Criminal Appeals thinks about the IPMC.

3. Sound Ordinances

Lessee's use of the property as a restaurant with live outdoor music was not a constitutionally protected vested property right.

City of Beaumont v. Starvin Marvin's Bar & Grill, L.L.C., 2011 Tex. App. LEXIS 10042 (Tex. App.—Beaumont December 22, 2011)

Lessee, Starvin Marvin's Bar & Grill, had a patio where customers could enjoy live music. After adoption of a more restrictive noise ordinance creating a Class C misdemeanor, Starvin Marvin's brought an action against the City of Beaumont. Starvin Marvin's sought to enjoin enforcement of the penal ordinance against Starvin Marvin's, its employees, and customers. The City made a plea to the jurisdiction arguing that the trial court, as a court of equity, lacked jurisdiction to enjoin the enforcement of a penal ordinance or to declare the ordinance unconstitutional. (Generally, a court of equity will not enjoin the enforcement of criminal law. However if the penal ordinance is unconstitutional or void, and its enforcement threatens irreparable injury to vested property rights, then equity may intervene to protect those property rights.) The trial court denied the City's plea to the jurisdiction and granted Starvin Marvin's a temporary injunction based on equitable estoppel.

On appeal, the court of appeals held that Starvin Marvin's use of the property as a restaurant with live outdoor music was not a constitutionally protected vested property right. Starvin Marvin's did not show that enforcement of the ordinance would cause an irreparable injury to a vested property right. Accordingly, the trial court did not have jurisdiction to hear Starvin Marvin's causes of action for declaratory relief or its cause for relief based on equitable estoppel. Even if the trial court had relied on inverse condemnation as a basis for the temporary injunction, Starvin Marvin's would be unable to satisfy all the requirements for obtaining a temporary injunction. Starvin Marvin's waived its right to any part of a condemnation award, and therefore had no interest in any potential award from an inverse condemnation claim.

Commentary: The Texas Supreme Court granted a petition for review. Stay tuned!

4. Alcohol Regulation

A Type A general-law municipality with a population of less than 900,000 lacks the authority to enact an ordinance setting a 1000-foot zone around a school prohibiting the sale of alcoholic beverages for off-premises consumption.

Tex. Atty. Gen. Op. GA-0942 (5/30/12)

The governing body of a Type A general-law municipality is generally authorized to enact an ordinance prohibiting the sale of alcoholic beverages by a dealer whose place of business is within 300 feet of a public school, but not to enact an ordinance prohibiting the sale of alcoholic beverages by a dealer whose place of business is within 1,000 feet of a public school, unless the municipality receives a petition to enact such an ordinance from a school district that is principally located in a municipality of 900,000 persons or more.

D. Prosecution

A claim that the State of Texas is liable for a city's actions by failing to prevent a city from prosecuting a defendant in the name of the "State of Texas" is not a claim for which immunity has been waived because whether or not a city was acting as the State's agent, only the Legislature, not the city, has the authority to waive the State's sovereign immunity.

Collard v. State, 2012 Tex. App. LEXIS 7287 (Tex. App.—Dallas, August 29, 2012)

The district court did not err in granting the State's plea to the jurisdiction because defendant failed to allege a claim for which immunity has been waived when her pleadings not only failed to establish, but affirmatively negated, the trial court's jurisdiction over her claims.

Commentary: Collard sued the State of Texas as well as the City of Richardson, a municipal judge, the city attorney, and others. Her suit stemmed from a 2006 prosecution for housing code violations in which she was subsequently arrested and jailed for 17 days while she awaited trial for city ordinance violations. Juries found Collard "guilty" of the violations and, after initially deferring disposition, fines totaling $20,200 were imposed.

Although specious, the contention that the City had no authority to bring a criminal prosecution in the name of the State of Texas for municipal ordinances is indicative of the kind of arguments regularly encountered by municipal judges and prosecutors. Such arguments fail to appreciate that county and municipal governments are subsets of state government. Furthermore, although rarely utilized, Texas law has in place an avenue allowing other prosecutors acting in the name of the State of Texas, specifically county attorneys, to intervene in municipal prosecutions. (See, Article V, Section 21 of the Texas Constitution.) Such authority potentially provides a safeguard against unjust prosecutions by city attorneys.

The proper entity to prosecute a violation of a water control and improvement district ordinance under Chapter 51 of the Water Code generally depends on whether the citation or complaint was filed in the justice court or municipal court.

Tex. Atty. Gen. Op. GA-0923 (5/7/12)

The county attorney, district attorney, deputy county attorney, or deputy district attorney conducts prosecutions in justice court. The city attorney or deputy city attorney prosecutes such violations in municipal court.

VI. Juvenile Justice

An automatic life sentence without the possibility of parole for a juvenile who commits murder violates the 8th Amendment's prohibition against cruel and unusual punishment.

Miller v. Alabama, 132 S. Ct. 2455 (2012)

At age 14, Miller was convicted by an Alabama jury of capital murder and sentenced to life without parole. Miller appealed, saying a life sentence for a minor violated the 8th Amendment protection against cruel and unusual punishment and the 14th Amendment right to due process, but the appellate court upheld the sentence.

In a 5-4 decision, Justice Kagan, writing for the majority, noted that this case implicated both *Roper v. Simmons*, 543 U.S. 551 (2005) and *Graham v. Florida*, 130 S. Ct. 2011 (2010). Both cases recognized two situations that gave rise to categorical bans on sentencing practices based upon mismatches between the culpability of a class of offenders and the severity of a penalty. In *Roper*, the Court held that the 8th Amendment prohibited imposing the death penalty on juveniles who committed capital murder. In *Graham*, the Court held that the 8th Amendment bars the imposition of life without parole for juveniles who commit non-homicide offenses. In both opinions, the Court recognized that children are constitutionally different from adults for purposes of sentencing. Children have diminished culpability and greater prospects for reform. Children are more vulnerable to negative influences and outside pressures. Mandatory penalty schemes like the one in this case prevent the sentence from taking account of these central considerations.

Justice Breyer, joined by Justice Sotomayor, concurred that the 8th Amendment simply forbids the imposition of a life term without the possibility of parole for a juvenile where the juvenile did not kill or intend for the victim to be killed.

Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented. Chief Justice Roberts noted that the direction of society's evolution favors the State's position as laws have moved away from rehabilitation for juveniles towards a more punitive sentencing structure.

Justice Thomas, joined by Justice Scalia, also dissented, noting that the two lines of precedent relied upon by the majority are inconsistent with the original understanding of the Cruel and Unusual Punishment Clause. That clause was originally understood as prohibiting torturous methods of punishment, specifically those akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted.

Justice Alito, also joined by Justice Scalia, dissented to note that the Court had abandoned the original meaning of the 8th Amendment by invoking "evolving standards of decency." At least in past cases, the Court looked for objective indicia for those evolving standards, such as public opinion polls or tallying the position taken by state legislatures. Recent opinions, including this one, continue to take America on a journey unauthorized by the Constitution, according to the dissent.

Commentary: Do you see the relevance of *Roper*, *Graham,* and *Miller* to arguments made against Texas laws authorizing children to be adjudicated in municipal and justice courts? It is not as attenuated as some think.

Section 51.095 of the Family Code does not require that a magistrate be alone with a juvenile at the time the magistrate administers the statutory warnings.

Herring v. State, 359 S.W.3d 275 (Tex. App.—Texarkana 2012)

The fact that detectives were present when the magistrate gave the warnings did not violate the juvenile processing and detention requirements of Section 51.095(a)(1). Additionally, the court found the defendant's statement to be voluntary based on the trial court's determination of the credibility and demeanor of the witnesses, including the magistrate who failed to check the boxes on both the magistrate's juvenile warning form and verification of admissibility to indicate the defendant voluntarily waived his rights.

Commentary: Petition for discretionary review was granted by the Texas Court of Criminal Appeals on June 20, 2012.

A person 18 years of age or older cannot commit an offense under Section 25.094 of the Education Code, despite the express provision in Section 25.085(f) that makes Section 25.094 applicable to certain persons under 21.

Tex. Atty. Gen. Op. GA-0946 (6/4/12)

As amended, Section 25.094(a) of the Education Code adds a necessary element to the criminal offense of failure to attend school requiring the offender to be 12 years of age or older and younger than 18. Education Code Sections 25.085(f) and 25.094(a) are irreconcilable, but because Section 25.094(a) is the most recently amended, it prevails over Section 25.085(f).

Commentary: See page 51 of the August 2011 issue of *The Recorder* for a summary and commentary on the 2011 legislative amendment to Section 25.094.

Article 4.19 of the Code of Criminal Procedure does not authorize the detention of a child under the age of 17 who has been transferred to criminal court for prosecution in a facility that does not comply with Section 51.12(f) of the Family Code.

Tex. Atty. Gen. Op. GA-0927 (5/7/2012)

Article 4.19 provides for juveniles, on court order, to be subjected to the provisions of the Code of Criminal Procedure that are normally applicable to adults. Significantly, however, the Code of Criminal Procedure does not generally govern the conditions of detention. Section 51.12(f) of the Family Code provides that a child "shall" be detained in specified buildings separate from adult detainees. The Legislature amended Subsection (f) during the 82nd legislative session to specify that a person under age 17 who is transferred to criminal court for prosecution is considered a child for purposes of the separate-confinement requirement. See, Senate Bill 1209, Section 1 at 2822.

VII. Law Enforcement

Police were entitled to qualified immunity because even if the warrant was invalid, it was not so obviously lacking in probable cause that the officers could be considered "plainly incompetent" for concluding otherwise.

Messerschmidt v. Millender, 132 S. Ct. 1235 (2012)

After a suspect's ex-girlfriend told the police that the suspect was a gang member and had shot at her with a pistol-gripped sawed-off shotgun, officers obtained a warrant to search the residence where the suspect was staying for all firearms and gang-related materials. Chief Justice Roberts delivered the opinion of the Supreme Court finding (6-3) that (1) a reasonable officer could conclude that there would be additional illegal guns among others that the suspect owned given his possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police; (2) it would not have been unreasonable for an officer to believe that evidence regarding his gang affiliation would prove helpful in prosecuting him; and (3) the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate.

Justices Sotomayor and Ginsburg, dissenting, found the general warrant in this case antithetical to the 4th Amendment, and believe the case should be resolved by the principle that the police must articulate an adequate reason to search for specific items related to specific crimes.

Justice Kagan, concurring in part and dissenting in part, thought the right answer lies in between the majority's award of immunity across the board and the dissent's desire to grant none at all. She agreed the officers should receive qualified immunity for their search for firearms, but disagreed that a reasonable officer could have thought the warrant valid in approving a search for evidence of "street gang membership." Still more fundamentally, she believed, the Court erred in scolding the court of appeals for failing to give weight to the fact that the warrant had been reviewed and approved by the officers' superiors, a deputy district attorney, and a neutral magistrate. An officer is not entitled to rely on the judgment of a judicial officer in finding that probable cause exists, hence issuing the warrant. This applies still more strongly to the approval of other police officers or state attorneys, who are part of the prosecution team.

A constable who was convicted of a felony, but whose appeals were exhausted only after he was reelected to a new term, is removed from office pursuant to Section 87.031(a) of the Local Government Code.

Tex. Atty. Gen. Op. GA-0933 (5/18/12)

A Hidalgo County Constable was convicted of a third degree felony in 2006. The trial court's judgment ordered removal under Section 87.031 of the Local Government Code. The Constable appealed his conviction all the way to the Supreme Court of the United States. During his appeals, the Constable retired from his position and successfully ran for reelection in 2008. The Constable submitted a new oath of office and the required bond, but the Hidalgo County Commissioners Court did not approve the bond. The Supreme Court denied the Constable's petition for writ of certiorari in 2011, finalizing the felony conviction. An officer's removal due to a final felony criminal judgment of conviction is automatic and effective as a matter of law. Therefore, the Constable is removed from the office to which he was re-elected as a matter of law, requiring no official action, and thus creating a vacancy for such public office.